Chapter 1 PROVISIONS RELATING TO ACCOUNTS

(Section 209 to Section 223)

Section 209: BOOKS OF ACCOUNTS TO BE KEPT BY THE COMPANY

1. Books of accounts to be kept

- Details regarding Receipts / Payments of cash
- Sales / purchases of goods by the company
- Assets / liabilities of the company
- Cost records – if required by the Central Government.

2. Venue

Should be kept at the Registered office. If BOD decides to keep books at any other place in India it can do so, but a notice to Registrar in writing should be given within 7 days of its decision to do so (Form no. 23AA)

3. Branch books

- Can be kept at their respective offices.
- But proper summarised returns of branch transactions should be sent to registered office at reasonable intervals. But such interval shouldn't exceed more than 3 months.

4. No proper books deemed to have been kept if

- Double entry system and Accrual basis of accounting is not followed and
- True & fair view not reflected.

5. Directors can inspect "Books of accounts and other books and papers" during business hours.

6. Preservation of Books of accounts

Company

In existence for 8 years or more	Not in existence for 8 years
Books and related & vouchers relating to 8 preceding years.	Books & related vouchers of all years.

7. Person responsible for Sec 209 compliance: -

- Manager
- Managing Director

- All other officers / employees / agents of the company. (Does not include Auditors, Bankers and Legal advisers.)
- If the company has no manager / MD, then every Director of the company.

Section 209A: INSPECTION OF BOOKS OF ACCOUNTS OF COMPANY

(I) **Who are all entitled to inspect:**

- ROC
- Officer authorized by central government
- Officer authorised by SEBI [inspection only with respect to matters provided u/s 55A]

Note: These persons can inspect without previous notice.

(II) **Assistance to persons inspecting**

(a) **Form of assistance**

- Providing them with all books of accounts & other papers.
- Furnishing any statement, information or explanation with respect of affairs of the company.
- Any other assistance.

(b) **Who shall give assistance**

- Every director
- Other officers / employees of the company

(III) **Powers of person inspecting: -**

- Take copies of such books etc.
- Place identification marks thereon (as a token of inspection)
- All powers that a civil court have.
- All powers, which ROC has under this act to make inquiries.

(IV) The Inspector should make a report to Central Government and in case of person appointed by SEBI, he should report to SEBI.

(V) Violation of Sec. 209A by a director leads to **vacation of office** and is disqualified for appointment as a director for 5 years in any other company.

Section 210: ANNUAL ACCOUNTS & BALANCESHEET

- Balance sheet & Profit and loss account should be laid before every AGM.
- In case of non-profit organization, "Income and Expenditure account" should be laid in the place of profit and loss account.
- **Period of financial statement**

In case of 1st AGM: From Date of Incorporation up to a date, this doesn't precede the AGM by more than nine months.
Subsequent AGM's: Financial year

Note: The end of financial year shall not precede the date of AGM by more than more six months. [Extension from ROC by three months possible]

I) Financial year

- ⇨ Can be less than 12m
- ⇨ Can be more than 12m
- ⇨ But shall not exceed 15m [ROC can give extension up to 18m]

Section 211: FORM & CONTENTS OF BALANCESHEET AND PROFIT & LOSS ACCOUNT

I) Schedule VI part I & II compliance necessary with respect to B/S & P&L Exemption to:

- Banking Company
- Insurance company
- Electricity Company
- Any other company having specific form of B/S & P&L a/c, specified by act governing it.

II) Central Government has got Power to exempt compliance of any of the requirement of schedule VI by notification in official gazette.

Note:

- CG can exercise such power only in public interest.
- Exemption may be conditional / unconditional.

III) **Compliance of Accounting Standards**

[Relevant provisions Sec.211(3A)(3B)(3C)]

Accounting Standard means Accounting Standard prescribed by National Advisory Committee on Accounting Standards. Till such committee prescribes AS, AS issued by ICAI.is applicable.

If AS is not complied the following disclosure in financial statement is necessary:

- The fact of deviation from AS.
- Reasons for such deviation.
- Financial effect of such deviation

IV) Modification of Requirements of The Companies Act With respect to Financial Statement Possible

- On an application by BOD to CG.

- Suomoto modification by CG with BOD consent.

II) Non-disclosure of certain matters required by Schedule VI, if not required by the following acts, will not affect true and fair view shown by financial statements

Company	Act.
Insurance company	Insurance act 1938
Banking company	Banking companies act 1949
Electricity company	Electricity supply act 1948
Any other company	Special Acts governing that company

III) Financial statement includes Notes to accounts.

Section 213: FINANCIAL YEAR OF HOLDING COMPANY & SUBSIDIARY COMPANY

[Overrides all the provisions of this act]

1) CG may allow the holding company or its subsidiary to extend its financial year to bring the financial year of both the companies to end on the same date.
2) For the above purpose CG may allow postponing the
   - Submission of a/c of extended company
   - Submission of annual returns of extended company
   - AGM of the extended company to any date specified in its direction.

Note: For the above purpose BOD should apply to CG

Section 214: RIGHTS OF HOLDING COMPANY'S REPRESENTATIVE & MEMBERS

1) A holding company may authorize by a resolution, a representative to inspect the books of accounts kept by any of its subsidiaries.
2) Such books should be open to inspection during business hours.
3) Relevant portion of Sec. 235

Company

Having share capital	Not having share capital
At least 200 members	1/5th of the members in companies ROM
Or	
Members holding at least 1/10th voting Power	

Note: As per Sec.214 the above right to apply to CLB may be exercised by member of holding company as if they alone are the members of subsidiary.

Section 215: AUTHENTICATION OF B/S & P&LA/C

Note: Before authentication BOD should approve such financial statement.

Company

Banking Co.	Others
B/S & P&LA/C signed on behalf of BOD by Person specified in Sec. 29(2)(a) or (b) of Banking companies act	By Mgr / Sec (if any)and At least 2 directors (one MD if any)

Note: If only one director is available in India, he shall sign the financial statements and he should attach a statement duly signed by him, explaining the reason for non-compliance.

Section 216: ANNEXURES AND ATTACHMENTS

Profit and loss account is an annexure to Balance sheet and Auditor's report is an attachment.

Section 218: PENALTY FOR CIRCULATION OR PUBLICATION OF FINANCIAL STATEMENTS IN CERTAIN CASES

A company shall not circulate financial statements

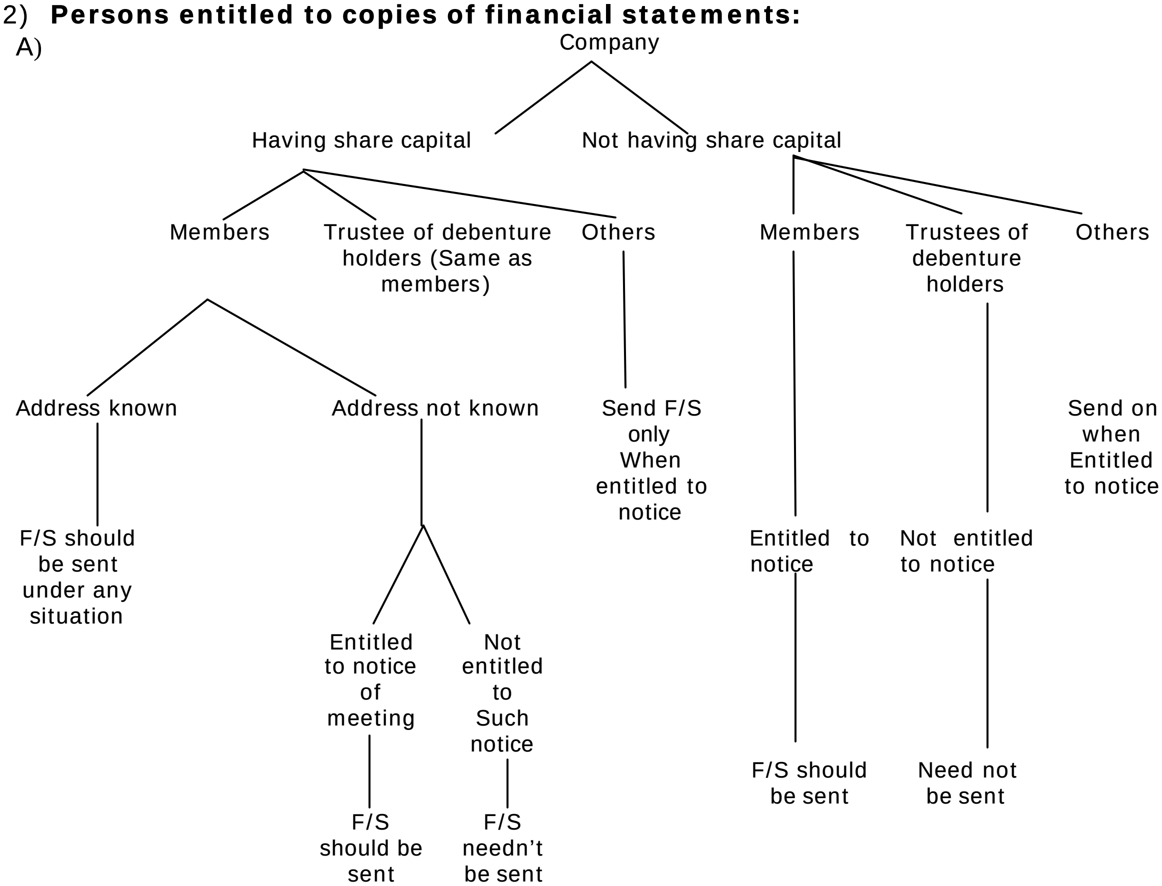
- Which are not authenticated under Section 215
- Which are not accompanied by its annexures and attachment

If it does so it is liable to penalty, which may extend to five thousand rupees.

Section 219: RIGHT OF MEMBERS TO COPIES OF BALANCESHEET AND AUDITOR'S REPORT

1) Time limit for sending financial statements: at least 21 days before the date of meeting
2) **Persons entitled to copies of financial statements:**

A)



B) Special points

Joint holders

None of them entitled to notice	**Only some entitled to notice**
Send F/S only to one	Send F/S only to those entitled to notice.

3) **Abridged financial statements**
- ⇨ Only listed companies can issue abridged financial statements
- ⇨ An unabridged financial statement should be kept open for inspection in the registered office of the company during business hours at least 21 days prior to the meeting

- Abridged financial statement should be sent to members etc 21 days before the meeting.
- Shorter sending possible if all members entitled to vote agree

4) **Furnishing a copy of financial statements to the following on demand at free of cost is allowed**
- Members
- Debenture holders
- Deposit providers

Section 220: FILING WITH ROC

(a) Time limit for filing the annual accounts

AGM

Held	**Not held**
3 copies of F/S should be filed within 30 days of AGM	3 copies of F/S should be filed within 30 days from the last date within which AGM ought to have been held.

(b) Before they are filed with ROC financial statements should be signed by:

Company

Has MD / Mgr / Sec.	**Has no MD / Manager / Sec.**
By MD or Mgr or Sec.	By a director

(c) In the following situations, a statement containing the fact and the reasons there for should be annexed with the F/S and filed with ROC

- When AGM is not held
- Accounts are not adopted due to adjournment.
- In AGM, Company did not adopt the accounts.

(d) Special provisions regarding private company

- Private company should file P & L A/C & B/S separately
- The profit and loss account filed with ROC is not open to inspection to non-members.

Section 222: CONSTRUCTION OF REFERENCES TO DOCUMENTS ANNEXED TO ACCOUNTS

1) If any information is required by this act to be given in accounts & is allowed by it to be given in a statement annexed to the accounts, such into may be given in Board's report.
2) Such portion of Board's report should be treated as annexure to the account and shall be the subject matter of audit report.

Note: Board's report is attachment and not annexure; therefore audit report should not cover matters included in Board's report exception being matters specified in this section.

Chapter 2

PROVISIONS RELATING TO AUDITORS
(SECTION – 224 TO 233B)

Introduction

Earlier ownership & Management were vested with same person(s). In a corporate form of organisation owners (shareholders) has no role in managing the affairs of the company. The management is vested in a group of individuals. [Individually called directors, collectively called Board Of Directors]. So the owners (i.e., shareholders) will want to ensure that the affairs of the company are managed in accordance with sound business principles & prudent commercial practices. There arises the need for audit.

Sec. 224 - 233B speaks about provisions relating to audit.

A	B	C	D	E	F	G	H
Who can be appointed as an auditor (Qualifications & Disqualifications)	Who will appoint auditors	Duties of auditors	Rights of auditors	Removal of auditors	Appt. of branch auditors.	Special audit	Cost audit

(A) **Qualifications & Disqualifications (Section 226)**

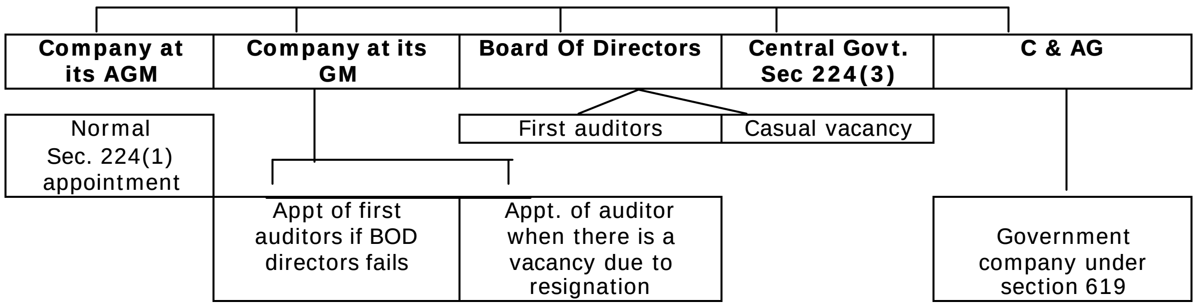
1) Chartered accountant holding the certificate of practice.
2) A firm in which all partners are chartered accountants holding certificate of practice & practice in India.
3) **Following persons are disqualified:**
   (a) Body corporate
   (b) Officer / employee of the company.
   (c) Partner / employee of such officer / employee
   (d) Indebted to the company for an amount exceeding Rs.1000.
   (e) Disqualified for appointment as auditor in Holding company/ Subsidiary company / Subsidiary of that company's Holding company.
   (f) Holds any security of the company.

Note: In addition, Sec. 8 of chartered accountants act specifies certain disqualifications:

(i) An insane person.
(ii) Un discharged insolvent
(iii) Guilty of an offence involving moral turpitude.

(B) **Appointment Of Auditor**

(i) Who will appoint



(ii) **Remuneration Sec 224(8):**

Normally the appointing authority will fix the remuneration. If appointed by the BOD then BOD will fix it, if appointed by the company – then company will fix it or the BOD will fix it in a manner prescribed by the company at the general meeting, if appointed by Central Government – Central Government will fix it, but if appointment is done by C & AG – Company will fix it or the BOD will fix in a manner prescribed by the company in the general meeting.

(iii) **Tenure:**

Holds office from the conclusion of the AGM in which he is appointed till the conclusion of next AGM.

(iv) **Procedure:**

(a) Obtain a certificate from the proposed auditor that there will be no violation of Sec. 224(1B) [ceiling on number of audits](with respect to the ceiling refer auditing material)
(b) Within 7 days of appointment, intimate to the auditor about his appointment.
(c) Auditor should within 30 days from the date of receipt of such intimation – inform the Registrar in writing of his acceptance.

(v) **Automatic re appointment [Sec 224(2)]**

A retiring auditor should be re-appointed except in the following cases:
(a) He is not qualified for re-appointment.
(b) He has given the company a notice is writing of his unwillingness to be re-appointed.
(c) A resolution has been passed at the meeting appointing somebody instead of him or providing expressly that he shall not be reappointed.

(d) Notice has been given of an intended resolution to appoint some other person, but due to death / incapacity of such person the resolution cannot be proceeded with

(vi) **Appointment by Central Government:**

Where a company fails to appoint a auditor in its AGM, then the Central Government gets the power to appoint the auditor of the company [Sec 224 (3)]. The company should inform the Central Government within 7 days from the date on which the above power becomes exercisable by Central Government. [Sec 224(4)]

(vii) **Appointment of first auditor u/s 224(5)**

- Should be appointed within 1 month of incorporation.
- Tenure – until the conclusion of next Annual General Meeting.
- Board of directors appoints the first auditors.
- If they fail to appoint the first auditors, the company in its general meeting can appoint the first auditors.

(viii) **Filling of casual vacancy: Sec 224(6)**

Board of directors can fill the casual vacancy in the office of auditors. Till such time the vacancy is filled the remaining auditors can act. If vacancy is due to resignation of an auditor then it can be filled only at the general meeting.

(C) **REMOVAL OF AUDITORS [Section 224(7) & 225]**

Previous approval of CG is necessary for removal of the auditor (Exception First auditors). Procedure for appointing any person other than retiring auditor or for removal of auditor

- Special Notice u/s 190 of the intended resolution – shall be made to the company.
- The company will shall in return send a copy of such notice to all members.
- A copy of such special notice should also be sent to the retiring auditor immediately.
- He has right to make representation in writing (This is in addition to his right to be heard at the GM).
- Such representation should be of reasonable length.

- Such representation should be sent to all members along with the notice of resolution.
- If the company could not send such representation due to the fact that it was rec'd belatedly or due to the default, such representation should be read out at the general meeting.

Note: If such representation is used to secure needless publicity for defamatory matters, then CLB can prohibit such representation on receipt of application from the agreed parties.

(D) **RIGHTS OF AUDITOR (SEC. 227(1))**

- Access to books and accounts and vouchers of the company (whether kept at H.O. or at branches)
- Access to information and explanation, considered necessary for performance of his duties.
- Right to receive all notice of and other communication relating to any GM which any member of the company is entitled to (Sec. 231)
- Right to visit branch and right to be heard at any GM (Sec. 231)
- Right to visit branch office (Sec 228)

(E) **DUTIES OF AUDITOR (SEC. 227)**

- Reporting (Discussed at length in auditing)

(F) **BRANCH AUDIT (Section 228)**

(i) **Who shall be appointed as branch auditor**

(a) Auditor appointed u/s 224.
(b) Any person qualified u/s 226.

Note: In case of a foreign branch, in addition, an accountant duly qualified to act as an auditor of the accounts of branch office in accordance with the laws of foreign country can be appointed.

(ii) **Who shall appoint branch auditor:**

The company at the GM shall appoint the branch auditor. It may also authorize the BOD to appoint branch auditor, in consultation with the company's auditor.

(iii) Power & duties of the branch auditor are similar so that of the company auditor.
(iv) To whom the branch auditor should report: to the company's auditor.
(v) Remuneration of branch auditor is to be fixed by the Company Or by the BOD duly authorized by the Company.
(vi) **Power of CG to grant exemption to branch audit**

In exercise of such power CG has framed rules regarding exemption of branch office audit.
You refer these rules in your auditing study material.

(G) **AUDIT REPORT**

Who shall sign?

(i) Auditor of the Company
(ii) If firm is appointed, a partner practicing in India alone can sign.

Reading and inspection of audit report

The auditor report shall be read before the company in GM and shall be open to inspection by any member of the Company.

(H) **SPECIAL AUDIT (Section 233A)**

(i) Who shall audit?
The central government

(ii) When can CG order special audit?

* Affairs of the company are not managed in accordance with sound business principles or president commercial practices.
* The company is being managed in a manner likely to cause serious damage or injury to the interest of the trade / industry / business to which if pertains
* The financial position of any company is likely to endanger its solvency.

(iii) Who can be appointed as special auditor
(iv) Any chartered accountant (Whether or not such CA is holding a COP)

(v) Power & duties (similar to those provided u/s 227)

Note: In addition a special audit report is required to on such other matters specified by CG.

(vi) The special audit report should be submitted to CG.
(vii) On receipt of the report from the special auditor, the central governmentt may take such action on the report as it consider necessary is accordance with the provision of then Act or any other law for the time being in force.
(viii) If the CG, intends to take no action & 4 months have elapsed, the CG may order circulation of such report or part thereof. In addition, it has to be read at the GM held immediately.
(ix) The expenses of special audit should be borne by the company otherwise, if should be recovered as arrears of land revenue.

(I) **COST AUDIT (Section 233B)**

It is intended to pin point the inefficiencies & wastages of the organizational resources. It is not a post mortem activity unlike financial audits.

(a) To whom cost audit is applicable:

- Company engaged in manufacturing, production, processing and mining activities.

- Company should have been required u/s 209(1)(d) to maintain cost accounting records.
- The central government has specifically order the company u/s 233B to get its cost accounting records audited.

(b) Who shall conduct cost audit:

- Cost accountant within the meaning of ICWAI Act 1959.
- In the absence of sufficient cost accountants the cost audit may be conducted by chartered accountants, if they have the prescribed qualification. The CG has not specified any such qualification

(c) **Who shall appoint cost auditor:**

The BOD with the previous approval of CG shall appoint a cost auditor. The BOD should obtain a certificate from the proposed auditor, that his appointment will not affect the Provision of Sec. 224(1B).

(d) **Powers & duties:** similar to that specified u/s 227

(e) A copy of cost audit report should be furnished to central government and another copy of the report to the company. Within 30 days from the date of receipt of a copy of the report the company shall furnish full particulars, w.r.t. each & every reservation / qualification contained in such report. After considering such information / explanation, if the central government seeks such other additional information / explanation, the company shall furnish the same. After considering such report & information / explanation, it can take such action as it considers necessary.

(f) Disqualifications of cost auditor are similar to that specified u/s 226.

(g) **Time within which the cost audit should be completed:**
Books shall be made available to the cost auditor within 90 days from the end of the financial year and Within 180 days from the end of the relevant financial year cost audit should be completed. If cost audit is not completed with in the aforesaid time, the cost auditor shall be liable to pay fine.

Chapter 3

INVESTIGATION

(Section 234 to Section 251)

Section 234: POWER OF ROC TO CALL FOR INFORMATION AND EXPLANATION

1) There are number of Documents that are filed with ROC. On perusal of such documents, the ROC may seek through an order information / explanation w.r.t any matter relating to such documents.
2) Company and every officer (past / present) has duty to provide such information / explanation.
3) If such information is not furnished or Information / Explanation furnished is not sufficient, the ROC can require by an order such company to submit such books & papers as it considers necessary for the purpose of inspection.
4) If the company defaults, then the ROC can apply to the court and the court may make an order directing the company to submit the books.
5) Information and explanation received by ROC could be annexed to the documents and similarly copies / extracts of books and papers can also be annexed to the documents.
6) If the documents, along with the information / explanation received does not
   - Disclose a satisfactory state of affairs of the company or
   - Give full & fair statement of any matter to which the document purports, then ROC may report to Central Government.
7) ROC could exercise the above powers; if creditors or contributories apply to it stating that the business of the company is carried on to defraud them or it has been carried for fraudulent purposes.

Note: If on enquiry, ROC is satisfied that such application is frivolous, then ROC shall disclose the identity of the informer to the company.
This section applies even to documents submitted by Liquidator / Foreign company.

Section 234A: SEIZURE OF DOCUMENTS BY ROC

1) If ROC feels that, any document relating to a company, MD or Manager may be destroyed, mutilated, altered or defaced then it may –
   (i) Enter the place where they are kept
   (ii) Search those places.
   (iii) Seize such books & papers.

2) The ROC should not keep such seized books for more than 30 days.

Note: Before returning such books Copies / extracts could be taken and marks of identification could be placed on such books.

Section 235: INVESTIGATION OF AFFAIRS OF A COMPANY

1) **Who can order investigation & appoint competent investigator:** Central Government.

2) **Situation under which it can order investigation:**

   (i) When report from ROC is received u/s 234 or
   (ii) When CLB declares that affairs of the Company ought to be investigated.

3) **When CLB can make such declaration:** when requisite number of members applies to it.

4) **Requisite number**

Company

Having share capital	Not having share capital.
* At least 200 members or * Members holding shares carrying at least 1/10 voting power.	* Members having at least $1/5^{th}$ count in ROM. (i.e., at least 20% of members)

Note: Opportunity of being heard should be given before CLB makes such declaration.

Section 236: APPLICATION BY MEMBERS TO BE SUPPORTED BY EVIDENCE:

Evidence is required to show to the CLB that there exist good reasons for the affairs of the company to be investigated.

Note: Central Government may, before appointing inspectors require security to be provided to meet the investigation cost.

Section 237: INVESTIGATION OF COMPANY'S AFFAIRS IN OTHER CASES

1) Other circumstances in which Central Government can order investigation

   (a) Company by special resolution resolves investigation
   (b) Court orders investigation.
   (c) CLB opines that investigation is necessary in certain circumstance

2) Circumstances which may make CLB feel that investigation is necessary

* Business of the Company is conducted
  - To defraud its members, creditors & others
  - For unlawful / fraudulent purposes
  - In a manner oppressive to any of its members.
* Persons concerned with formation of the company or with management of the affairs of the Company are guilty of fraud, misfeasance and other misconduct.
* Information regarding affairs of the company are not furnished to the members (including calculation of commission payable to MD/ Directors)

Section 238: Only individuals can be appointed as inspectors.

Section 239: POWER OF INSPECTOR TO CARRY INVESTIGATION INTO AFFAIRS OF RELATED COMPANIES AND PERSONS

1) Related Companies and Persons:

- Company's holding company
- Company's subsidiary company
- Subsidiary of Company's holding Company
- Any body corporate in which the Company's Manager / MD is the MD / Manager
- Any body corporate whose BOD consists of Company's nominees.
- Any body corporate whose BOD is accustomed to act in accordance with the instruction of
  - (a) The Company
  - (b) The director of the Company
  - (c) Any Company which has, employees / nominees of person having control & management of the Company (1st Company) – as its director.
- Manager / MD of the Company

2) Central Government – before giving approval should give opportunity of being heard to these persons.
3) The words "at the relevant time" in Bare act.

Section 240: PRODUCTION OF DOCUMENTS & EVIDENCE:-

1) Officers, employees and agents of any person whose affairs are investigated u/s 235, 237, 239 should:

   * Preserve & Produce all books & papers necessary and
   * Provide necessary assistance.

2) With the previous approval of Central Government, the inspector may require any other body corporate (unrelated) to furnish such information, books etc.

3) Books could be detained only for a period of 6 months. Thereafter, they should be returned.

Whenever required, Books etc could be called back.
Inspector can examine any person on oath. (In relation to affairs of those inspected)

Section 240A: SEIZURE OF DOCUMENTS BY INSPECTOR:

The provision of this section is same as that of section 234A. The points of difference are:

(a) Documents seized could be detained up to completion of inspection. (In 234A only for 30 days detention is allowed)
(b) Extracts / copies cannot be taken. (In section 234A extracts / copies could be taken)

Section 241: INSPECTOR'S REPORT:

1) Inspector's Report

Interim report to Central Govt. (Only when Central Govt. requires)	Final report to Central Govt. (On conclusion of investigation)

2) Persons entitled to receive a copy of Final report:

(a)	Company, and body corporate referred to u/s 239	–	To be delivered at its Registered office
(b)	Member of the Company and BC inspected		
(c)	Affected creditors of the Company and body corporate inspected	-	On payment of prescribed fees.
(d)	Requisitionist under Sec. 235(2)		
(e)	Court (u/s 237)		

Section 242: PROSECUTION: Prosecution is attracted only when a person is criminally liable.

Section 243: APPLICATION FOR WINDING UP OR ORDER U/S 397/ 398

1) If on the perusal of inspection report, if Central Government is of the opinion that the company should be wound up, it may:
   (a) Present a winding up petition under just & equitable clause or
   (b) Present an application u/s 397 /398 or
   (c) Present both winding up petition & application u/s 397 & 398.

Section 244: PROCEEDINGS FOR RECOVERY OF DAMAGES OR PROPERTY

Central Government may in the public interest, initiate proceedings in the name of the company, for:

1) Recovery of damages in respect of any fraud, misfeasance and misconduct in connection with promotion or formation of the company or BC
2) Recovery of any property of the Company / BC, misapplied / wrongfully retained.

Section 245: EXPENSES OF INVESTIGATION

1) The expenses of investigation should in the first instance be defrayed by Central Government.
2) Central Government is entitled to reimbursement from:
   (a) A person convicted u/s 242.
   (b) A person ordered to pay damages / restore property u/s 244.
   (c) Company/ BC under investigation and in whose name Section 244 proceedings are initiated.
   (d) MD / Manager of the Company / BC – dealt with in the report

(e) Applicants u/s 235(2).

Notes:

1) Expenses of investigation includes cost of Section 244 proceedings
2) Liability of Company / BC in whose name Section 244 Proceedings are initiated – is restricted to value of Security / Property recovered.
3) Central Government has got the first charge in the above property.
4) Persons referred to under © should reimburse the expenses borne by (d) & (e).
5) Persons referred under (a) & (b) should reimburse the expenses borne by ©.

Any portion of expenses not recovered by Central Government – shall be met out of money provided by parliament.

Section 247: INVESTIGATION OF OWNERSHIP OF THE COMPANY

1) Central Government has power to order investigation to find:
   (a) The persons, who are financially interested in the Company's success / failure
   (b) The persons, who could control the policy of the Company.
2) Central Government can order such investigation on receipt of an order from the CLB.
3) Central Government should define the scope of investigation i.e. the matters to be investigated and the period to be investigated.

Note: Scope may be so limited to the extent that investigation may be w.r.t the ownership of particular shares / debentures.

4) Those persons who are believed to have beneficial ownership / control over the Company's policy should provide necessary assistance to investigation.
5) Investigation report – Central Government need not be give the report to any person, if it feels that there exists good reasons for not divulging the contents of the report.

Otherwise, it may keep such report with ROC for inspection .

Section 250: IMPOSITION OF RESTRICTIONS UPON SHARES & DEBENTURES & PROHIBITION OF TRANSFER OF SHARES / DEBENTURES IN CERTAIN CASES.

1) **Restrictions that can be imposed by CLB on Shares / Debentures.**
   (a) Transfer of such shares shall be void.
   (b) If shares are to be issued, then they should not be issued.
   (c) Voting rights should not be exercised
   (d) Right issue, Bonus issue (w.r.t such shares void.)

(e) No payment of Dividend, Repayment of capital etc. shall be made except on liquidation.

2) **When restrictions can be imposed:**

CLB, in order to find out the relevant facts about any shares, with respect to whose ownership investigation u/s 247 is done, may impose the above restriction. CLB can do so if reference is made to it by Central Government or on receipt of a compliant in this behalf.

3) The above restriction can be imposed only for a period of 3 years.
4) **Prohibition of transfer**

Transfer has already taken place	Transfer likely to take place.
➔As a result of which change in composition of BOD is likely to take place, which is likely to be prejudicial to public interest. ➔Then CLB may order that voting rights in respect such shares – shall not be valid for a period of not exceeding 3 yrs.	➔As a result of which change in composition of BOD is likely to take place, which is likely to be prejudicial to public interest ➔Then CLB may by order prohibit the transfer of such shares for a period of not exceeding 3 yrs.

Section 250A:VOLUNTARY WINDINGUP ETC OF A COMPANY NOT TO STOP INVESTIGATION PROCEEDINGS

1) Passing of special resolution for voluntary winding up	Will not affect investigation proceedings u/s 235, 237, 239, 247
2) Application u/s 397, 398	

Section 251: SAVING FOR LEGAL ADVISERS & BANKERS:

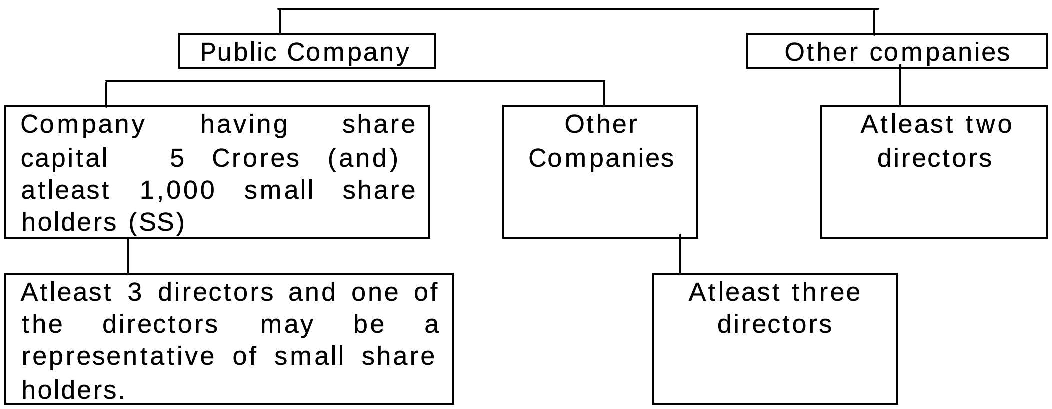
Bankers and legal advisers need not divulge any information about their clients to CLB / Central Government/ ROC /inspector.

Chapter 4

DIRECTORS

(Section 252)

Section 252 – Minimum No. of directors:-



Small shareholders may elect one among themselves to be small shareholders directors in such manner as may be prescribed.

Expn: SS means shareholder holding shares the nominal value of which do not exceed twenty thousand rupees.

The directors of a company are collectively referred to as “Board of Directors” or “Board”.

Section 253

Only Individuals can be appointed as directors & no body corporate, association or firm shall be appointed as directors.

Section 254: First Directors

In default of or subject to any regulation in the articles, subscribers to the memorandum shall be deemed to be the directors of the company.

Such subscribes should be Individuals.

Such deemed directors will hold the office till the directors are duly appointed in accordance with section 255.

AOA mentions the first directors

No

AOA prescribes any procedure for election of directors

No

Subscribes to MOA who are Individuals shall be directors.

Note: First directors appointed Under Section 254 will hold the office only till the directors are appointed in accordance with the provision of Section 255.

Section 255

Public Co.

Directors retiring by rotation

Number of such directors should be atleast rd of directors in office

Permanent directors

Number of such directors should be at most rd of directors in office

In default of and subject to regulations in AOA. Both are appointed by the Company in a GM

Private Company

Directors appointed by the company in a General Meeting in default of and subject to any regulation in the articles.

All the directors will be permanent (or) as per the provision of the AOA

If the articles of a Public Company provide for the retirement of all directors at every AGM, all the directors has to retire and there will not be any classification of directors into

(i) Directors retiring by rotation.
(ii) Permanent directors.

Section 256

In this section, the expression "retiring directors" means a director retiring by rotation.

This section does not apply to a private company.

(1) At an AGM held next after the date of GM at which directors are appointed under section 255 and at each subsequent AGMs,

- (i) Directors liable to retire by rotation has to retire.
- (ii) Number of such directors to retire is rd of such directors who are liable to retire by rotation.
- (iii) If the number is not three or multiple of 3, the number nearest to one third shall retire.

(2) Those who have been longest in office shall retire first. If directors were appointed on the same day, directors to retire will be determined based on the agreement between themselves & if there is no such agreement, it will be determined by lot.

(3) The Company may fill up the vacancy by appointing the retiring director ((i.e.) by rotation) (or) by appointing some other person.

(4) If the vacancy is not filled up then meeting has to resolve expressly that vacancy should not be filled up. Otherwise, meeting will be adjourned to the same day next week at the same time & place & if that day is a public holiday till the next succeeding day which is not a public holiday at the same time and place. Such adjournment is for filling up the vacancy.

(5) If in the adjourned meeting also vacancy is not filled (or) the meeting does not resolve expressly not to fill up the vacancy then the retiring director will be deemed to have been reappointed at the adjourned meeting.
However the retiring director will not be deemed to have been reappointed if

- (i) Either at the original meeting (or) at the adjourned meeting a resolution for the reappointment of such director has been put & lost.
- (ii) Retiring director expressed his unwillingness in writing to be reappointed.
- (iii) He is not qualified (or) he is disqualified.
- (iv) A resolution, whether ordinary or special is required for his appointment or reappointment by director by any provision of this Act.

(v) Provision to Sec.263 (2) is applicable to his case.

Provision to Section 263

Even if a resolution is passed in violation of 263(1), no provision for the automatic reappointment of director retiring by rotation in default of another appointment shall apply.

(e.g) consider A Ltd. A & B are directors retiring by rotation. At an AGM, they retire & in their place X & Y are appointed as director at that meeting by passing a single resolution in violation of Section.263 (1). Then A & B cannot claim that their appoint is void & ∴ meeting has to be adjourned for filling by the vacancy (by virtue of provision to 263(2)).

Section 257

(1) 257(1) is not applicable to a private company. But section 257(1A) is derived from section 257(1), therefore 257(1A) is also not applicable to private companies.
(2) "Retiring director" means director retiring by rotation.
(3) Retiring director is not required to follow the procedure provided in this section.
(4) If a person is eligible for appointment to the office of director at any GM, he has to give a notice in writing under his name which should specify his candidature for the office of director. Such notice should be left at the office of the company not less than 14 days before the meeting. Similarly, if any member is proposing a person for the office of director, then such member has to give a notice in writing under his hand signifying his intention to propose that person for the director ship. Such notice should also be given not less than 14 days before the meeting.

The company shall after receipt of the notice, inform its members by serving individual notices not less than seven days before the meeting.

Instead of serving individual notices, the company may advertise such candidature or intention in atleast two newspapers circulating in the place where the registered office of the Company is located

Time limit for advertisement is not less than seven days before the meeting.

Atleast one newspaper should in English and another on should be in vernacular.

Section 258

A company in a General Meeting may by ordinary resolution increase or decrease the strength of its directors. However following should be considered:

(1) Such increase should be within the limits fixed by the article.

(2) Such decrease should not be below the minimum requirement specified in section 252 (or) the minimum requirement fixed by the articles.
(3) While increasing (or) decreasing the strength, care should be taken that the ratio of directors retiring by rotation to other directors as specified in section 255 is not varied.
(4) Provision of section 259 should also be considered.

Section 259

Note: Section.258 is applicable to any Company. Section 259 is applicable to public Company only.

If increase in strength of 15 directors is beyond the maximum specified in is articles as just registered, such increase shall not have any effect unless approved by the Central Government & if it is disapproved by the CG such increase shall become void.

However if permissible maximum is 12 or below 12, increase in the number of directors will not require the approval, if such increase does not take the total number beyond 12

Section 260 Additional Directors

(1) Applicable to all companies.
(2) Power to appoint additional directors should be given by the articles.
(3) Nothing in Section 255, Section 258 (or) Section 259 shall not affect the power given by this article to appoint additional directors
(4) Additional directors shall hold office only upto the date of next AGM. Date of next AGM means the due date on which next AGM is to be held.
(5) No. of directors & no. of additional directors together shall not exceed the maximum strength of the Board fixed by the articles.

Section 262

(1) This is not applicable to a private company.
(2) Casual vacancy can be filled by the Board only in a Board Meeting & not by circular resolution.
(3) However this is subject to any regulation in the articles.
(4) Director whose vacancy is to be filled should have been appointed by the company in a General Meeting.
(5) Term of office of the new director shall be upto the date upto which the director in whose place he is appointed would have held office if it had not been vacated.

Section 263

(1) This is applicable to a Public Company only

(2) A motion for appointing two or more directors by a single resolution cannot be made.
(3) However such motion can be made if a resolution that such motion can be made should have been first agreed to by the meeting without any vote cast against it (Neutral may be possible).
(4) A resolution moved in contravention of the above provision shall be void whether or not objection was raised at the time of moving it.

However just because the resolution is void, provision for the automatic re-appointment of the director retiring by rotation in default of another appointments shall apply.

See Section 256(4) (b) (v).

Section 263A

This is applicable to Section 25 companies. The articles of such co. may provide for the retirement of all directors at AGM & election of all its directors by ballot.

∴To facilitate this, Section 263A says that provisions of 177, 255, 256 & 263 shall not affect any provision in the articles of a Co. for the election of all its directors at each AGM by ballot.

However such Co. should not carry on business for profit (or) prohibits the payment of a dividend to its members.

Section 264

(1) This is not applicable to a Private Co.
(2) This section is for filing consent with the Co. to act as a director & for filing consent in writing with the registrar to act an such director.
(3) A person other than a director retiring by rotation or otherwise a person who has left a notice under section 257 signifying his candidature for the office of a director need not file consent with the co. to a act as director if appointed. However every other person proposed as a candidate for the office of a director has to file consent in writing with the company to act as a director if appointed. 264(i). There is no time limit within which consent should be filed. However consent should be made before appointment.

If a person is appointed as a director, he shall not act as director unless he has filed his consent in writing to act as such director with the Registrar. Time limit is within 30 days of his appointment (section 264(2)).

Following persons need not comply with 264(2):-

(a) A director re-appointed after retirement by rotation.
(b) A director re-appointed immediately on the expiry of his term of office.
(c) An additional director appointed as a director or re-appointed as additional director.
(d) An alternate director appointed as a director or re-appointed as alternate director.
(e) Person filling a casual vacancy in the office of a director under section 262 appointed as a director.

Note: However if a person is appointed for the first time as additional (or) alternate director, he has to comply with both provision of 264(1) & 264(2). Similar case for a person filling the casual vacancy under section 262 for the first time

(f) A person named as a director of the Company under its articles as first registered. ((i.e.) under section 254).

Section 265

The article of a Public Company may provide for appointment of directors according to the principle of proportional representations. (i.e.) by way of single transferable vote (or) by a system of cumulative voting the provisions of section 265 have a overriding effect over other provisions in the Act.

If appointments are made in accordance with this section, they will not be removed under section 284.

Appointments will be made once in 3 years.

Interim casual vacancies will be filled in accordance with the provisions of section 262.

Section 266

A person approved by the AOA as director	A person named as a director or proposed as director in the prospectus.	A person proposed as director of an intended Co. in a prospectus of that intended Co. (or) in a statement in lieu of prospectus field with the registrar.
Before registration of AOA	Before publication of prospectus	Before publication of prospectus (or) filing of statement in lien, at the case may be.

Has to file a consent in writing with the ROC to act as such director. (and) has to acquire qualification shares or commit himself to acquire qualification shares.

Section 266 is not applicable to

(a) A Company not having a share capital.
(b) A private company
(c) A company which was a private company before becoming a public Co.
(d) A prospectus issued after one year from the date on which the company was entitled to commence business.

MANAGING DIRECTORS

Section 267

This section provides both for vacation and disqualification for managing directors.

A person cannot be appointed (or) continue to be employed if as a MD of any company if

(i) He is an undischarged insolvent (or) at any time he has been adjusted insolvent.
(ii) Suspends (or) has at any time suspended payments to his creditors.
(iii) Makes composition (or) has at any time made composition with his creditors.
(iv) Is (or) has at any time been convicted by a court, either in India (or) outside India, for an offence involving moral turpitude.

Section 268

This section applies only to public companies.
Amendment of any provision relating to the appointment (or) reappointment of

(1) MD
(2) WTD
(3) Director not liable to retire by rotation.

Shall not have any effects unless approved by CG & become void if disapproved by the Government.

Such provision to be amended may be in MOA/AOA (or) in agreement (or) in resolution by Co. in a GM (or) in a resolution passed by its BOD.

Section 269

(1) Public Company having a paid-up share capital 5 crores should have a MD (or) WTD (or) Manager.
(2) Appointment a MD (or) (WTD) (or) Mgr in the case of a Public Company

Appointment in accordance with Schedule XIII	Not in accordance with Schedule XIII.
Return within 90 days from the date of appointment should be furnished.	Application setting approval of appointment should be within 90 days of the appointment to the CG.

(3) CG may not accord its approval if the person appointment is not fit and proper (or) appointment is not in the public interest (or) terms & conditions of appointment are not fair & reasonable.
(4) CG can also accord it approval for lesser period than the period for which appointment was made.
(5) If CG does not approve the appointment, the person appointment shall vacate his office as such & date of vacation shall be the date on which the decision of CG is communicated to the Co.
(6) If appointment is made in contravention of schedule XIII and without the approval of CG, the CG may refer it to CLB for decision. The CLB may issue show-cause notice to Co. such MD, WTD (or) Mgr. as to why appointment should not be terminated & penalties should not be levied.

(7) If CLB makes an order that contravention has been made, they penalties will be levied & appointment will be deemed to have been terminated on making the order.

Thereafter such person in addition to fine & penalties, has to refund to the Co. all monetary benefits & per qualities received between the date of his appointment of the passing of such order.

All acts done by a MD (or) WTD (or) Mgr will be valid if the acts so doe are otherwise valid notwithstanding any order made by the CLB.

Note: Appointment includes reappointment & WTD includes a director in whole-time employment of the company.

Section 274 – Disqualification of directors:

The following persons are disqualified from being appointed as a director of the company (Pvt. / Public):

(a) Found to be a person of unsound mind by a court of competent jurisdiction and the finding is still in force.
(b) Person who is an undischarged insolvent.
(c) Person who has applied to be adjudicated as an insolvent and his application is pending.
(d) Person who has been convicted by a court (in India or Outside India) of any offence involving moral turpitude and sentenced to imprisonment for a period of six months or more and five years has not elapsed from the day of expiry of the sentence.
(e) Person who has not paid any call in respect of shares of the company (whether held singly /jointly) for a period of more than six months from the last day fixed for the payment of the call.
(f) A person who has been disqualified for appointment by the order of the court u/s 203 and such order is in force.

Note: If leave of the court has been obtained for his appointment u/s 203, then he can be qualified.

(g) Person who is already a director of a public company which

(i) Has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after 1.4.1999 (or)
(ii) Has failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay the dividend declared and such failure continuous for one year or more.

Note: Such person shall not be eligible to be appointed as a director of any other public company for a period of 5 years from the date on which such public company, in which he is a director, has performed the acts in (i) and (ii) above.
He need not vacate the office of directorship in the company in which such offence is committed.

Note: The Central Government (by notification in official gazette) has power to remove the disqualification incurred by a person in clause (d) and (e) above.
A private company can provide additional grounds for disqualification in its Articles.

Section 275:- No person to be a director of more than 15 companies.

A person cannot hold the office as director in more than 15 companies at the same time.

Section 276:- Transitional provision – No relevance.

Section 277:- Choice by person becoming director of more than 15 companies.

- A person who is already holding the office of director in 15 companies and such person is appointed as a director in another company, then within 15 days he has to vacate his office as director in any of the companies in which he was already a director.
- If the director fails to vacate, the appointment in another company shall become void, immediately on the expiry of 15 days.
- Where a person is already holding the office of director in less than 15 companies and is appointed as director in 2 or more companies, then he shall choose the directorships which he wishes to continues or accept so that the total member of directorship does not exceed 15. however if he does not made any choice within 15 days all new appointments shall become void and none of the new appointments shall have effect until such choice is made.

Section 278:- Exclusion of certain directorship for the purpose of Section 275, 276, 277.

The directorship held by a person in the following companies shall be excluded.

(i) A private company which is neither a subsidiary nor a holding company of a public company.
(ii) An unlimited company.
(iii) An association not carrying on business for profit or which prohibits the payment of dividend. (Sec. 25 companies)
(iv) A company in which such person is an alternate director.

If any company mentioned in (i), (ii), (iii) above loses its characteristics or ceases to fall within the purview of these clauses then such company shall be excluded for a period of 3 months from the date on which the company loses its characteristics or ceases to fall within the preview of those clauses.

Section 283:- Vacation of office by directors:-

A director shall vacate his office if:-

(a) He is found to be of unsound mind by a court of competent, jurisdiction;
(b) He applies to be adjudicated an insolvent.
(c) He is adjusted an insolvent.
(d) He is convicted by a court of any offence involving moral turpitude and sentenced for a period of six months or more.
(e) He fails to pay any call in respect of shares of the company held by him (singly/jointly) within 6 months from the last date fixed for the payment of the call.

Note: Central Government can by notification remove the disqualification incurred by such failure. In such a case director need not vacate the office.

(f) He becomes disqualified by an order of court u/s203.
(g) He absents himself from 3 consecutive Board meetings or from all board meetings for 3 calendar months, whichever is longer, without obtaining leave of absence from the Board.
(h) He fails to obtain within 2 months the qualification shares.
(i) He accepts a loan or any guarantees or security for a loan from the company in contravention of sec. 295;
    (a) Whether by himself.
    (b) By any person for his benefit
    (c) On his account
    (d) From any firm in which he is a partner
    (e) From any private company of which he is a director
(j) He acts in contravention of section 299.
(k) He is removed in pursuance of section 284.
(l) Having been appointed a director by virtue of his holding any office or employment and he ceases to hold such office or employment. (e.g. whole time director).

Note: A private company can provide additional grounds for vacation of office by directors in its Articles.

With respect to the points b, c, d above, the disqualification shall not take effect for 30 days from the date of adjudication/sentence/ order.

However, where any appeal is preferred within the said 30 days and such appeal results in adjudication / sentence / conviction, the disqualification shall not have any effect until the expiry of 7 days from the date of disposal of such appeal / petition.

Further, where another appeal is preferred within 7 days and if such appeal is allowed and such appeal would result in the removal of disqualification, then disqualification shall not have any effect until such further appeal / petition is disposed of.

Section 284: Removal of directors.

(1) The following director cannot be removed by the company in general meeting:
  (i) A director appointed by Central Government u/s 408.
  (ii) Directors appointed under IDRA.
  (iii) Directors appointed under SICA.
  (iv) A director of a private company holding office for life on 1/4/1952.
  (v) Director elected by the principle of proportional representation u/s 265.
  (vi) Directors appointed by CLB u/s 402.
  (vii) Nominee directors.

(2) A company may, by ordinary resolution passed in general meeting after giving special notice of such resolution, remove a director before the expiry of his term of office.

(3) On receipt, the company shall forthwith send on copy to director to enable him to make a representation.

(4) If the director makes representation, in writing and requests the company to notify it to he members, the company shall, unless it is received by it too late for it to send to the members.
  (i) State the fact of the representation made to members to whom notice is sent.
  (ii) Send a copy of the representation to members to whom notice is sent.

(5) If the representation is not sent as aforesaid, the company must at the instance of the director read it out at the meeting.

(6) Director is also entitled to be, heard on the resolution at the meeting.

(7) If such representation is used to secure needles publicity for defamatory matters, then CLB can prohibit such representation on receipt of application from the aggrieved parties.

(8) Another director can be appointed in his place (in the same meeting) provided special notice of the intended appointment has been given.

(9) Such appointed director shall hold office for the period of his predecessor

(10) Such vacancy can also be filled as a casual vacancy u/s 262.

Section 291: General Powers of Board.

(1) The BOD shall be entitled to exercise all such powers and to do all such acts as the company is authorized for do.

(2) The BOD shall not exercise any power or do any act which is to be exercised or done by the company in general meeting.
(3) The BOD action or power should not be inconsistent with the following.
   (i) Companies Act or any other Act.
   (ii) Memorandum or Articles of the company.
   (iii) Any regulations made in general meeting or otherwise.
(4) The company in general meeting cannot by regulation invalidate the prior acts of the Board which would have been valid if that regulation had not been made.

Section 292: Certain powers to be exercised by Board only at meeting.

The following powers are to be exercised only by means of resolutions passed at Board meetings.

(i) To make calls on shareholders in respect of money unpaid on their shares.
(ii) To authorize buy back u/s 77A.
(iii) To issue debentures.
(iv) To borrow moneys otherwise than on debentures.
(v) To invest the funds of the company.
(vi) To make loans.

The Board can delegate the powers mentioned in (iv), (v), (vi) to

- ⇨ Any committee of directors
- ⇨ MD, Manager or any other principal officer
- ⇨ Principal Officer of the branch.

The Board should pass a resolution for such declaration.

The resolution delegating the powers should contain the extent of authority granted to the delegate.

Point (iii) above (i.e.) to borrow money, excludes borrowings by a banking company from other banking companies or from RBI, SBI or other banks.

With respect to OD / CC, the arrangement made by the company with its bankers is to be considered and not the day to day operations.

However, the above powers can be restricted by the company at general meeting.

Section 293: Restrictions on Powers of Board.

The BOD of a public company cannot without the consent of the company in general meeting.

(i) Sell, lease or otherwise dispose of the company's undertaking or substantial part of the undertaking.
(ii) Limit, or give time for the repayment of any debt due by a director.

(Renewal or continuance of an advance made by a banking company to its director in the ordinary course of business is to be excluded)

(iii) Invest the amount received on disposal of undertaking otherwise them in trust securities.
(iv) Borrow moneys where the moneys to be borrowed together with the moneys already borrowed will exceed the aggregate of the paidup capital and free reserve (temporary trans from bankers in the ordinary course of business is to be ignored)
(v) Contribute to charitable or other funds not directly related to the business of the company or the welfare of its employees, any amounts the aggregate of which will exceed 50,000/- or 5% of its avg. net profits (Sec. 349, 350) during the immediately preceding 3 financial year, which ever is greater.

With respect to (iv), (v) above, where a resolution is payed at the general meeting authorizing the Board to borrow or contribute, such resolution should contain the extent of authority granted to the Board.

Temporary Loans

Includes	Excludes
* loans repayable on demand	* Loans raised for the purpose of financing expenditure of a capital nature.
* Loans repayable within 6 months (cc, bill discounting etc.)	
* Other short term loans of seasonal character.	

The company should not reduce its capital due to sale, lease or otherwise of an undertaking or part of undertaking.

Where the company has borrowed in excess of the limits specified in (iv) above, the tender cannot demand repayment unless he proves that he had advanced the loan in good faith and without the knowledge that the limit had been exceeded.

Section 299: Disclosure of interests by director.

(1) Every director of a company, who is in any way

- Directly or indirectly
- Concerned on interested in a
- Contract or arrangement or
- Proposed contract or arrangement
- Entered into or to the be entered into
- By the company or on behalf of the company should disclose the nature of his concern / interest at the Board meeting.

(2) Such disclosure should be made at the 1st Board meeting held after the director becomes concerned / interested.

(3) Where a contract or arrangement is Proposed, disclosure should be made at the Board meeting at which the contract / arrangement was entered into and taken for consideration or at the first Board meeting held after he becomes interested / concerned in case he was not interest at the time of entering the contract.

(4) Disclosure should be made by giving a general notice to the Board.

(5) Such notice shall have effect during the financial year in which it is given.

(6) Such notice can be renewed for 1 more financial year by giving a fresh notice in the last month of the financial year before expiry.

(7) Such renewal notice should also be given to the Board and the director should take reasonable steps to ensure that it is brought up and read at the 1st meeting of the Board after it is given.

(8) This section does not vertrict the director to have any interest / concern in any contracts / arrangements with the company.

(9) Where a contract / arrangement is entered into between 2 companies and one ore more directors of one company holds not more than 2% of the paidup share capital in the other company, this section shall not apply.

Chapter 5

BOARD OF DIRECTORS MEETING

(Section 285)

Section 285: BOARD TO MEET ATLEAST ONCE IN EVERY 3 CALANDER MONTHS

- Board meeting should be held atleast once is every 3 months.
- Atleast 4 such meetings must be held is a year.
- Central government has powers to exempt certain / any class of companies from the application of the above section.

Special points

(1) The year means calendar year.
(2) **DCA opinion**:

The Board meeting may be held on any date between 1st Jan & 31st March, 1st April & 30th June & so on.

But the above view seems to contradict to the plain words of Sec. 285(i.e.) the time gap between 2 meetings should not be more than 3 months. Moreover the aforesaid option of DCA seems to contradict the Marginal notes of the above section.

(3) **Duty of Directors to attend Board Meeting**:

The Director of a company need not attend all meetings of the Board. But his willful non-attendance w.r.t. important meetings may amount to negligence for which he may be held liable, if prejudice thereby is caused to the company (or) to the general body of shareholders.

Example: A. Ltd has 5 Directors. Mr. A. one of the director willfully & recklessly absented himself from a series of Board meetings, which transacted businesses having serious impact on the affairs of the company. The other Directors using his absence dissipated the assets of the Company by incurring wasteful & other improper expenditure. But had Mr. A. been present the entire picture could have changed. In this case Mr. A is answerable to the losses of the company.
Moreover Sec. 283 also contemplates vacation of office of Director, if he absents himself from three consecutive Board meeting or did not attend all Board meeting held during a period of three months without obtaining leave of absence.

(4) **Time & place of Board Meeting**:

Unlike Sec. 166, Sec 285 does not require the Board to hold Board Meeting during business hours or on a day other than public holiday or only at the Registered Office. So the Board meeting can be held on any place & need not be at the Registered Office.

BOARD MEETING

Requires statutory records that are to be kept only at the Registered Office & are allowed for Inspection by members.	Which does not requires so.
Board Meeting can be held at a place other than Registered Office only if it does not come in the way of the right of members to Inspect such records.	Board Meeting can be held anywhere.

(5) Any irregularity w.r.t the conduct of Board Meeting will in no way affect the rights of 3rd party acting bonafide.

(6) **Section25 Companies**: It is enough if the Board Meeting is held within every six calendar months. (Govt. notification)

Section 286: NOTICE OF BOARD MEETINGS

DIRECTOR

For the time being present in India.	Others
Notice in writing should be served on him (i.e.) it should be sent to him wherever he is.	At his usual address in India.

Special Points

(1) **Notice to Directors residing abroad:** By reading the plain words of this section, notice need not be sent to the foreign country. But if AOA requires the sending of notice abroad, then it has to be sent.

(2) **Importance of notice:** Notice of Board meetings must be send to all Directors. Failure to do so will render the resolution passed at the meeting null & void.

(3) In Arunachalam Chettiar Vs. Kaleswara Mills Ltd. It was held that it is sufficient compliance with provision. of Sec 286 if the AOA states that "on the 1st Saturday of each month, there would be a Board Meeting".

(4) **Whether notice of adjourned Meeting necessary:** In Pramod Kumar Mittal Vs. Southern Steel Ltd, it was held that notice of adjourned meeting need not be given unless AOA provide otherwise. The logic behind this is, the adjourn meeting is only a continuation of original meeting & therefore the notice of original meeting holds good for all the adjournments. But in the following situations notice should be given even for adjourned meeting:

- Where a meeting is adjourned since die.
- Where a new business is to be transacted. (R.V. Grim shah Case)

(5) **Ratification of Improper notice:** In Bharat fire & general Insurance Company Ltd Vs. Parameswari Prasad Gupta, it was held that, where notice is not given as required but all directors attend the meeting and do not object to the absence of notice (or) where the absentee Directors do not complain of want of notice, the proceedings at the meeting will not be invalid especially if they are ratified at a subsequent meeting at which the absentee directors are present.

(6) **Waiver of notice:** A Director who is entitled to notice cannot waive his right to receive notice.

(7) **Length of notice:**

- Not provided in the Section.
- However AOA can prescribe
- The logic for not providing the length of notices is that, the Board may have to meet instantaneously for transacting certain urgent business, so to facilitate conducting emergency meeting, the length of notice is not contemplated under provisions of Sec. 286

(8) **Conditional notice invalid:** Contingent notice is not a sufficient notice (Alexander Vs. Simpson)

(9) **Notice to Interested Directors:** There is a concept of Interested & Disinterested Director w.r.t. Board Meeting. Interested Director means, a Directors who is concerned / interested in a business to be transacted at the Board Meeting. The concept of interested director should be applied to each agenda & not w.r.t. Board Meeting as a whole.

Sec. 300 prohibits voting rights of Interested Directors & they are not allowed to participate in the discussion held during the Board meeting & they are also not counted for the purpose of Quorum u/s 287. But this does not mean that notice should not be sent to the Interested Directors (i.e.) the concept of interested directors does not affect the requirements of Sec. 286.

(10) **Agenda to the Board Meetings:** Agenda not necessary even if the meeting is extra-ordinary or special (Abnash Kaur Vs. Lord Krishna Sugar Mills Ltd.) (i.e.) the Board can transact any business even without formal agenda. But it is healthy Secretarial Practice to include agenda also in the notice, so that the Director may be knowing the materiality of the business to be transacted & may decide whether to attend the Board Meeting (or) not. Even when if they decide to attend, they may come prepared for the discussion if they are informed of the agenda to the meeting.

Note: But there are certain businesses w.r.t. which sections in the Act requires compulsory inclusion of agenda in the notice to the meeting:

1) Section 316: appointment of MD who is already a MD in one or more companies.
2) Section 386: appointment of Manager who is already a manager in one or more companies
3) Section 372A: inter corporate investments etc.

Note: The concept of ordinary & special resolution applies only to general Meeting & not to Board Meeting. w.r.t. Board Meeting there are only 2 types of resolution:

(a) Ordinary resolution
(b) Unanimous resolution.

Section 287: QUORUM FOR BOARD MEETING

- $1/3^{rd}$ to Total Strength (or) 2, which ever is higher.
- For the above purpose only disinterested directors should be considered.
- Total strength means Total strength fixed by AOA (-) vacancies in the Board.
- If the no. Of Interested directors equals (or) exceeds $2/3^{rd}$ of total strength then even 2 directors disinterested can constitute quorum.

Example: Let as assume that A. Ltd has by its AOA fixed 10 Directors as the total strength but at present, office of a director is vacant. The no. of directors present at the meeting were 5 in number out of the above 2 Directors are Interested. In this case the quorum will be $1/3^{rd}$ of total strength (i.a.) 1/3 * 9 = 3 (or) 2 whichever is higher. Therefore 3 or 2 whichever is higher, which means 3 disinterested Directors. So the company has required quorum.

If out of 9 directors, 7 directors are interested, then the Quorum is deemed to be present even if atleast 2 disinterested directors are present.

Special points

(1) The quorum is presumed to be present unless the presumption is questioned at the meeting (or) the records disclose that the quorum was infact not present.

(2) Time at which the quorum should be present
Quorum should be present w.r.t. each & every business transacted. (Compare with GM)

(3) **No. of Directors falls below the quorum:** Where the no. of Dir. Of the company is reduced below the minimum fixed by AOA, business may still be transacted if a quorum exist & is present. But where the number is reduced below the quorum requirement, the business cannot act unless the number is made up by the BOARD itself / thro' the general meeting. In this case

disinterested Directors can be appointed u/s 260 as additional Directors / a general meeting can be called for appointment of a director. (DCA opinion)

(4) **AOA can increase the quorum but cannot reduce it.** In Amrit Kaur Puri Vs. Kapartala Flower Oil & General Mills Co. Pvt Ltd, it was held that, the Section only indicates the min. no. of Dir. necessary to constitute a proper Quorum. It is open to the company by its AOA to indicate a higher but not a lower number, as constituting a valid quorum.

(5) Decision by majority.

Company

Adopted Table 4 (or) Has provision in line with reg. 74 of Table A.	Others
Since regulation 74, specifically provides that decisions should be made by majority, it is enough if the resolution of is approved by majority of Director excepting SEC. 316, 386 & 372A where unanimous approval is necessary.	If AOA is silent, then all the directors present should approve the resolution.

(6) w.r.t. Committee meeting, the whole of the committee should meet (no Quorum specified)

(7) Any irregularity with respect to Quorum will not affect, the contracts entered into with 3rd party provided if such person has no knowledge of such irregularity.

Section 288: PROCEDURE WHEN MEETING IS ADJOURNED FOR WANT OF QUORUM

Board Meeting not held

For want of Quorum	For any other purpose
Automatically adjourned to next week same day, time & place. But if such day is a pubic holiday, to the next succeeding working day at the same time & place. (Note: the words “unless the articles otherwise provides”)	Can be held on a public holiday.

⇨ The provisions of SEC. 285 shall not be deemed to have been contravened merely by reason of fact that a meeting of Board had been called in compliance with teams of that section could not be held for want of Quorum.

Note: If it is adjourned for any other reason, then it seems provision of Sec. 285 is violated.

Section 289: PASSING OF RESOLUTION BY CIRCULATION
Modes of passing Resolution

At the Board Meeting	Thro' circular resolution
Following Sections requires passing of resolution only at the Board meeting:	If AOA / act do not require Board Meeting, circular resolution can be passed.
(1) SEC. – 262	
(2) SEC. – 292	
(3) SEC. – 297	
(4) SEC. – 299	
(5) SEC. – 308	
(6) SEC. – 316	
(7) SEC. – 386	
(8) SEC. – 372A	
(9) SEC. – 488	
(10) SEC. – 293A	
FD Advertisement	

Steps:

(1) Preparation of draft resolution that is to be circulated.

(2)

Sending of the draft resolution to

Directors in India	Directors outside India
Serve them.	Usual address in India.

(3) Resolution is said to have been passed if all directors have approved it then present in India (or) majority of them.

(4) Passing resolution by circulation not possible if the no. of Directors present in India is less than the req. of quorum.

Section 290: VALIDITY OF ACTS OF DIRECTORS

Act done by Director whose appointment is defective & making it invalid

Company is not aware of such defect	Company is aware of such defect
Acts done is valid notwithstanding defect in appt.	Acts done is invalid.

Chapter 6

Sole Selling Agent
(Section 294, 294A, 294AA)

Section 294: APPOINTMENT OF SOLE SELLING AGENT TO REQUIRE APPROVAL OF COMPANY IN GENERAL MEETING.

1) Can be appointed for a maximum period of only 5 years. But reappointment is not prohibited.
2) Ratification of appointment, by company in the general meeting held immediately after the appointment is necessary to make the appointment valid. If no approval is obtained then the appointment becomes void.
3) Government has got the Power to investigate the terms & conditions of appointment of Sole Selling agent & vary the same, if it is against company's interest.
4) If more than one selling agent is appointed by the company, the government has got the power to declare one selling agent as Sole Selling Agent & has got the power to vary their terms of appointment.
5) Officers of the Company have got the duty to provide assistance for investigation made by the government.

Section 294A: PROHIBITION ON PAYMENT OF COMPENSATION TO SOLE SELLING AGENT FOR LOSS OF OFFICE IN CERTAIN CASES.

a. No compensation is payable to sole selling agent in the following cases:

- Appointment of sole selling agent is not approved in the general meeting.
- Where the sole selling agent has resigned.
- Where the sole selling agent has resigned due to amalgamation or reconstruction of the company and has been appointed as sole selling agent of the amalgamated or reconstructed company.
- Where the sole selling agent is guilty of Fraud, Breach of trust, gross negligence
- Where he himself has instigated termination.

b. Ceiling in other cases	=	[Residual period or three years] (Whichever is less)	*	Average remuneration (i.e.) Avg. of remuneration earned during preceding three years or if he is not in service for three years, the period of service)

Section 294 AA: POWER OF CENTRAL GOVERNMENT TO PROHIBIT SOLE SELLING AGENT APPOINTMENT IN CERTAIN CASES.

1) Where the central government is of the opinion that the Demand for a product is greater than its supply and services of a sole selling agent is not necessary to create market for the product, then it can notify that, no sole selling agent should be appointed for that product.

2) Approvals those are required for appointment of a Sole Selling Agent
[Reading Sec 294(2), 294AA (2), 294AA (3)]

	Paid up capital is less than Rs.50lacs.	**Paid up capital is 50lacs or more**
Substantial interest	Previous approval of Central Government & ordinary resolution.	Previous approval of Central Government & special resolution.
No substantial interest	Ordinary resolution.	Approval of Central Government & special resolution.

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Note1: Provisions relating to Sole Buying Agents. [SEC .294AA(8) & 294AA (4)]

i. **Approvals required for appointment**

	Paid up capital is less than 50 Lacs	**Paid up capital is 50 Lacs or more**
Substantial interest.	Previous approval of Central Government	Previous approval of Central Government & special resolution.
No substantial interest	No approval	Approval of Central Government & Special resolution

Note II

ii. SEC 294A (Compensation) – will not apply to sole buying agent.

Substantial interest

Individual	Firm	BC.
With relatives	Partners with their relatives	Directors with their relatives
Beneficial interest	Beneficial interest	Beneficial interest

Exceeds 5 Lacs / 5% of paid up share capital which ever is less

Chapter 7

Political Contribution

(Section 293A)

Section 293A: PROHIBITIONS & RESTRICTIONS REGARDING POLITICAL CONTRIBUTION

- **Contribution covered under this section**
    - Contribution to Political party
    - Contribution to political purpose to any person.
- **The following companies cannot contribute to political party or for political purpose:**
    - Government company
    - Company in existence for less than 3 financial years.
- **Conditions to be fulfilled by other companies for making the above contribution**
    - Resolution at Board meeting authorizing the above contribution should be passed.
    - Contribution should be within the ceiling give below:
    - Ceiling = 5% of Average Net profit of preceding three financial years
    - **Note:** Net profit is the profit computed as per Sec 349 &350
    - Disclosure should be made in profit & loss a/c about the
        - Total amount contributed
        - Name of person to whom contributed.
- **Deemed political contribution**
    i. Contribution / subscription/ donation to any person carrying on any activity to affect public support for a political party amounts to contribution for **political purpose**.
    ii. Amount incurred for advertisement in publications run
        i. By or on behalf of a political party amounts to contribution to a **political party.**
        ii. For advantage of a political party amounts to contribution for political **purpose.**

Chapter 8

REGISTERS

(Section 301 to Section 308)

Section 301: REGISTER OF CONTRACTS, COMPANIES & FIRMS IN WHICH DIRECTORS ARE INTERESTED

1) To what does the register relate

The register relates to contracts u/s 297/299,

2) Contents

a) Date of contract
b) Name of the parties.
c) Terms and conditions of contract.
d) Date of placing the contract before the Board of directors.
e) Names of directors who voted for and who voted against and who remained neutral to the contract.

3) Time within which entry should be made in the Register

Contracts

Requiring Board approval	Other Contracts
Within 7 days of BOD meeting at which the contract was approved (exclusive of public holidays)	Later of: 7 days of receipt of contract at Registered Office Or 30 days of contract.

4) Necessity to place the Register before next BOD meeting

The register should be placed before the next BOD meeting and all Directors present should sign it.

5) **Place of keeping :** At the Registered office of the Company.

6) **Provision relating to inspection, taking copies and extracts:**

Similar to Sec163 Provisions.

Note: If the value of goods/ services doesn't exceed Rs1000/-, this Section does not apply.

Section 302: DISCLOSURE TO MEMBERS OF DIRECTOR'S INTEREST IN CONTRACT APPOINTING MANAGER/MD.

Contract for appointment

Of Manager

Director is interested

Of MD

Abstract of terms of contract should be sent to all members within 21 days of

	contract.
Abstract of terms of the contract, along with the memorandum specifying the nature of interest of the director should be sent to all the members within 21 days of the date of contract.	If any other director is interested in such contracts, in addition, a memorandum specifying the nature of his interest should also be sent.
Note: If a contract has already been entered, in which the director was interested, then if there is a variation in such contract, then also the above provisions will apply.	**Note:** If a contract has already been entered, in which the director was interested, then if there is a variation in such contract, then also the above provisions will apply.

1) If the director becomes interested subsequent to the entering of such contract, then the abstracts etc should be sent to all members within 21 days from the date in which he became interested.
2) Provision relating to keeping, inspection, taking extracts / copies of above contracts is similar to Sec 163. (Should be kept at registered office.)

Section 303: REGISTER OF DIRECTORS ETC

1) Place at which it should be kept – Registered office.
2) Contents
   i. Name, surname
   ii. Father's name, Father's surname
   iii. Residential address
   iv. Nationality
   v. Details regarding the office of Director/ Manager / Secretary / MD held by him in any other Body Corporate.
   vi. Date of birth
3) Particular regarding whom should be kept
   a) Director
   b) MD
   c) Any person in accordance with whose directions the Board of directors is accustomed to act.
   d) Manager
   e) Secretary
4) A return containing the particulars specified in the register should be filed within 30 days of appointment or change thereof.

Section 304: INSPECTION OF THE REGISTER

1)

Member	Any other person
• Inspection allowed without charging any fees.	• Inspection allowed on payment of Re.1/- on each occasion.

2) Inspection should be allowed during business hours only

Note: AOA may impose reasonable restrictions but at least 2 hours should be allowed for inspection each day.

Section 305: DUTY OF DIRECTORS ETC TO MAKE DISCLOSURE (APPLIES EVEN TO DEEMED DIRECTOR)

To facilitate maintenance of 303 register disclosure should be made.

Section 306: REGISTER TO BE KEPT BY ROC & INSPECTION THEREOF

- ROC should maintain a separate register incorporating the detail mentioned in the return under Sec 303.
- It shall be open to inspection to public during office hours.

SEC. 307 – Register of director's shareholding etc.

(1) The register should relate to whose shareholding / Debenture holding ?

a) Directors holding shares.
b) Managers holding shares.
c) Deemed directors.
d) Directors deemed to have shareholdings.

Note: Deemed directors:

Any person in accordance with whose direction, the BOD of the Company is accustomed to act.

Note: Directors deemed to hold shares

(a) Company —— Another Company

Hold shares.

Director —— BOD.

Accustomed to act in accordance with the directions of this director. Then this director is deemed to the above shares.

(b) Company —— Another Company

Director

Holds shares.

The director exercises at least rd of voting power at any General Meeting of the investor company, then the director is deemed to hold the above shares.

(2) **Shareholding or Debenture holding in which company**

a) Company in which he is the director
b) Its holding Company
c) Its subsidiary Company
d) Subsidiary of its holding company

(3) **Nature of interest**

i. Registered ownership
ii. Beneficial ownership

(4) **Contents**

i. Number of shares / Debentures.
ii. Description
iii. Amount involved
iv. Date of transfer
v. Consideration for transfers.
vi. Nature / extent of interest.

(5) Bar on inquiry if details contained are not correct.

(6) **Period allowed for inspection.**

Person inspecting

Central government or ROC.	**Others (members / Debenture holders)**
• The register could be inspected at any time	• Business hours (at least 2 hrs a day)
• Even extracts / copies could be taken at any time.	• During 14 days before AGM & 3 days after AGM.

Note: exclude Saturdays / Sundays / Public holidays.

Section 308: DUTY OF DIRECTORS and PERSONS DEEMED TO BE DIRECTORS TO MAKE DISCLOSURE OF SHAREHOLDINGS:

To facilitate maintenance of register u/s 307,the above persons should take reasonable steps to ensure that the above matters are read in BOD meeting.

Section 317: TERM OF OFFICE OF MD

1) **Applicability:** Applies only to a public company.
2) Term shall not exceed a period of 5 years at a time.
3) Reappointment or extension is allowed but it should not be sanctioned earlier than 2 years from the date on which it is to come into force.

Chapter 9

COMPENSATION TO DIRECTORS FOR LOSS OF OFFICE

(Section 318 to Section 321)

Section 318: COMPENSATION FOR LOSS OF OFFICE NOT PERMISSIBLE EXCEPT TO MD / WTD / DIRECTORS WHO ARE MANAGERS.

1) No compensation should be paid to a director who is not an MD/WTD/Director who is a manager.
2) **Situation under which no compensation should be paid even to MD / WTD / Directors who are managers:**

   a) Such person resigns
      - Due to amalgamation or reconstruction of the company and subsequently has been appointed in reconstructed / amalgamated company.
      - For his own reasons.

   b) Loss of office arises due to operation of Sec 283 or 203
   c) Loss of office is due to winding up of the company, which has resulted on account of his negligence.
   d) He has been found Guilty of fraud, misfeasance, gross negligence or breach of trust.
   e) He has himself instigated the process of termination of his appointment.

3) Ceiling on compensation: -

Maximum compensation	=	Average Remuneration	*	[Unexpired period of service or three yrs]	**Which ever is shorter**?

Note: Average Remuneration:
Average of remuneration earned by such director during the three years preceding the date of termination .If his service is less than three years, then Average of remuneration earned during the period of his service.

4) If a Company is being wound up and the assets are not sufficient to repay the share holders, their share capital and share premium and termination of office takes place within 12M before the date of commencement of winding up, then no compensation should be paid to such directors.

5) Paying Compensation to directors for services rendered in any other capacity is not prohibited.

Section 319: PAYMENT TO DIRECTORS' ETC COMPENSATION FOR LOSS OF OFFICE ETC IN CONNECTION WITH TRANSFER OF UNDERTAKING OR PROPERTY

1) If loss of office is due to transfer of property/ undertaking of the company then the compensation is payable as follows:

Compensation

From company	From transferee or any other person
Cannot be paid to a Director who is not an MD/WTD/Director who is a manager	Compensation can be paid to a Dir/MD/WDT if the proposed Payment has been disclosed to the Members & have been approved by them in the General Meeting.

3) Any amount received in contravention shall be kept in trust for the company.

Section 320: PAYMENT TO DIRECTOR FOR LOSS OF OFFICE ETC IN CONNECTION WITH TRANSFER OF SHARES.

1) Where loss of office is due to transfer of shares in a company and

2) The transfer is due to:
   - An offer made to the general body of shareholders or
   - An offer by a BC to make the company it subsidiary or subsidiary of its holding company or
   - An offer by an individual to obtain at least 1/3rd of total voting power, then

3) No director should receive any **compensation from the company** for loss of office on account of above transfer.

4) **Conditions to be fulfilled to receive compensation from the transferee:**
   - The Director should take reasonable steps to ensure that, the particulars of proposed payment are included in the notice of offer made by the transferee.
   - The proposed payment should be approved at the class meeting. (Meeting of shareholders whose shares are offered & shareholders of the same class)

5) **Deemed approval:**

If quorum not present at the above meeting, then it will be adjourned to a later date.

If in the adjourned meeting also quorum is not present, then approval is deemed to have been granted for giving such compensation.

6) **If money is received without fulfilling above conditions, then:**
   - ⇨ It is deemed to have been received in trust for the persons who have sold their shares.
   - ⇨ The expenses incurred in distribution of the above amount should be borne by the director concerned.

Section 321: PROVISIONS SUPPLEMENTARY TO SECTION 318, 319 & 320

1) If a Director holds shares in the Company and an offer to obtain shares is made by the transferee u/s 320 and the Director also transfers his shares and as a result of which there will be loss of office for him and the Consideration paid for his shares is greater than the consideration paid for other's shares, then such excess consideration will be treated as compensation for loss of his office and thereby provisions of sec320 should be fulfilled.

2) **Meaning of the term compensation for loss of office:**
   - Damages for breach of contract
   - Superannuation allowance, gratuity etc in respect of past services

Not considered as compensation for loss of office.

DIRECTORS WITH UNLIMITED LIABILITY
(Section 322 to Section 324)

Section 322: DIRECTORS and MANAGERS WITH UNLIMITED LIABILITY IN LIMITED COMPANY

Conditions to be fulfilled.

- MOA should provide for the same.
- At the time of appointment, in the proposal itself, a statement that the liability of the Director/Manager if appointed will be unlimited, should be added.
- Promoters / Directors / Managers / Officers should give a notice in writing to the person proposed to be appointed about the fact, that his liability will be unlimited if he is appointed.

Note: Even if such a statement is not added to the proposal or notice in writing is not given, the liability of the person appointed will not be affected i.e. it still remains unlimited. But the Director/Manager/officer who commits default is liable for damages sustained by the person, who was appointed and in addition is also liable for fine.

Section 323: SPECIAL RESOLUTION OF LIMITED COMPANY MAKING LIABILITY OF DIRECTOR ETC, UNLIMITED.

If AOA authorises, MOA could be altered by a Special resolution, to make the liability of Directors/Managers unlimited.

Note: Existing Director's/ Manager's liability will not become unlimited; unless they give their consent. This is only for the current term if they are reappointed, their liability will become unlimited.

Chapter 10

COMPUTATION OF PROFITS

(Section 349&Section 350)

Section 349: DETERMINATION OF NET PROFITS

(1) **Credits shall be given**: To Bounties / Subsidies from government etc.
Note: If Central Government directs otherwise, credit shall not be given.

(2) **Credits shall not be given for:**
1) Securities premium
2) Profit on share forfeiture
3) Profit on sale of whole or part of an undertaking
4) Sale of proceeds immovable property – Original cost

Note: immovable property # goods

(3) **Sums that could be deducted**.
1) All usual working charges.
2) Director's remuneration.
3) Bonus/commission to staff
4) Tax on abnormal profits
5) Tax on business profits on special reason.
6) Interest on debenture.
7) Interest on mortgages, loans or advances-Secured
8) Interest on Unsecured loans & advances
9) Repairs – revenue in nature.
10) Contribution u/s 293(i)(e) [charitable purpose]
11) Depreciation – u/s 350.
12) Unadjusted past years losses.
13) Damages payable including those payable for Breach of contracts. (Voluntary payment not allowed to be deducted)
14) Insurance premium.
15) Bad debts written off
16) Excess amount written off u/s. 350 on the year of sale, disposal etc.

Note: Loss on sale of undertaking – not of deductible (since if is of capital nature).

Section 350: ASCERTAINMENT OF DEPRECIATION

1) Depreciation can be calculated both as per SLM Method and WDV method at the rates specified in Schedule XIV.

2) In the year of sale, discardation etc. (WDV – Sale proceeds) should be charged to P & L a/c.

Chapter 11

INTER CORPORATE INVESTMENTS

(Section 372A)

Section 372A: INTER CORPORATE, LOANS, INVESTMENTS ETC

1) **Transactions covered**:

a) Loans made by one body corporate to another
b) Investment made by one body corporate with another
c) Guarantee or security given by a body corporate to a loan made by /made to, another body corporate

2) **Applicability:** This Section does not apply to loans etc., made by
a) Banking company
b) Insurance company
c) Housing finance company
d) Infrastructure company
e) Investment company
f) Private Company

This section also does not
i) Apply to investment in right shares
ii) Loans, guarantee, security given by a holding company to its **wholly owned** subsidiary and also in investment in the securities of wholly owned subsidiary.

Note: For the purpose of computation of ceiling (i) and (ii) are considered.

3) **Relevant Definitions**

a) Loan includes: -
- Investment in debentures issued by a non-banking company
- Deposit placed with a non-banking company

b) Free reserves: -
- Reserves free for distribution as dividend (as per latest audited B/S available)
- It includes Securities premium, but does not include share Application Money.

4) **Companies prohibited to make loans& investment or give guarantee& security**

Companies, which have committed default in complying with provision of Sec 58A.

5) **Interest rate on loan:** interest rate prevailing bank rate.
6) **Register u/s 372A** (obligation to maintain is cast on Company)

Note: details regarding, investment in wholly owned subsidiary, Loans, Securities, and Guarantees to wholly owned subsidiary should form part of the Register.

(A) **Contents:**

1) Name of Body corporate.
2) Amount involved.
3) Terms & purpose.
4) Date of loan etc.

(B) **Time limit for entry** - Within 7 days of loan, security, guarantee or Investment
(C) **Provisions regarding inspection, copies, extracts:** Sec163 applies
(D) **Place of keeping the register** – Registered office.

6) **Ceiling on Inter-corporate loan, Security, guarantee& Investment:**

60% [paid up share capital + Free reserves] (includes both preference & equity)
Or
100% of free reserves
[Whichever is more]

Note:

- While computing the ceiling, both existing as well as proposed loan, Security, guarantee & investment should be taken.
- If in the sum, details regarding bonus share issued by Investee Company are given, then ignore them.

7) Conditions to be fulfilled for making loan etc. above the ceiling

(1) Board meeting should be convened to discuss the proposal.
(2) Agenda to Board meeting is necessary.
(3) Unanimous approval of all director present necessary
(4) Previous SR in a general meeting necessary.
(5) Notice of such resolution should contain:
    a) Limits
    b) Particulars of Body corporate
    c) Purpose
    d) Specific source of funding
    e) Other relevant details.

(8) Approval from PFI's

Term Loan

Subsists

Does not subsists

Aggregate of proposed or well as existing loan, Security, guarantee & investment doesn't exceed 60% of paid up capital + Free Reserves

Exceeds 60% aforesaid

No approval required.

No approval of PFI is Required

[Provided - no default in repayment of loan installments or interest.]

Prior approval Required

Chapter 12 Arbitration, Compromises, Arrangement & Reconstruction

(Section 390, 390A)

Section 390: Interpretation of Section 391 & 393

a) Company means, company liable to be wound up under this act.
b) Arrangement includes reorganisation of share capital.
c) Unsecured creditors who have filed suits are treated in par with unsecured creditors who have not filed suits.

Section 391: Power to make compromise & arrangement with creditors & members

Where a compromise or arrangement is proposed between Company & Creditors or between Company & its members, then application should be made to the NCLT by:

- The Company or
- The creditors or
- The Members or
- The Liquidator (in case of winding up).

The NCLT may on receipt of such application order meeting of creditors or members as the case may be and may also provide direction for holding such meeting.

The above compromise and arrangement should be approved by creditors or members as the case may at their respective meetings. Such approval should be given by creditors or members (present and voting) who are majority in number and 75%in value

If NCLT sanctions such compromise & arrangement, then it will be binding on creditors/members/ company/liquidator/contributories.

NCLT should give sanction only if the company /applicant furnishes material facts to a NCLT namely:

- Latest financial position details
- Latest auditors report.
- Latest accounts.
- Details regarding investigation proceedings.

Order of NCLT is effective only if certified copy of such order is filed with ROC.

A copy of order should be attached to every copy of MOA issued subsequent to such order.

Section 392: Power of NCLT to enforce compromise & arrangement

The NCLT has the following powers w.r.t compromises and arrangement:

- Power to supervise the carrying out of Compromise & Arrangement
- Power to modify Compromise & Arrangement
- Power to issue directions regarding any matter.
- Power to order winding up if NCLT is satisfied that Compromise & Arrangement cannot be worked satisfactorily.

Section 393: Information as to Compromises & Arrangements with creditors / members.

a) Directors / MD/ Manager / Trustees of Debenture holders should furnish particulars regarding their material interest in the above compromises and arrangements.

b) A statement should be prepared containing:
   * The terms of Compromises & Arrangements and its effect.
   * Material interest of Directors etc. on the above.
   * Effects of Compromise & Arrangement on such interest if they are different from the effect on like interest of other persons.

c) The above statement should be annexed to the notice of the meeting called under section 391.

d) If notice is advertised, then the above statement should also be advertised. If it is not advertised, at least the place where such statement can be obtained should be advertised.

e) The company should provide to members / creditors such statement free of charge.

Note:

The particulars regarding trustees are necessary only if the compromise or arrangement affects the rights of debenture holders.

Section 394: Provisions for facilitating reconstruction & amalgamation of Companies

Applicability of this section:

Applies only when:
- (i) Compromise & arrangement relates to reconstruction of the company or amalgamation of two or more companies or
- (ii) The scheme provides for transfer of whole / Part of the undertaking, assets, liabilities of the company to any other company.

In the above case NCLT may provide for the following matters in its order (either in order sanctioning the scheme or subsequent order)
- (i) Transfer of whole / part of undertaking, assets, liabilities etc.
- (ii) Manner of discharge of purchase consideration.
- (iii) Continuation by/against Transferee Company of any legal proceeding pending against / by Transfer Company.
- (iv) Dissolution of Transferor Company without winding up.
- (v) Provisioning for dissenting persons.
- (vi) Incidental, consequential or supplemental matters that are necessary.

In case of a company, which is being wound up, the NCLT should not give sanction for amalgamation unless it receives a report from ROC that business/ affairs of the company have not been conducted in a manner prejudicial to the interest of its members/public.
The NCLT should not pass order of dissolution unless a report from official liquidator stating that the affairs of the company have not been conducted in a prejudicial manner is received.
Once an order is passed, all liabilities and properties of transferor company shall vest with transferee company.
Once an order is passed it should be filed with ROC for registration.

Section 394A: Notice to central government

The NCLT has to give notice to central government about every application received by it u/s 391&394 and should take into consideration representation made by central government before passing an order.

Section 395: Power and duty to acquire shares of shareholders dissenting from scheme or contract approved by majority

This section deals with scheme or contract for acquisition of shares by a company (Transferee Company) in another company (target/transferor company) from shareholders of transferor company. [i.e. it is not a contract between two companies but a contract between a company and shareholders of another company]

The transferee company should keep the aforesaid scheme open for a period of four months.

On the expiry of four months, if shareholders holding nine-tenth in value approve the aforesaid scheme, the transferee company becomes entitled to acquire shares of the dissenting shareholders also.

Note:

- In calculating the nine-tenth, shares already held by nominee of the transferee company or its subsidiary should not be taken into account.
- If the transferee company along with its nominees and subsidiaries already holds more than one-tenth of the aggregate shares of the company then shareholders holding nine- tenth in value and three-fourth in number should approve the above scheme.

It may then send a notice to such shareholders requiring them to transfer their shares. Such notice should be sent within two months from the expiry of the said four- month period.

The dissenting shareholder can go on appeal to the tribunal within one month from the date of receipt of above notice.

If the tribunal decides in favour of the transferee company, the company shall forthwith send the following to the transferor company:

- Copy of notice given to dissenting shareholders
- An instrument of transfer duly singed.
- Amount representing consideration for transfer.

Thereupon the transferor company shall register the transferee company as its member and within one month from date of such registration, intimate the dissenting shareholders that their name has been struck off from the register and amount due to them is with the company.

The transferor company shall keep the amount due to the dissenting shareholder in a separate bank account in trust.

Miscellaneous provisions:

- Every offer / circular containing such offer shall contain the prescribed information.

- Such offer should contain a statement by transferee company disclosing the arrangement made for availability of cash
- Every offer shall be presented to ROC for registration (then only to be circulated)
- ROC can refuse to register
- Appeal against such refusal possible.

Section 396: Power of CG to provide for amalgamation of companies in national interest

Central government can pass order under this section to amalgamate two companies if it is in public interest.

In the order it shall provide for constitution, rights, liabilities, properties etc of the new company.

Care should be taken to ensure that the rights of the members/creditors/debenture holders etc of the existing companies remain same in the new company.

If rights are reduced, then compensation shall be payable for reduction in such rights.

A prescribed authority shall assess the above compensation and the same shall be notified in the official gazette.

The company resulting from amalgamation shall pay the compensation to the members or creditors.

Any person dissatisfied by the assessment made by the prescribed authority can go on appeal within 30 days from the date of publication of such assessment in official gazette. The authority to whom appeal is to be made is the NCLT.

Central government shall not pass any order for amalgamation under this section unless:

- A draft copy of proposed order has been sent to companies concerned,
- Two months time is given to parties concerned for suggestions and objections and
- Appeal if any, for compensation has been finally disposed off by the tribunal.

Copy of order made should be placed before both houses of parliament.

Section 396A: Preservation of books & papers of amalgamated to Transferor Company

Books, papers etc of amalgamated or acquired company shall not be disposed off without central government's permission.

Before granting permission central government may appoint a person to examine them to find out whither any act of commission or omission is there w.r.t promotion, formation or management of the company.

Chapter 13

PREVENTION OF OPPRESSION & MISMANAGEMENT

(Section 397 to Section 408)

Section 397: **APPLICATION TO NCLT FOR RELIEF IN CASES OF OPPRESSION**

1) The necessity of this remedy

The Company may be a sound going concern. If remedy is sought u/s 433(f) (Just & equitable clause) for oppressive acts of majority, the remedy may be worse than the disease. Thus remedy u/s 397 gains importance.

In case of oppression of minority or mismanagement of the company, the minority shareholders have the following remedies.

Apply to the National company law tribunal for winding up under just & equitable clause	Apply to National company law tribunal u/s 397 & 398	Apply to CG for Proper relief

2) If the affairs of the company are being conducted in a manner.
- Prejudicial to public interest
- Oppressive to any member/members,

then requisite number of members can apply to National company law tribunal for necessary relief

3) National company law tribunal, with a view to bring an end to the matters complained of, may pass such order as it thinks fit, after satisfying itself about the following:

a) The affairs of the company are conducted in a manner
→ Prejudicial to public interest.
→ Oppressive to any member/ members.

b) It is just to windup the company, but to windup would unfairly prejudice the applicants.

Notes:

a) **Meaning of oppression.** (Shanti Prasad Jain & Kalinga tubes)

- Visible departure from the standards of fair dealing and violation of condition of fair play on which every shareholder who entrust the money to the company is entitled to rely.
- Complaining shareholder must be under a burden which in unjust, harsh & tyrannical.
- The conduct complained should be a continuing one and not isolated.

b) **Instances of oppression**: -

(1) Forcing risky objects on unwilling minority
(2) Unwise, inefficient & careless conduct of a director in conduct of his duties - **not oppression**
(3) Depriving a member of his ordinary membership rights.
(4) Unreasonable refusal to accept transfer/ transmission of shares.
(5) Creating new majority without allowing the minority (petitioner) to participate in further issue.
(6) Fixing issue price at a substantial higher level **will not amount to oppression.**
(7) Member can complain of oppression only in this capacity as member & not in his capacity as director/ creditor

Section 398: APPLICATION TO NCLT FOR RELIEF IN CASES OF MISMANAGEMENT.

a) Circumstance under which application to NCLT can be made for relief.

1) Affairs of the company conducted in a manner Prejudicial to interest of company or public

Or

2) Material change has taken place in the management/control of the company and as a result, it is likely that the affairs of the company will be conducted in a manner prejudicial to company's interest/public interest.

Note:

Material change in management/control of the company is deemed to have taken place if there is an alteration:

- In BOD.
- In the ownership of the shares of the company
- In its members (for Company without shares capital)
- In its manager.
- In any other manner what so ever.

NCLT may on receipt of such application, bring an end to the matter complained there of by passing an order.

Important notes

- Sec. 400: NCLT should give notice of every application received u/s 397/398 to Central Government & shall take into consideration the representation of Central Government.
- Sec. 401: CG can also be the applicant u/s 397/398 or it can authorise any person to be an applicant u/s 397/398 on its behalf.
- **Distinction between SEC 397 & 398**

SEC. 397	**SEC. 398**
• NCLT should pass order only when there are circumstances that necessitate winding up.	• No such requirement.
• NCLT seeks to prevent injustice done to member(s) in their capacity as members.	• NCLT seeks to prevent injustice done to company as a whole.
• NCLT can end matter complained of only.	• NCLT can prevent matters complained of (or) apprehended.

Section 399: REQUISITE NUMBER OF MEMBERS

Company having

Share capital	**No share capital**
Least of the three:	
• 100 members, • 1/10th of total members, • Member having 1/10th of **issued** share capital.	• Atleast 1/5 of total members.

- Joint holder counted as one
- Applicants should have paid all calls & other sum due on shares.
- After obtaining the consent of other members in writing, any one of the above members can apply on behalf of other.

Note:

(i) CG- may allow even one member to apply to NCLT u/s 397/398, even if Sec.399 condition is not satisfied. (SEC. 399(4))

(ii) Before authorizing, CG may obtain security from such member for such amount as it thinks reasonable for payment of cost, which NCLT may order to pay.

(iii) Application cannot be withdrawn without the leave of NCLT.

(iv) Member authorised by Central Government u/s 399(4) can withdraw application only if notice of such withdrawal is given to Central Government.

(v) After making application to NCLT, if any member who had given consent to such application withdraws, it will have no effect – (Rajamundry electric supply Company vs. Nageswara Rao)

(vi) Whether majority shareholder can apply for relief u/s 397

Calcutta high court in Rameshwar Prasad Vs. Sindurs & Foundry Pvt. Ltd., held that majority can apply.	Delhi high court Suresh Kumar Sangh Vs. Supreme Motors Ltd., held that majority cannot apply. (Recent Judgment)

Section 402: POWERS OF NCLT ON APPLICATION U/S 397/398

1) NCLT may provide for the following in its order.

a) Regulation of conduct of company's future affairs.
b) Acquisition of shares of any members of the company
   → By any other member
   → By the company. (In this case, it may provide for consequent reduction in share capital.)
c) Termination, setting aside or modification of contract between company & MD Director or Manager.
d) Termination, setting aside or modification of contract between company & any other person.

Note:

(i) Notice to concerned party should be given
(ii) Consent of person – is necessary (for modification)

e) Setting aside of any transfer, delivery of goods, payment, or execution of any other act relating to property made or done by/against the company within three months before the application date, which shall be deemed to be a fraudulent preference.
f) Any other matter.

Section 403: INTERIM ORDER BY NCLT:

On application by any party to the proceeding for regulating the conduct of company's affairs.

Section 404: EFFECT OF ALTERATION OF MOA / AOA BY ORDER U / S 397 / 398.

1) Where NCLT by an order u/s 397/398 makes alteration to MOA/AOA, then Company should not alter the MOA/AOA in a manner inconsistent with the alteration made by NCLT, without the leave of NCLT.
2) Alteration made by NCLT's order shall have same effect, as if, it was made duly by the company.
3) Certified copy of order altering MOA/AOA shall be filed with ROC within 30 days of the order.

Section 407: CONSEQUENCES OF TERMINATION / MODIFICATION OF CERTAIN AGREEMENTS.

- No compensation / damages is payable for termination, setting aside or modification of agreements.
- No MD/Mgr/Director of the company whose agreement has been terminated / set aside u/s402, shall be appointed as MD/ Director /Mgr for a period of 5 yrs in the company

Note: CG has power to remove such restriction.

Chapter 14

WINDING UP

(Section 425-560)

INTRODUCTION

A company is a creation of law. It's existence can be put to an end only thro' a legal process. The process thro' which the existence of a company is put to an end is called winding up.

Once the affairs of the company are completely wound up, then the company will be dissolved.

Provisions relating to winding up. (Sec. 425 –560)

- Sec. 425 Modes of winding up.
  - Winding up thro' NCLT (Sec. 433 – 483)
  - Voluntary winding up (Sec. 484 – 520)
- Sec. 426 – 432 Provisions relating to contributories.
- Provisions relating to every mode of winding up (Sec. 528 – 560)

I PROVISIONS RELATING TO CONTRIBUTORIES

(SEC. 426 – 432)

1) **Meaning of contributory (Sec. 428)**

   a) Every person-liable to contribute to the assets of the company, in the event of winding up.
   b) Holder of fully paid up shares – also considered as contributory.
   c) Person alleged to be a contributory – is also considered as contributory.

Note:

- Winding up – need not always result in deficiency. It may also result in surplus. Fully paid up shareholders are also entitled to participate in such surplus. This is the reason for including them as contributory.
- The contributions made by these contributories are used for:
  (i) Payment of debts & liabilities

(ii) Meeting the cost of winding up.
(iii) Interse adjustment.

2) **Liabilities of contributories (Sec. 426)**

Contributories

Past members	Present members

Liabilities of present members as contributories:

Limited Companies

Company limited by shares.	Company limited by guarantee.
- Present members are liable to contribute only to the extent of amount remaining un paid on shares held by them.	a) Liable to contribute to the extent of amt remaining un paid on shares and b) Liable to contribute to the extent guaranteed by them.

Note: When a company goes into liquidation and the dividend is in arrears, then the shareholders will not be treated in paripassu with other creditors but this dividend liability will be taken into account only during adjustment of rights of shareholders as contributories.

Liabilities of past members as contributories

The NCLT has got the power to make the past members contribute to the assets of the company, if it feels that the present members are unable to contribute.

But, in the following cases the past members are not liable to make any contribution:

a) The gap between the date of cessation and the date of commencement of winding up is more than 12 months.
b) The debts for which, the contribution is required, was contracted after the date of his cessation as members.

3) **Obligations of directors / managers whose liability is unlimited: (Sec. 427)**

Section 322 & Section 323, allows a company to have directors / managers with unlimited liability.

Directors / managers with unlimited liability

Past	Present

Liability of Present Directors / Managers

Liability as an ordinary members	**Liability as unlimited Director / Manager**
Sec. 426 will apply.	His liability will be similar to that of a member of an unlimited company.

Note: These directors / managers can be required to make contribution, in their capacity as unlimited director or manager, only if the NCLT deems fit.

Liability of past directors / Managers:

The past directors / managers with unlimited liability can also be required to make contributions. But, in the following cases the past directors / managers with unlimited liability, need not make any contribution:

a) The gap between the date of cessation and the date of commencement of winding up is more than 12 months.
b) The debts for which, the contribution is required was contracted after the date of cessation.

Note: The liability of contributories is ex lege and not ex-contractu (Sec. 429). Therefore a fresh period of limitation operates in favour of liquidator.
4)

Contributories

In case of death of a members	**In case of insolvency of a members**	**In case of winding up of Company**
(Sec. 430)	(Sec. 431)	(Which is a member in another company (Sec. 432)

Legal representative	Official assignee	Liquidator

II WINDING UP THRO' NCLT (SEC. 433 – 483)

Sec. 433 & 434 Grounds for winding up	**Sec. 439 & 440** Petition for winding up to NCLT	Sec. 441 Commencement of winding up	**Sec. 442 & 443** Powers of NCLT, after winding up petition is presented	Sec. 444 – 447 Consequences of winding up order	**Sec. 448 – 463** Previous relating to Liquidators	**Sec. 464 & 465** Committee of Inspection	**Sec. 466 – 483** Powers of NCLT after winding up order

1) Grounds for winding up thro' NCLT (Sec. 433)

(a)	(b)	(C)	(d)	(e)	(f)	(g)	(h)	(i)
Special resolution by company	Not conducting statutory meeting	Non – commencement of business within 1 year from the date of incorporation	Reduction of members below statutory minimum	Unable to pay debts	Just & equitable clause.	Default in filing annual accounts or annual returns for 5 consecutive financial years	The company has acted against the: • Interest of sovereignty and integrity of India • Security of the state • Friendly relations with foreign states • Public order decency or morality	Winding up of sick company by the tribunal under section 424G
For compulsory winding up.	Non – delivery of statutory report to ROC.	Suspension of business for whole year.						

Important points w.r.t. grounds for winding up

a) Petition u/s 433© will be entertained only if there are indications that the company has no intention to start/ continue its business.

While considering the above petition the wishes of the majority should be respected by the NCLT.

b) **Important point w.r.t 433 (e) ground (i.e., unable to pay debts) (Sec. 434)**

(i) **When a company will be deemed to be unable to pay its debts?**

Situation – 1	**Situation – 2**	**Situation – 3**
⇒ Company owes an amount to a creditor, exceeding Rs. 1,00,000	Execution / process issued by the NCLT in favour of a creditor and returned unsatisfied.	It is proved to the satisfaction of the NCLT that the company is unable to pay its debts.
⇒ The creditors had served a notice at the registered office requiring the company to repay his dues.		
⇒ The company had neglected to pay / secure / compound his claims.		
⇒ Three weeks had elapsed from the date of notice.		

Note: While deciding the NCLT should take into account:

(i) **Contingent liabilities**

&

(ii) Prospective liabilities

(ii) The fact that the assets of the company are greater than the liabilities does not mean that the company is commercially solvent.

c) **Important points w.r.t. Just & equitable clause: - Illustrative list of cases falling under Sec. 433(f)**

(a) Where there is a dead lock or crises in management of a company.

(b) Where the company has been formed to carry on an illegal / fraudulent business.
(c) Where the company is a “bubble” (i.e., a company with no business to carry on)
(d) Where the business of the company is carried on in a manner oppressive to any of its members.
(e) Where the substratum of the company has disappeared. (i.e., the company can no longer carry on any business relating to its main object)

Note: This ground should not be construed as ejusdem generis (i.e., of the same kind / natural with the other clauses (a) to (e) of that section).

2) Petition for winding up to NCLT (Sec. 439)

a) **Who can present winding up petition to NCLT:**

(i) Company
(ii) Creditors
(iii) Contributories
(iv) ROC
(v) Any person authorized by CG u/s 243

b) **Important points w.r.t. Creditors: -**

(i) The term ‘creditor’ includes
- Any secured creditor
- **Any debenture holder.**
- Trustees to debenture holder.
- Contingent creditors
- Prospective creditors

(ii) Contingent creditors & Prospective creditors can make petition only with the leave of NCLT.

c) **Important points w.r.t. Contributories: -**

Grounds

Sec. 433(d)	**Others**
Any contributory can present a petition under this ground	Contributories who can apply

Original allottee of shares	Holding shares for a period of at least 6 months, during the 18 months preceding the date of commencement of winding up.	Being persons on whom shares have devolved due to death of a member

Note: (For removal of doubts) Holders of fully paid up shares can also present petition even if:

→ The company has no surplus assets
→ The company has no assets.

d) **Important point w.r.t. ROC:**

(i) ROC cannot apply under the ground referred to u/s 433(a).
(ii) T
(iii) o present a petition for winding up, ROC should obtain the previous sanction of CG.

(iv) **Grounds other than 433(a) ground**

433 (e) ground (i.e., unable to pay debts)	Others
	No other restriction

ROC should not present petition unless: ROC is satisfied that the financial condition of the company is not sound having regard to

- Sec. 233A Special audit report.
- Sec. 235 / 237

	Inspector's report. • The financial statements filed with it u/s 220.

e) **Important points w.r.t. Sec. 433(b) ground:**

⇒ Who can make petition under this ground
* Only ROC and / or contributory.

⇒ When such petition can be made:
* After expiry of 14 days from Sec. 165 deadline.

f) Even if the company is already being wound up voluntarily / under supervision of NCLT then also petition for winding up thro' NCLT can be made **(Sec. 440)**

⇒ Who can make such petition
* Official liquidators
* Persons referred to u/s 439.

Note: if section 433(h) is attracted, only central government or state government should make application to the tribunal.

3) Statement of affairs to be filed on winding up of a company(Section 439A)

⇨ A company interalia can file winding up petition to the tribunal. In such case, a statement of affairs should accompany the petition.

⇨ If the winding up petition had been preferred by some other person referred to under 439,then if the company opposes, it has to file a statement of affairs.

⇨ Contents of such statement:

- Last known addresses of all directors and company secretary.
- Details of location of assets of the company and their value.
- Details of all debtors and creditors with their complete addresses
- Details of workmen and other employees and the amount outstanding to them.
- Such other details as may be specified by the tribunal.

4) Commencement of winding up (Sec. 441)

Winding up

Voluntary winding up.	Through NCLT (Compulsory winding)	U/s 484 already commenced but later petition u/s 440 is made.

Date of Sec. 484 resolution	Date of Presentation of petition	Date of Sec. 484 resolution
Stated in Sec. 486		

Importance of commencement of winding up (Illustrative list):

a) For settling the list of contributories
b) For determining the contributories who can present petition u/s 439
c) For determining whether fraudulent preference is made or not (Sec. 531)
d) For determining whether a transfer of property fall under Sec. 531A
e) For determining the validity of floating charge (u/s 534)
f) For determining the period within which the liquidator is entitled to disclaim onerous property

4)

Powers of NCLT on hearing petition (Sec. 443)

Dismiss the petition	Adjourn the hearing conditionally or unconditionally	Make any interim order	Order winding up

Note:

(i) Even if all assets of the company are mortgaged or the company has no assets it should not be a ground to the NCLT for dismissing winding up petition.
(ii) When remedies alternative to winding up of company – are available to petitioners – the NCLT will not order winding up.
(iii) Where winding up petition is preferred u/s 433(b) then the NCLT instead of ordering winding up, may direct the company: -
   * To conduct statutory meeting and / or
   * To deliver statutory report.

5) Consequences of winding up order. (Sec. 444 – 447)

Sec. 444 & Sec. 445

Petitioners — File petition u/s 439 / 440 → **NCLT** — Pass winding up order u/s 443.

Communication of winding up order to

Official liquidators | ROC — Record in register.

Petitioners — File winding up order — Publication in official gazette

Company — File winding up order

Note:

(i) Petitioners & Company shall file winding up order with ROC within 30 days of winding up order.
(ii) While calculating 30 days – days required to obtain winding up order, shall be excluded.
(iii) The winding up order, shall be deemed to be notice of discharge of all employees and officers except, when the business is carried on for beneficial winding up.

Suits stayed on winding up (Sec. 446)

When winding up order is passed u/s 443 then all the suits pending against the company, will be automatically stayed.

Responsibility of directors and officers to submit to tribunal audited books and accounts (section 446A):
Audited accounts should be submitted up to the date of winding up order and penalty is provided for such default.

SEC. 458A: Exclusion of certain time in computing periods of limitation:

Date of commencement of winding up — Period of one year after winding up order

This interregnum period shall be excluded for computation of period of limitation w.r.t. Suits / legal proceedings

6) Provisions relating to liquidators. (Sec. 448 – 463)

a) Who will be appointed as Liquidator in case of winding up thro' NCLT?
Official Liquidator **(Sec. 449)**
b) Who can be an official Liquidator?
- Firm of chartered accountants

- Firm of advocates
- Firm of company secretaries
- Firm of cost and works accountants
- A body corporate consisting of above professionals
- A whole time or part time officer of central government **(sec 448)**

c) **Terms and conditions of appointment:**

- Determined by the tribunal for the person other than central government officer.
- Maximum remuneration = 5% of value of debt recovered and realisation of sale of assets. **(Sec 448)**

d) **Priority of liquidators remuneration:**

It shall be treated as first charge on the realisation of assets and will be either paid to the central government or official liquidator as the case may be. **(Sec 448)**

e) **Certain powers of tribunal:**

- Power to transfer cases from one liquidator to another (reasons to be recorded in writing)
- Power to remove official liquidator (sufficient cause to be shown)
- Power to proceed against the official liquidator against professional misconduct. **(Sec 448)**

f) **Provisional Liquidator: - (Sec. 450)**

After presenting winding up petition	NCLT can appoint provisional Liquidator	Before making winding up order

⇒ Before making such an appointment, opportunity of being heard, shall be given to all concerned.
⇒ The provisional liquidator shall have all powers, which the official liquidators have
⇒ But the NCLT can restrict any of such powers, if it deems fit.
⇒ When, winding up order is passed the provisional liquidator becomes official liquidator.

g) **Duties of official liquidators: (Sec. 451):** The official liquidator shall perform such duties imposed by the NCLT.

h) **Validity of acts of Liquidators:(Sec. 451)**:If there is any defect in appointment, it will not affect the validity of his acts, which are otherwise valid.

i) Where liquidator is appointed, receiver shall not be appointed w.r.t. any assets without the leave of the NCLT. **(Sec. 453)**

j) **Statement of affairs to be made to official liquidator (Sec. 454)**

(i) When winding up order is made or provisional liquidator is appointed, a statement as to the affairs of the company should be submitted to the official liquidator.

(ii) **Time within which such statement shall be made: within 21 days from the relevant date.**

Note: Extension up to 3 months – allowed.

(iii) **Contents of such statement:**

1) Details of assets – (Separately state cash in hand & negotiable instruments)
2) Debts & liabilities
3) Creditor's details
   - Name, address & occupation
   - Amount of debt.
   - Amount secured
   - Amount not secured
   - Value of the securities
   - Dates on which they were given.
4) Debtor's details:
   a) Name, address & occupation
   b) Amount due
   c) Amount likely to be realised.

(iv) **Who shall make such statement available to official liquidator:**

a) Directors of the company (at the relevant date) and
b) Managers or Secretaries or Chief officer of the company at the relevant date or
c) **Such other person required by liquidator.**

(v) **Cost of preparation of such statement:**

The official liquidators shall reimburse the cost to the person who had incurred such cost out of assets of the company.

(vi) **Inspection of such statement:**

- Who can inspect
  - ⇒ Creditors
  - ⇒ Contributories

  on payment of prescribed fees.
- Inspection is allowed at all reasonable times.

(vii) **Meaning of relevant date:**

Relevant date

Date of appointment of provisional liquidator
Or
Date of winding up order

k) **Report by official liquidator: (Sec. 455)**

(i) Once the statement referred to u/s 454 is rec'd, official liquidator should make a preliminary report to the NCLT, containing the following details:

a) Issued share capital
b) Subscribed share capital
c) Paid up share capital
d) Cash & negotiable securities
e) Debts due from contributories
f) Debts due to the company (Specify also the extent secured)
g) Movable & immovable properties.
h) Un paid calls
i) All other liabilities
j) If the company has failed, the reason for such failure.

Note: The report should also state whether it is desirable to conduct further inquiry into promotion / formation or failure of the company.

(ii) Time within which such report shall be made:

- As soon as possible
- But not later than 6 months from the date of winding up order (or such extended period)

(iii) Further report by official liquidator and NCLT's power on receipt of such report:

The official liquidator can conduct further inquiry as to promotion / formation / failure the company.

He can also report whether any fraud, has been committed in such promotion, formation or management.

The NCLT on receipt of such report can order public examination u/s 478.

l) **Custody of company's property: Sec. 456**

⇒ Where a winding up order has been made or the provisional liquidator has been appointed, then the liquidator / provisional liquidator, shall take into his custody all the property, effects and actionable claims of the company.

⇒ For this purpose, he can seek the assistance from chief presidency magistrate or district magistrate.

⇒ Once winding up order is passed, all the properties will be deemed to be in the custody of NCLT.

m) **Powers of liquidator: (Sec. 457)**

Powers which require sanction of NCLT	**Powers which do not require sanction of NCLT**
Sub Sec. (1)	Sub Sec. (2)
a) Institute / defend any suits or proceedings in the name or on behalf of the company.	a) Execution of deeds, documents, etc. in the name of the company.
b) Carry on the business of the company for beneficial winding up.	b) Using company's seal.
c) Sell immovable / movable properties & actionable claim of the company.	c) Inspection of records & returns filed with ROC.
d) Raise money on security of the assets of the company	d) Proving, ranking and claiming in the insolvency of a contributory.
e) Power to sell whole of the undertaking of the company as a going concern.	e) Execution of negotiable instruments in the name and on behalf of the company.
	f) Appointing an agent to carry on any business, which Liquidator is unable to do.

Note: The NCLT has got the power to say that w.r.t sub-section (1) powers, no sanction need to be obtained **(Sec. 458)**

Note:

(i) The NCLT has got the power to control the exercise of the aforesaid powers.

(ii) The liquidator has got the powers to seek legal assistance from a chartered accountant, company secretary, cost accountants or legal practitioners **(Sec. 459)**

(iii) **Points to be borne in mind by Liquidator in exercise of aforesaid powers (Sec. 460):**

a) Due regards should be given to resolution passed at creditor's meeting, member's meeting and Committee of inspection meeting.

b) If there is any conflict between directions given by contributories meeting / creditors meeting and the committee of inspection meeting, then directions by creditors / contributories will override the latter.

c) The liquidator can also use his own discretion w.r.t. exercise of aforesaid powers.

(iv) **Power of liquidator to call creditors / contributories Meeting:**

Liquidator

Can call meeting of contributories / creditors suomoto.	Shall summon meeting on the request of specified number of creditors or contributories as the case may be.

Note: Specified number: means members / creditors holding at least $1/10^{th}$ in value.

n) **Books to be kept by liquidator: (Sec. 461)**

(i) He should keep proper books as may be prescribed.

(ii) He should also maintain a minutes of proceedings of meetings.

o) **Audit of Liquidators accounts: (Sec. 462)**

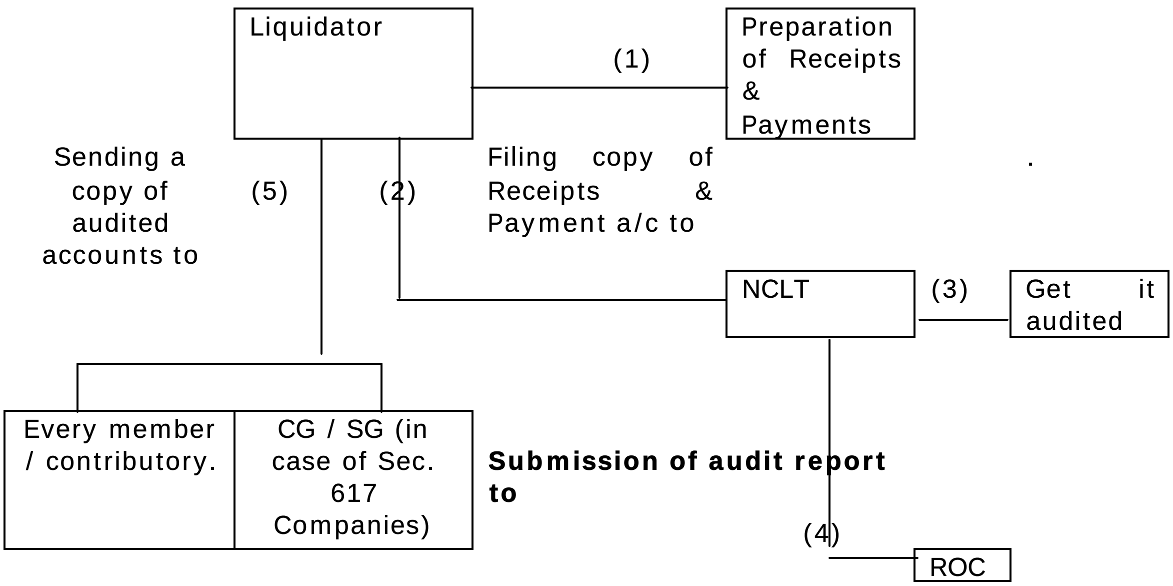
(i) Every liquidator should prepare an account of his receipts & payments as liquidator at least twice a year.

(ii) The account should be in the prescribed form and shall be made in duplicate.

(iii) Such account should be delivered to the NCLT.

(iv) It is the duty of NCLT to get the accounts audited.

(v) Liquidator shall provide necessary assistance for the purpose of such audit.
(vi) The audit report will be submitted to the NCLT.
(vii) The NCLT shall deliver a copy of such audited accounts to ROC.
(viii) In case of a government company, Liquidator shall forward a copy of audited accounts to Central Government or State Government or both.
(ix) Liquidator shall circulate a copy of such audited accounts among every creditor and contributory.



p) The Central government has been empowered under Sec. 463 to take action against the liquidator if any complaint is lodged against him.

8) **Provisions relating to committee of inspection: (Sec. 464 & 465)**
Section 464

a) **When committee of inspection will be appointed** If NCLT thinks that it is necessary to have committee of inspection, it may direct the appointment of committee of inspection, to act along with the liquidator.

b) **Procedure for appointment of committee of inspection**
(i) Within 2 months of NCLT's order, the liquidator shall convene a meeting of creditors

Note: This meeting is intended to determine the members of the committee.

(ii) **Within 14 days of the creditors meeting, the liquidator shall call a meeting of contributories to consider the decision taken at the creditor's meeting.**

Note:

The contributories can
- Accept the decision of Creditors in full
- Reject in full
- Accept, subject to modification

(iii) Where the decision of the creditors is not accepted in full, then the liquidator shall apply to the NCLT for further directions.

Summary of section 464:

Direction by the NCLT to have committee of inspection

Liquidator

Call: Creditor's meeting within 2 months

Call: Contributories meeting within 14 days of creditors meeting

Apply to

NCLT (for further directions)

Section 465:

c) **Maximum number of members that the committee can have: 12 members.**

d) **Proportion of members & creditors:**

Agreement between Creditors & Contributories	**No agreement**
Agreed proportion	**Determined by NCLT**

e) **Circumstances which results in vacation of office of members:**

(i) If he is adjudged as insolvent.

(ii) If he enters into composition with creditors.

(iii) If he absents himself from 5 consecutive committee meetings without obtaining leave of absence.

f) **Resignation of members:** A member can resign by submitting a resignation letter in writing to the liquidator.

g) **Removal of member:**

Members

Representing creditors	Representing contributories
Can be removed at the meeting of creditors thro' ordinary resolution.	Can be removed at the meeting of contributories thro' ordinary resolution.

Note: Length of notice calling the meeting at which the members is going to be removed – 7 days.

h) **Filling of vacancy:**

Vacancy

Filled by contributories, if the vacancy is that of a member who represents contributories.	Filled by creditors, if the vacancy is that of a member who represents creditors.

i) Liquidator, if he feels that the vacancy need not be filled, can apply to the NCLT w.r.t. the same.

j) The continuing members can act, notwithstanding any vacancy, except when the number of members falls below two.

k) Who can call committee meeting

Liquidators	Any member of the committee.

l) **Quorum:** 1/3 of the total strength or 2 whichever is higher.

m) Decisions are taken thro' majority.

n) The committee has got the right to inspect the accounts of liquidators – at all reasonable times.

9) **Power of NCLT after passing winding up order:**

a) **Power of NCLT to stay winding up (Sec. 466):**

(i)

Official Liquidator	Apply to
Creditor	Apply to
Contributory	Apply to

NCLT

Pass

Order for staying winding up proceedings.

(ii) The company shall deliver a copy of such order to ROC immediately.
(iii) ROC shall make a minute of such order in its books.

b) **Powers of NCLT to settle list of contributories (Sec. 467):**

⇒ The NCLT has power to settle the list of contributories
⇒ For the above purpose, it has power to rectify the register of members.
⇒ The NCLT has also got the power to dispense with the settlement of such list.

c) If money, property, books & papers belonging to the company are with the trustees, receives, banker, agent, officer, contributory or employees then the NCLT can direct them to delivers the same to the liquidator. **(Sec. 468)**

d) **Power of NCLT to enforce the payment of any sum, other than calls, due from contributories and extent of set off allowed (Sec. 469):**

The NCLT has power to enforce payment of any sum, other than calls, due from contributories.

Creditors

- Have been paid in full
  - Contributories can set off any amount due to them (whether in their capacity as members or otherwise) against any amount due from them (including calls)
- **Not paid in full.**
  - Company
    - Limited Company
      - Contributories
        - **Director / manager with unlimited liability**
          - The amount due to them other than in their capacity as members can be set off against the amount due from them u/s 469(1) (i.e., amount due other than calls)
        - Others
          - Such set-off not possible
    - Unlimited Company
      - All types of Contributories
        - The amount due to them, other than in their capacity as members can be set off against the amount due from them u/s 469(1) (i.e., amount due other than calls)

e) **Power of NCLT to make calls:(Sec. 470)**

The NCLT has power to make calls and enforce the same from the contributories for

- Payment of debts & liabilities.
- Payment of cost of winding up.
- Making interse adjustments among members.

Note:

(i) Before exercising the aforesaid power the NCLT has to take into account:
- The sufficiency of assets
- The possibility of certain contributories defaulting in payment of such calls.

(ii) The NCLT has also power to direct the contributories to directly deposit the amount of calls and any amount due by them (Other than calls) into the public account of India in RBI. **(Sec. 471)**

(iii) The amount so deposited in such account, shall be expended only in such manner as the NCLT directs. **(Sec. 472)**

f) **Power to exclude creditors not proving in time(Sec. 474):**

The NCLT has power to fix the time within which the creditors should have to prove their claims. Otherwise the NCLT has power to exclude them.

g) **Power to order cost (Sec. 476):**

If the assets of the company are insufficient then the NCLT has got the power to give priority for cost of winding up.

h) **Power to summon Person suspected of having Property of the Company (Sec. 477):**

The NCLT has power to summon the following persons and examine them on oath:

Persons

Capable of giving information concerning	Having possession of property of the company	Having possession of books of papers	Indebted to the Company
* Promotion * Formation * Trade * Dealings * Property * Books * Papers * Affairs.			
(A)	(B)	(C)	(D)
The NCLT will require these persons to provide the necessary information.	The NCLT will require these persons to deliver such properties to the liquidator.	The NCLT will require these persons to return such books & papers in their custody (Without prejudice to their right of lien.)	The NCLT will require these persons to make the payment to the company.

Note:

(i)

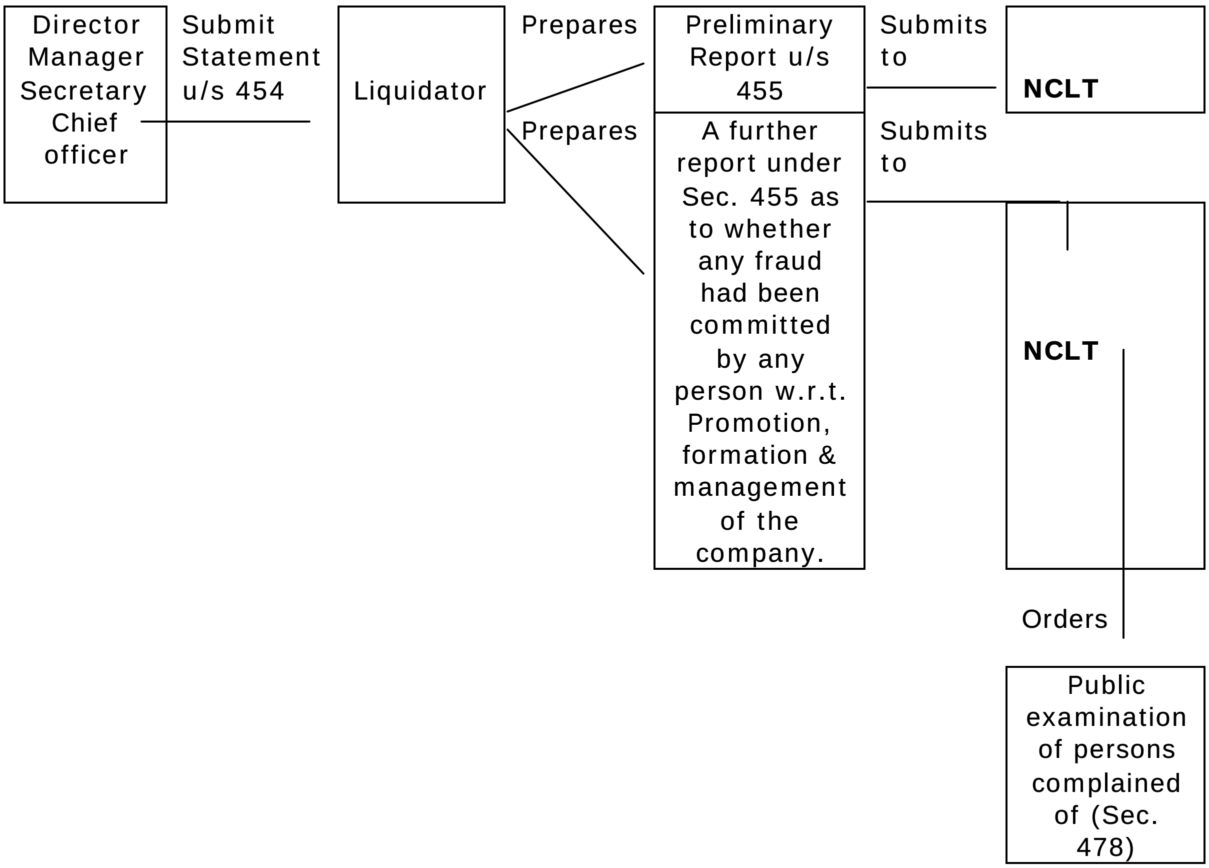
Examination

Oral	Written interrogation.

Reduce the statements in writing

(ii) Once the aforesaid person delivers the property / books & papers or provide information or make payment, then they will be discharged of all their liabilities.

i) **Power to order public examination of promoters, directors, etc.: (Sec. 478)**



Meaning of public examination:

The person complained of will be examined in the presence of various interested parties such as

- Contributories
- Creditors,
- Official liquidators etc.

Persons who can take part in the public examination:

Person

Who shall take part	Who may take part
⇒ Official liquidator.	=>Contributories & Creditors.

Note: The above persons can seek legal assistance from a chartered accountant, company secretaries, cost accountants or advocate.

<u>Powers of NCLT in this regard:</u>

(i) The person complained of could be examined on oath.
(ii) The NCLT can put any question that it considers necessary.
(iii) Notes of examination shall be taken down in writing & it will be read to the person who was examined and he will be asked to sign such statement.

Thereafter it can also be used as evidence against him.

Note: Such statements are available to creditors / contributories at reasonable time.

(iv) **The NCLT has power to adjourn the examination from time to time.**

j) **Power of NCLT to dissolve the company (Sec. 481):**

When

- Affairs of the company are completely wound up.
- The NCLT feels that it is not possible for the liquidator to continue the winding up proceedings.

The NCLT may order dissolution of the company.

Liquidator — Should deliver the order within 30 days. → **ROC** — Shall take minutes of the order.

Chapter 15 VOLUNTARY WINDING UP

(Section 484 – 520)

Provisions relating to voluntary winding up

Provisions common to member's voluntary winding up and creditors voluntary winding up.	Declaration of Solvency	Provisions applicable to creditor's voluntary winding up	Provisions applicable to member's voluntary winding up	Provisions applicable when member's voluntary winding up is converted into creditor's voluntary winding up.
	Sec. 488	**Sec. 499 – 509**	**Sec. 489 – 494 & 496 & 497**	**Sec. 495, Sec. 498**

PART – I	PART – II
Sec. 484 – 487	**Sec. 510 – 520**

(Discussed later)

(1) **COMMON PROVISIONS (PART – I) (SEC. 484 – 487)**

Resolution for voluntary winding up	Publication of resolution	Commencement of winding up.	Consequences of winding up.
Sec. 484	**Sec. 485**	**Sec. 486**	**Sec. 487**
(i)	(ii)	(iii)	(iv)

(i) **Resolution for winding up: (Sec. 484)**

A company can be voluntarily wound up

If the company passes a special resolution in this regard	If the company passes an ordinary resolution in this regard

Note: Winding up thro' ordinary resolution is possible only in the following cases:

i) When the period fixed for the duration of the company by AOA – has expired.
ii) When the event, on the occurrence of which the company should be wound up, has occurred.

(ii) **Publication of resolution: (Sec. 485)**

The aforesaid resolution should be published

In the official gazette	In the News paper

Time limit for Publication: Within 14 days of passing resolution.
Note: The newspaper should have circulation in the district where the registered office is situated.

(iii) **Commencement of winding up : (Sec. 486)**

The winding up commences on the date of passing the aforesaid resolution.

(iv) **Consequences of winding up : (Sec. 487)**

- The company ceases to carry on its business.
- The corporate status & power continues.

Note: For beneficial winding up, the company can continue its business.

(2) **DECLARATION OF SOLVENCY: (SEC. 488)**

a) **Inquiry by BOD: The BOD shall make a full inquiry into the state of affairs of the company.**
b) **Purpose of inquiry**: The purpose of inquiry is to ascertain whether the company is solvent or not.
c) **Convening of BOD meeting:** Once the inquiry in completed the BOD, may convene a meeting of BOD to make a declaration.
d) **Subject matter of declaration:**

i) The company has no debt
Or
ii) The company will be able to pay all its debts within the period specified in the declaration

Note: Such period shall not exceed 3 yrs.

e) Time limit for making such declaration:

Date of Declaration — **Date of Sec. 484 resolution**

This gap should be less than or equal to 5 weeks.

f) Audit report should accompany the aforesaid declaration.

g) Importance of aforesaid declaration:

Board Of Directors

Able to make declaration of solvency	Not able to make declaration of solvency.
Member's voluntary winding up.	**Creditor's voluntary winding up.**

h) **Liabilities for misrepresentation:**

Declaration

Based on reasonable grounds	Not based on reasonable ground
	Directors liable to fine & imprisonment.

Note: If the company fails to pay the debts within the period specified in the declaration, then, it will be assumed that the declaration is made without reasonable grounds.

(3) **PROVISIONS APPLICABLE TO MEMBER'S VOLUNTARY WINDING UP:**
(SEC. 489 – 494 & 496 & 497)

a) **Appointment of liquidator & fixation of remuneration :(Sec. 490)**

- ⇨ Who can be appointed as liquidator: Only individual **(Sec. 513)**
- ⇨ Who will appoint the liquidator & fix remuneration: Company at the general meeting.
- ⇨ Remuneration
  - * Once fixed cannot be increased.
  - * The Liquidator shall not take charge unless remuneration is fixed.

b) **Filling of casual vacancy: (Sec. 492)**

Casual Vacancy may be

Due to death	Due to insolvency	Due to resignation.	Due to any other reasons.

Who can fill such casual vacancy: Company at the general meeting.

Who can call the general meeting?

Any contributory	Liquidator

c) **Notice to ROC (Sec. 493):**

Notice to ROC

Notice relating to appointment u/s 490 or Filling of vacancy u/s 492	Notice relation to occurrence of vacancy

Time limit for such notice: Within 10 days of appointment or vacancy as the case may be.

d) **Consequences of appointment of liquidator: (Sec. 491)**

i) Power of MD / Mgr / WDT / Dir – will cease.

ii) **But if the company at the general meeting or the liquidator sanctions certain powers, such powers are exercisable by the aforesaid persons.**

e) **Duty of liquidator to call general meeting: (Sec. 496)**

Winding up process

Continues for more than one year	Does not continue for more than one year

Continues for more than one year
Liquidator should call general meeting every year.
Purpose of the general meeting is to lay before such meeting, an account of his acts & dealings.

f) **Final meeting & dissolution: (Sec. 497)**

i) Duty of Liquidator when affairs of the company are fully wound up

Preparation of an account showing how the winding up has been conducted.	Calling final meeting, to consider the aforesaid account.

ii) Notice to the final meeting:

- Should be advertised in official gazette and newspaper circulating in the area where registered office of the company is situated.
- The aforesaid notice should be given one month before the date of meeting.
- Such advertisement should contain the time, place & object of the meeting.

iii) Documents to be filed with ROC & Official Liquidator.

Meeting

Held	**Could not be held for want of quorum.**
Documents to be filed.	**Documents to be filed.**
⇒ Copy of the aforesaid accounts	⇒ Copy of the aforesaid accounts.
⇒ A return stating that the meeting had been properly held.	⇒ A return, stating that the meeting had been duly convened, but could not be held for want of quorum.

iv) **When the aforesaid documents should be filed:**
It should be filed within one week from the date of meeting.

v) **Duty of ROC:** The ROC shall register the aforesaid documents.
vi) Duty of official liquidator on receipt of the aforesaid documents:

Conducting a scrutiny of books & papers of the company	and	Reporting to the NCLT.

vii) **Report by official liquidator:**

Affairs of the company **are not** conducted in a manner prejudicial to the public interest.

The Company is deemed to be dissolved on the date of such report

Or

Affairs of the company **are** conducted in a manner prejudicial to public / members interest.

The NCLT may order the official liquidator to conduct further inquiry & report.

On receipt of such report, the NCLT may pass such order as it deems fit.

(4) **PROVISIONS APPLICABLE TO CREDITOR'S VOLUNTARY WINDING UP (SEC. 499 – 509)**

Declaration of solvency – made by BOD u/s 488 — Yes → **Members' voluntary winding up. Sec. 489 – 498**

No. ↓

Creditors voluntary winding up Sec. 499 – 509

a) **Pictorial representation of the procedure followed in creditors voluntary winding up:**

Company

- (1) Should call → **Meeting of creditors.**
- (2) Should file resolution u/s 500. → **ROC** → **Record in its registers.**
- (3) **Appointment of Liquidator** / **Fixation of remuneration** / **Filling casual vacancy.**
- (4) **Appointment of committee of inspection.**

Liquidator

- **Should call meeting of creditors & members every year.**
- **Should call final meeting, once the affairs of the company is wound up.**

b) **Meeting of creditors:(Sec. 500)**

(i) **When creditor's meeting is necessary:** When the BOD is not able to make declaration of solvency u/s 488; the company should call a meeting of creditors.

(ii) **When such meeting should be called:**

On the date of Sec. 484 meeting	Or	On the next day

(iii) **Notice of such meeting:**

* ***Who is entitled to such notice*: All creditors.**
* *Manner of service*: By Post.
* *When notice should be sent*: It should be sent along with notice of member's meeting.

* **Publication of the notice:**

In the official gazette	In two newspapers.

(iv) **Duty of BOD**

Laying before the creditors meeting * Full statement of company's affairs. * List of creditors. * Estimation of their claims.	Appointing a director to act as chairman for the meeting.

(v) **Position of creditor's meeting if Sec. 484 Meeting is adjourned:**

The resolution passed at the creditor's meeting shall have effect as if it had been passed immediately after the Sec. 484 resolution.

c) **Filing of a copy of resolution with ROC: (Sec. 501)** Aforesaid resolution should be filed with ROC within 10 days of the resolution.

d) **Appointment of Liquidator: (Sec. 502)**

Creditor's meeting		Member's Meeting	
Liquidator not appointed.	**Liquidator appointed.**	**Liquidator appointed.**	**Liquidator not appointment**

Liquidator = Liquidator appointed at member's meeting	**Is Liquidator appointed at member's meeting = Liquidator appointed at creditor's meeting?**	**Liquidator = Liquidator appointed creditors meeting**

Yes → **No problem.**

No → **Has aggrieved creditor / member / company / any director applied to the NCLT w.r.t. Liquidator appointment.**

Yes → **Refer note (Given below)**

No → **Liquidator = Liquidator appointed at creditor's meeting**

Note:

The NCLT can pass any of the following order.

Liquidator = Liquidator appointed at members meeting.	Liquidator = Official Liquidator.	Some other Person should be appointed as Liquidator.	Liquidator = Liquidator appointed at creditors meeting + Liquidator appointed at member's meeting

Note: Only Individual shall be appointed as Liquidator. (Sec. 513)

e) **Fixing of remuneration to liquidator (Sec. 504)**

Remuneration fixing authority

Committee of inspection	Creditors at their meeting	NCLT
	Can fix remuneration only if not fixed by committee.	Can fix only if the committee or creditors fail.

Note: Remuneration once fixed cannot be increased.

f) **Filling of vacancy (Sec. 505)**

Liquidator was appointed by

NCLT	**Others**
Vacancy Filled by NCLT	**Vacancy Filled at creditor's meeting.**

Appointment of committee of inspection (Sec. 503)

At creditor's meeting

Not more than 5 persons can be appointed as members of committee of inspection

At member's meeting

Not more than 5 persons can be appointed as members of committee of inspection.

Person appointed by members acceptable to creditors?

Yes

No problem

No

Creditors can say that the persons appointed by members at their meeting are not members of the committee.

Powers of the NCLT in this regard:

The NCLT can say that the persons appointed by members shall also be members of the committee.	The NCLT can say that persons appointed by creditors shall not be members of the committee.

Note: All provisions relating to committee of inspection under compulsory winding up, to the extent applicable applies here also.

g) **Cessation of BOD's power after Liquidator's appointment (Sec. 505)**

Powers of the BOD

w.r.t. which sanction of: * The committee of inspection Or * Creditors is available	Others
These powers are exercisable.	These powers are not exercisable.

h) **Duty of Liquidator to call meeting of members & creditors (Sec 508)**:

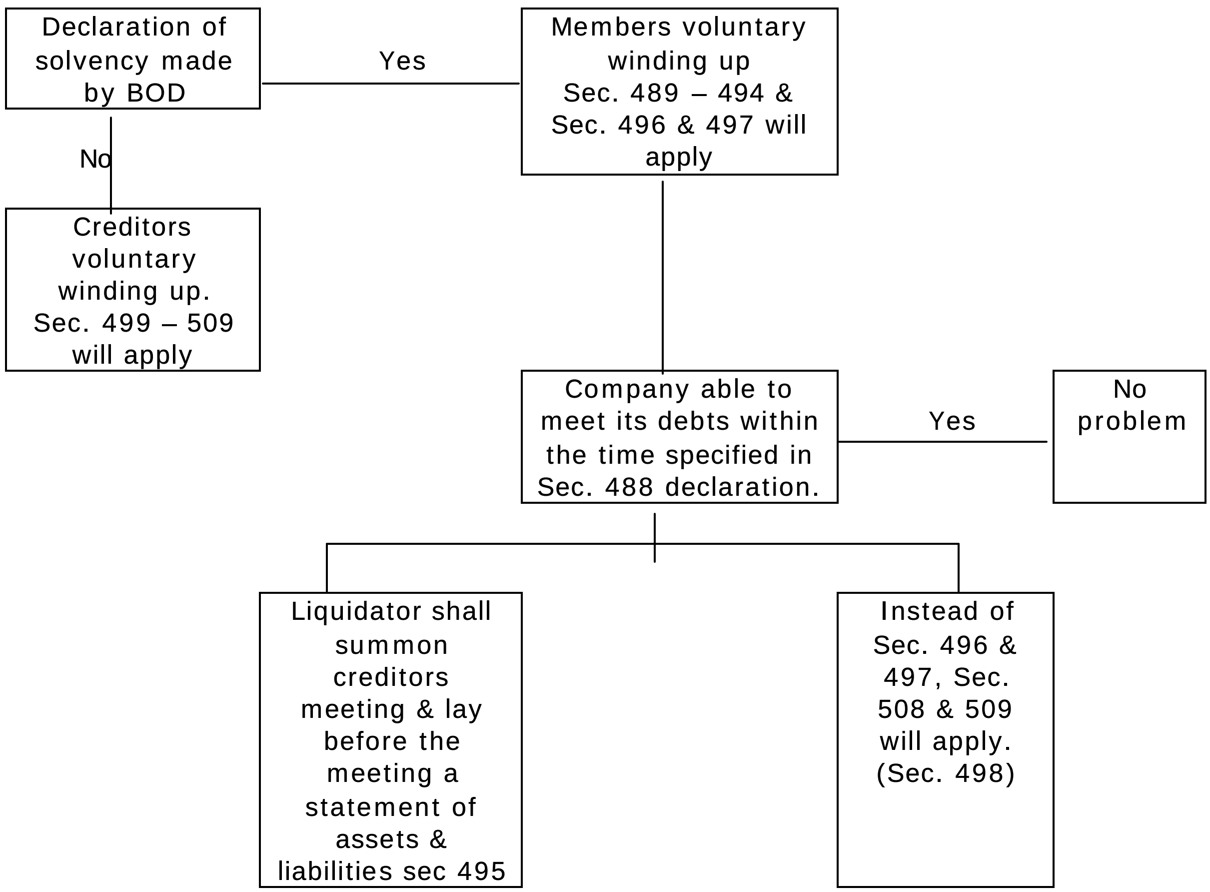
Refer Sec. 496 (exactly the same).

Note*:* In addition call creditor's meeting.

i) **Final Meeting & dissolution (Sec 509):** Refer Sec. 497 (exactly the same). The term official liquidator in this section refers to official liquidator who is an officer of central government.

Note: In addition, call creditor's meeting.

(5) **PROVISIONS APPLICABLE WHEN MEMBER'S VOLUNTARY WINDING UP IS CONVERTED INTO CREDITOR'S VOLUNTARY WINDING UP. (Sec. 495 & 498)**



(6) **COMMON PROVISIONS (PART – II – SEC. 510 – 521)**

Provisions relating to liquidator	Application of Sec. 454 to voluntary winding up.	Applicability of Sec. 478 (i.e., ordering public examination)	Power of NCLT to determine certain things.	Cost of wining up.
Sec. 512 – 516	**Sec. 511A**	**Sec. 519**	**Sec. 518**	**Sec. 520**

A) **Provisions relating to Liquidator**:

(a)

Person who can be appointed as liquidator (Sec 513)

Individual	Firm	Body Corporate	AOP

Cannot be appointed as liquidator.(some cases allowed)

(b) Powers of Liquidator (Sec. 512)

Powers available to liquidator.

Sec. 457(1) Powers	Sec. 457(2) Powers	Powers to settle the list of contributories	Power to make calls	Power to call General meeting

Sanction necessary	**No sanction necessary – to exercise the aforesaid powers**

Who shall sanction

Member's voluntary winding up	Creditors voluntary winding up.

Member's voluntary winding up: Sanction of company by special resolution is necessary

Creditors voluntary winding up: Options

Sanction by NCLT	Sanction of Committee of inspection.	Sanction of meeting of creditor.

Note: If more than one Liquidator is appointed then their powers – will be determined by the resolution appointing them.

(c) Power of NCLT to appoint & remove Liquidator Sec. 515

Liquidator's

- Appointment
  - Liquidator already appointed.
    - NCLT can appoint official liquidator.
  - Liquidator not yet appointed.
    - NCLT can appoint official liquidator.
- Removal
  - NCLT can remove liquidator on application by ROC.

(d) Notice of appointment to be given to ROC

Liquidator shall within 30 days of his appointment

* Publish in official gazette, the notice of his appointment
* Deliver to ROC, the aforesaid notice.

B) **Application of Sec. 454 to voluntary winding up: (Sec. 511A)**

Changes:

* Relevant date – Date of Sec. 484 resolution
* Instead of the term "official Liquidator" – substitute the term "Liquidator"
*

C) **Application of Sec. 478 to voluntary winding up (Sec. 519)**

Sec. 478 mutatis mutandis applies.

D) **Power of NCLT to determine certain things (Sec. 518)**

- Power to determine any question arising in the course of winding up.
- Power to make calls & enforce them.
- Power to stay winding up
  - The orders staying winding up - shall be filed by company with ROC.
- Power to set aside distress attachment execution etc.

E)

F) **Power to order cost: (Sec. 520)**
- Priority given to Liquidation expenses – in case of insufficiency of assets.

G) **Power of Liquidator to accept shares etc. as consideration for sale of property of company.**

Voluntary winding up

Members voluntary winding up	Creditors voluntary winding up
Sec. 494	**Sec. 507**

Liquidator — Wants to transfer any business or property of the company to — **Transferee company**

Consideration may be received

In cash	**Not in cash, but in the form of shares, securities or any instrument allowing the members to participate in the profits of transferee company**
No approval necessary.	**Approval necessary.**

Approval required:
Special resolution of the company.

Duty of Liquidator w.r.t. Dissenting shareholders:

Shareholders

Not dissenting	Dissenting	
No further duty	*Voted against the resolution. *Expressed his dissent, in writing to the Liquidator at registered office.	Not done this.

Options available to Liquidator.	Liquidator has no duty.

Abstain from doing the above act.	Purchase the interest of dissenting shareholders at agreed price or price fixed thro' arbitration.

Note 1: The purchase consideration should be paid before dissolution.

Note 2: In case of creditor's voluntary winding up (Sec. 507) the liquidator can make the aforesaid transfer only after obtaining:

* The sanction of the NCLT or
* The sanction of committee of inspection.

Note 3: Voluntary winding up converted into compulsory winding up / winding up under supervision of NCLT:

Date of commencement of winding up — Date of conversion

Interregnum less than 1 year

No. → Special resolution enough

Yes → In addition to special resolution the sanction of NCLT is necessary.

IV PROVISIONS RELATING TO ALL MODES OF WINDING UP (SEC. 528 – 560)

Sec. 528 to Sec 530	**Sec. 531** to Sec 537	Sec. 538 to Sec 545	Sec. 546 to **Sec 556**	Sec. 557 & Sec 558	Sec. 559 & Sec 560
Proving & Ranking of claims.	Effect of winding up on antecedent and other transactions.	Offences by officers in the course of winding up	Miscellaneous provisions.	Supplementary Powers of NCLT	Provisions w.r.t Dissolution.

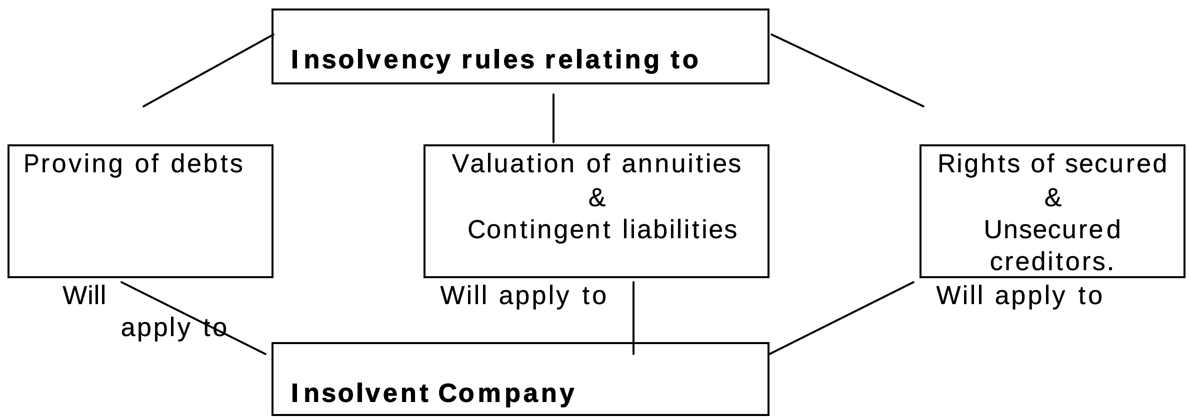
1) Proving and ranking of Claims (Sec. 528 – 530)

a) Debts of all description should be admitted to proof.

Note: In case of debts which are contingent or which may sound only in damages, a just estimate should be made **(Sec. 528)**

b) **Winding up of an insolvent company (Sec. 529)**

(i) Applicability of insolvency rules.



(ii) **Position of secured creditors:**

Options available to secured creditors

Options – 1	**Option – 2**
Relinquish the security & Prove & rank their debts	**Realise the security**

Important points w.r.t. Option – 2

(i) The secured creditors are not entitled to the entire amount of security realised.

(ii) The workmen are also entitled to a proportionate share in the proceeds of realisation. (Provision as per Sec. 529(1))

(iii) The disadvantage suffered by the secured creditors due to participation of workmen in such proceeds will be made good, by including such amount as over-riding preferential payment. (u/s 529A)

Illustration: (1)

⇒ Amount due to secured creditor (Mr.S) – Rs. 300000/-
⇒ Amount due to workmen – Rs. 100000/-
⇒ Value of security – Rs.100000/- (realised)

Application of amount realised Rs. 100000/-

Workmen Rs. 25000	Secured Creditor Rs. 75000

Working note:

Proportion of realised amount due to workmen [Amount due to workmen] / [Amount due to workmen and secured creditors] * [Amount realized]
[100000 / 400000]*100000=25000/-

Proportion of realised amount due to secured creditors = [Amount realized - Amount due to workmen]
i.e., Rs.100000 – 25000 = 75000/-

Note: The disadvantage suffered by Mr.S is Rs. 25000/-. This will treated as over-riding preferential payment u/s 529A.

Illustration: - (2)

Assume the facts of Illustration (1) except that the value of security realised is Rs. 360000/-

Application of amount realised Rs.360000/-

Secured creditors Rs.270000	Workmen's due / claim Rs.90000

Working note:

[300000 / 400000]*360000=Rs.270000/-
[100000 / 400000]*360000=Rs.90000/-

Note: The disadvantage suffered by Mr.S is not Rs.90000, but Rs.30000/- only. Therefore Rs.30000, will alone be treated as over-riding preferential payment u/s 529A.

Conclusion:

The amount of disadvantage suffered by the secured creditor is Amount payable to workmen or Amount that he could not recover (Which ever is less)

Note:

(i) The proceeds of realisation that is available to secured creditors & workmen – is net of the expenses incurred by the liquidator in maintaining such assets before sale.

(ii) **Meaning of workmen's dues:**

a) **Salaries & wages**
b) Compensation payable under the Industrial dispute Act 1947.
c) Accrued holiday remuneration.
d) Compensation payable under the workmen Compensation Act. 1923:
   But the following amount should be excluded:
   (i) Amount to the extent insured
   (ii) If winding up is for reconstruction / amalgamation .
e) Pension.
f) PF dues.
g) Gratuity fund.
h) Any other fund for the welfare of workmen.

c) **Over-riding Preferential payments (Sec. 529A):**

Workmen's due	Secured creditors. (To the extent of disadvantage suffered u/s 529(1) proviso)

Note: These over-riding preferential payments should be paid in full, before the payment of any other debts.

d) **Preferential payments (Sec. 530):**

(i) Revenues, tax, cess etc. payable to Central Government, State Government and Local authority, within 12 months before the 'relevant date'.

(ii) Wages, salaries payable to employees (it is employees and not workmen)

Note: Quantum of wages that could be treated as preferential payment

* 4 months wages or 20000/- which ever is less.
* Such wage should have fallen due, within 12 months before the relevant date.
* Advance made to these employees – should be deducted in computing the above quantum.

(iii) Accrued holiday remuneration – less advance if any availed against this.
(iv) Contribution to ESI – during 12 months before the relevant date:
(v) Payment under workmen's compensation Act.
(vi) PF dues
(vii) Pension Fund
(viii) Gratuity Fund
(ix) Any other fund – for the welfare of employees.
(x) Expenses of investigation u/s 235, 237

Note:

(i) Meaning of relevant date.

Winding up

Thro' NCLT	Voluntary / Supervision of NCLT
Relevant date	Relevant date
Date of appointment of provisional liquidators Or Date of winding up order	**Date of passing resolution u/s 484**

(ii) All the preferential payments will be ranked equally

SUMMARY
Sequence of payments
(i) Secured creditors & workmen sharing the realisation proceeds.
(ii) Over-riding preferential payments u/s 529A.
(iii) Cost of winding up. (u/s 520 & 476)
(iv) Income tax & Central sales tax dues (if informed u/s 178 of Income tax Act or Sec. 17 of Central sales Tax Act.)
(v) Preferential payments u/s 530
(vi) Unsecured creditors.
(vii) Preference shareholders.
(viii) Equity shareholders.

15a EFFECT OF WINDING UP ON ANTECEDENT & OTHER TRANSACTIONS

(Sec 531 to Sec 537)

Section 531: FRAUDULENT PREFERENCE

Certain persons by virtue of their position will have access to inside information about the company. Naturally, they will be aware of the solvency position of the company well ahead of others and so they may take certain steps to mitigate their losses in the event of company being wound up so they stand to unduly gain at the expense of others.

Thus the lawmakers have framed Sec. 531 to avoid the fraudulent preference being made to such persons.

If a company makes any transfer of immovable properties/delivery of goods/payment/ execution/ any other act relating to property, within 6 months before the date of commencement of winding up, then it will be treated as fraudulent preference, if the aforesaid acts are treated as fraudulent preference in case of an insolvency proceeding initiated against an individual.

Section 531A: AVOIDANCE OF VOLUNTARY TRANSFER

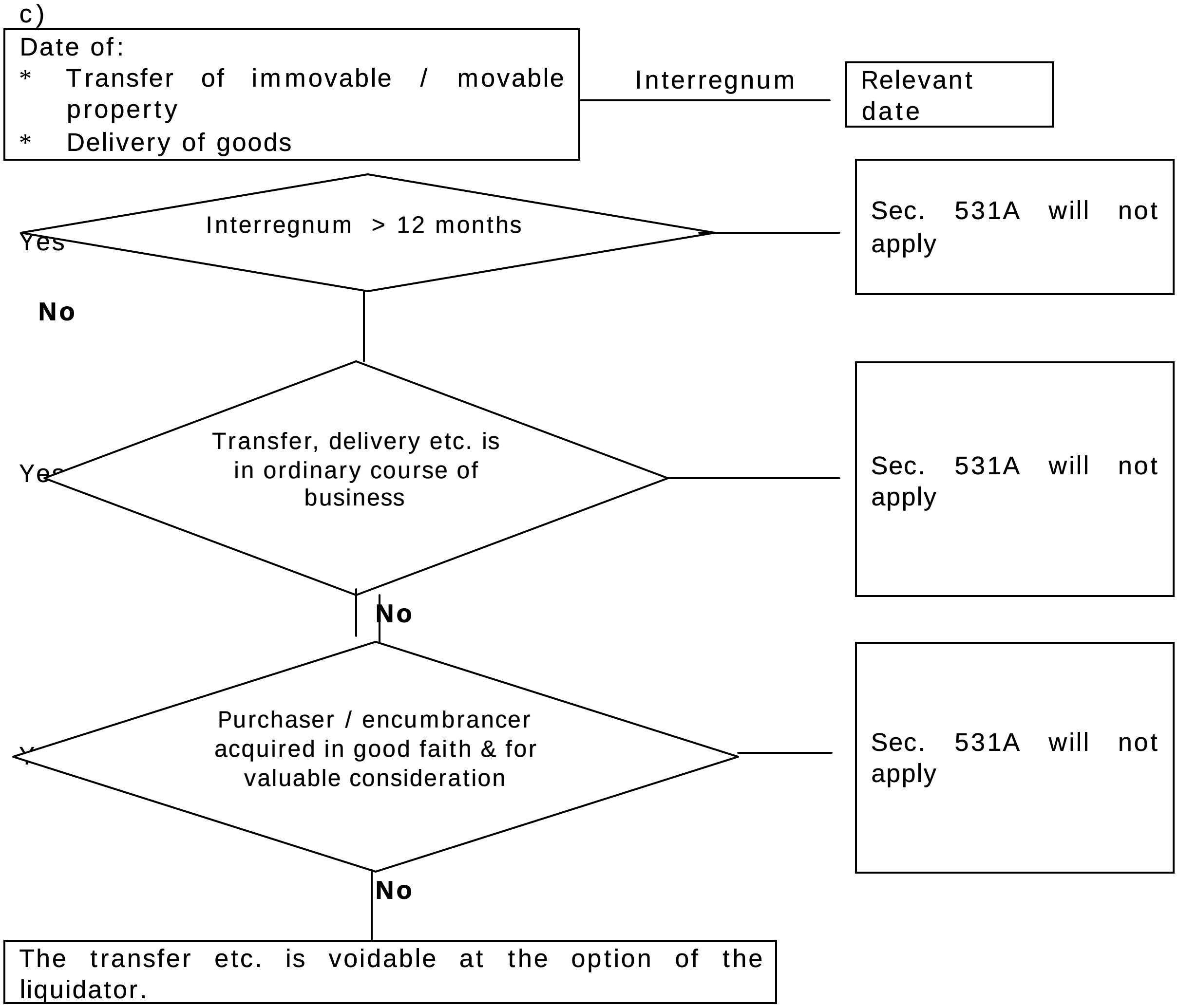
a) Ascertain the mode of winding up.
b) Ascertain the relevant date.

Relevant date

Modes of winding up

Compulsory winding up	**Voluntary winding up**
Date of Sec. 439 Petition	Date of Sec. 484 resolution

c)



Sec. 532 Transfers for benefit of all creditors to be void:-

Any transfer / assignment by a company of all its property, to trustees, for the benefit of all its creditors shall be void.

Sec. 533 Liabilities & rights of certain fraudulently preferred persons:-

Liable to the extent of

Mortgage charge on property	Or	Value of interest

Right: has got a right of surety

Section 534: EFFECT OF FLOATING CHARGE:-

Ascertain the interregnum between the date of creation of charge & the date of commencement of winding up.

Interregnum > 12 months

Yes

Sec. 534 will not apply (i.e., the charge created is valid.)

Is the Company solvent at the time of creation of charge?

Yes

The Charge created is valid

Consideration for creation of charge rec'd in cash either at or subsequent to, creation of charge?

Yes

The charge created is valid

The charge created is not valid.

Note: Features of a floating charge:

(i) Not on a particular assets.
(ii) Also on prospective assets.
(iii) Subsequent charge > earlier charge.

A	Loan	A Ltd	5/11/2000 (no charge created for the loan)
B	Loan	A Ltd.	6/12/2000 (Floating Charge created in favour of B)

Date of commencement of winding up is 31.12.2001.
The Company became insolvent on 31.3.2001
A obtained this secret information on 31.3.2001.
He required the company to create a floating charge in his favour. But for Sec. 534, this charge > charge in favour of B. (thus B loses because of not having access to inside information)

Section 535: DISCLAIMER OF ONEROUS PROPERTY IN CASE OF A COMPANY WHICH IS BEING WOUND UP

Onerous Property

Land burdened with onerous covenants	Shares in another company	Un profitable contracts	Unsaleable & unrealizable assets

Time limit for disclaimer:

Knowledge of onerous property to Liquidator.

At the time of commencement of winding up	Subsequent to commencement of winding up.
Within 12 months of the date of commencement of winding up.	Within 12 months of the knowledge.

⇒ NCLT's sanction necessary
NCLT

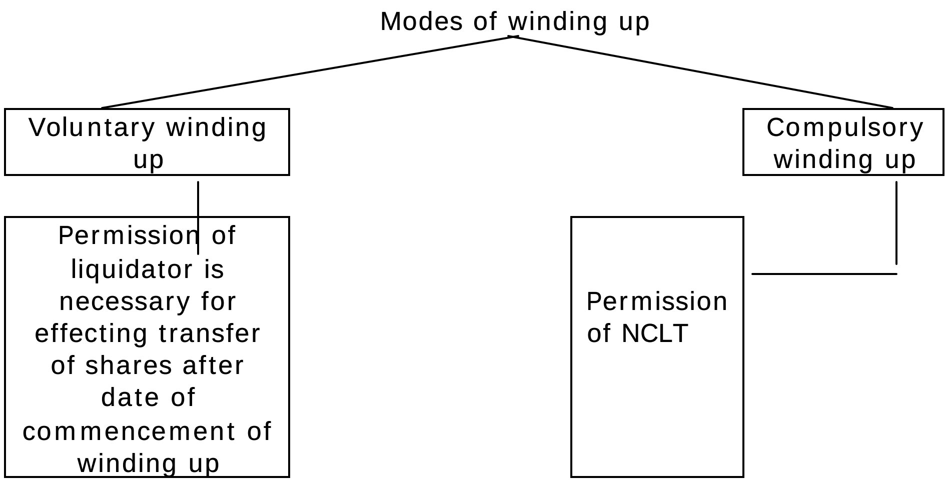
May impose terms / conditions for disclaims	Require notice to be given to the various interested parties.

⇒ Interested parties can approach Liquidators to know whether, he is going to disclaim the property.
He should reply within 28 days. Otherwise, he loses his right to disclaim.

⇒ The NCLT can order damages to be paid to the interested parties.

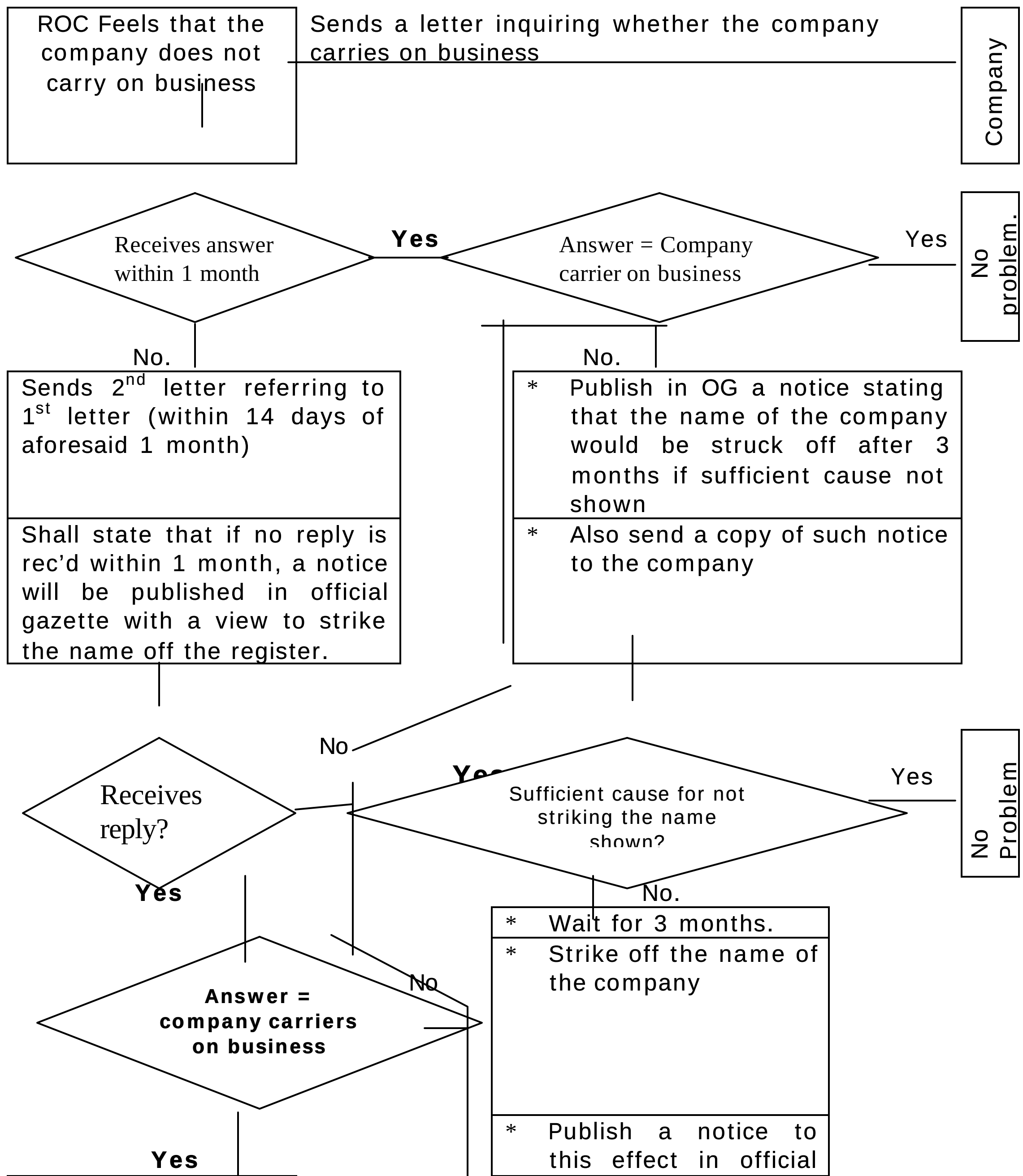
⇒ The NCLT can also require the Liquidator to transfer the property concerned to the interested parties. But the property transferred will be transferred only along with the onerous covenants.

Section 536: AVOIDANCE OF TRANSFERS ETC AFTER COMMENCEMENT OF WINDING UP



PROVISIONS RELATING TO DISSOLUTION

Section 560: POWER OF ROC TO STRIKE DEFUNCT COMPANY OFF REGISTER



No problem

gazette
* Date of dissolution = Date of Publication

If the company is being wound up and liquidator is not acting and fails to file returns for consecutive 6 months.

SPECIAL POINTS:-

a) To whom the aforesaid letter / notices – should be addressed

Company has registered office?

Yes – Letters / notices sent to the registered office

No.

Address of directors / manager / officer

Yes – Send the letters / notice to such address

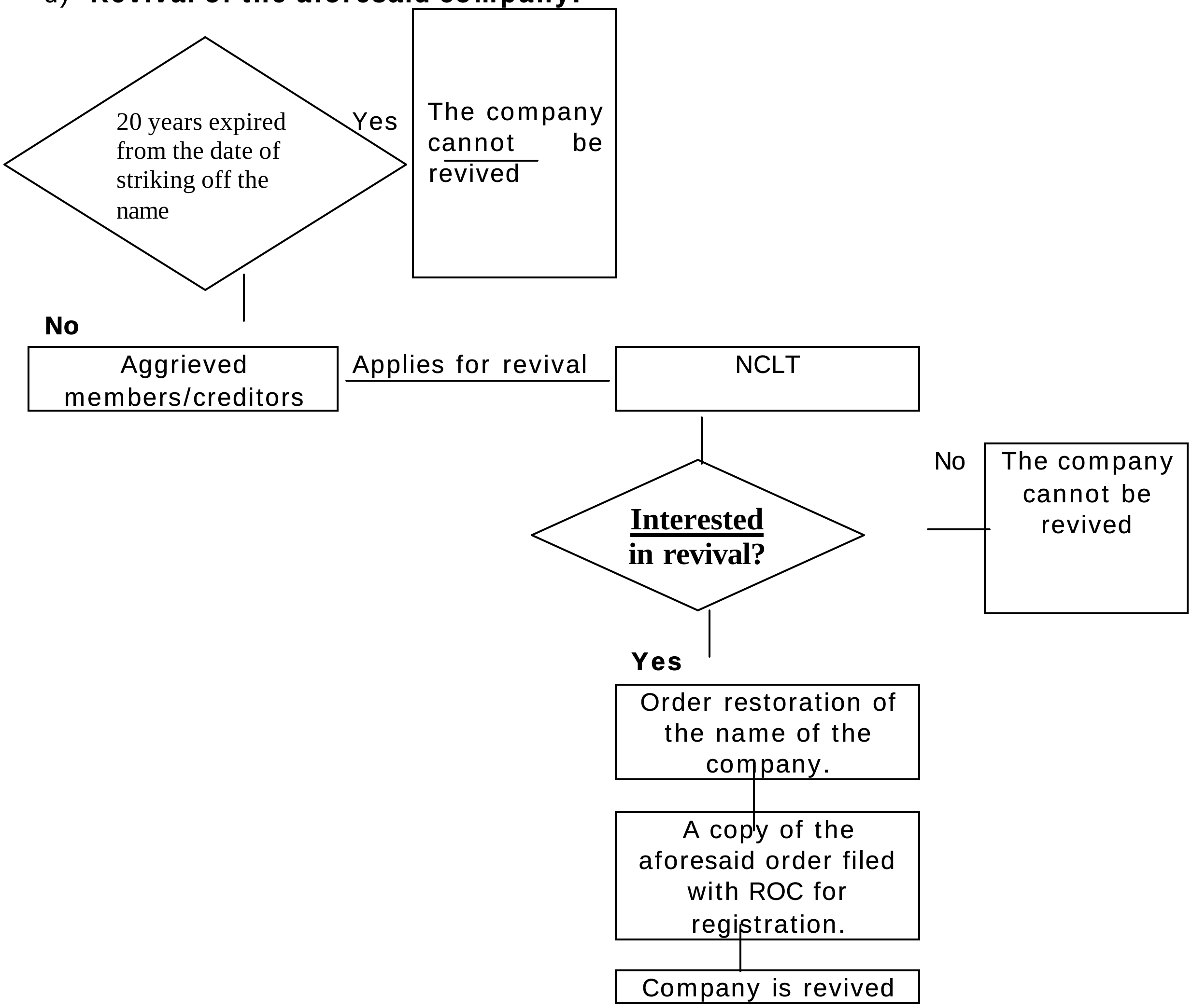
No

Send to the subscription of MOA.

b) Liability of director / manager etc will continue even if the company is dissolved in the aforesaid manner.

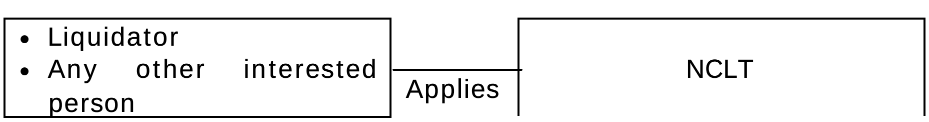
c) Even if the company is dissolved in the aforesaid manner still it can be wound by NCLT.

d) **Revival of the aforesaid company:**



Note: Status quo of the company & various interested parties is protected by NCLT order.

REVIVING THE DISSOLVED COMPANY (SEC. 559)



Pass an order declaring dissolution to be void. (Within 2 years)

Communication of order of NCLT to (Within 30 days of order) → ROC → shall → Register such NCLT order

Chapter 16

WINDING UP OF UNREGISTERED COMPANY

(Section 582 to Section 589)

Section 582: MEANING OF UNREGISTERED COMPANY

Includes:

Any partnership	Consisting of more than seven members, at the time when winding up petition is presented before the NCLT.
Any association	
Any company	

Section 583: WINDING UP OF UNREGISTERED COMPANY

1) **Mode of winding up:** Only winding up thro' NCLT (i.e. compulsory winding up) is possible.

2) **Grounds for winding up**

   a) Company is dissolved.
   b) Company ceases to carry on business.
   c) Company carries on business for the purpose of winding up.
   d) Company is unable to pay debts
   e) Just & equitable clause.

3) **Relevant provisions governing winding up:**

All provisions relating winding up of a company applies (subject to the provisions of this part)

Section 584: POWER TO WINDUP FOREIGN COMPANY ALTHOUGH DISSOLVED

A Foreign Company, which is carrying on business in India, could be wound up as an unregistered company even though it has been dissolved as per foreign law.

Section 585: CONTRIBUTORIES IN WINDING UP OF AN UNREGISTERED COMPANY

i. **Who is a contributory?**

Person responsible to contribute towards:
a) The payment of debt/liability of the company
b) Liquidation expenses.

c) Interse adjustments (among members)

ii. **Duty of contributory:** should contribute towards assets of the Company.

iii. **Deemed contributory:**

In case of Death of a contributory	-	Legal representatives of the deceased contributory is the contributory
In case of Insolvency of a contributory	-	Official assignee of the insolvent person is the contributory

Section 586: POWER TO STAY/RESTRAIN PROCEEDINGS

Time when petition for winding up made. — Interregnum period — Time when winding up order in made

NCLT has powers to stay any petition against company /contributories

Section 587: SUITS ETC STAYED ON WINDING UP ORDER

When winding up order is passed - no suits could be allowed to proceed / commence against any contributory w.r.t any debts of the company. But NCLT has got the power to entertain suits.

Section 588: DIRECTION AS TO PROPERTY IN CERTAIN CASES:

1) If a company has no power to sue or be sued in common name, then the NCLT may order vesting of properties in the name of official liquidator.
2) The official liquidator could be sued or could sue on behalf of the company.

Section 589: Official liquidator has got all the powers, which he has under winding up of registered company.

Chapter 17

COMPANIES INCORPORATED OUTSIDE INDIA (FOREIGN COMPANIES)

(Section 591 to Section 608)

Section 591: SECTION 592 –SECTION 602 APPLIES TO FOREIGN COMPANY

Provisions of Section 592 to Section 602 apply to a Company incorporated outside India & having a place of business in India.

Exception:

The aforesaid provisions will not apply to a Company incorporated outside India & having a place of business in India, in which at least 50% of paid up Capital (Equity or Preference) is held singly / jointly by

- Indian citizens
- Body corporate incorporated in India

Note: Place of business includes, share transfer office or share registration office **(Sec602)**

Section 592: DOCUMENTS ETC THAT ARE TO BE DELIVERED TO ROC BY A FOREIGN COMPANY CARRYING ON BUSINESS IN INDIA.

1) Documents etc to be delivered:

i. Certified copy of the charter / memorandum defining the constitution of the company in English language. If it is not in English language, then a certified translation.
ii. Address of its Registered Office.
iii. Address of Principal place of business in India
iv. Name & address of person resident in India to whom all communication is to be sent
v. Particulars regarding

Directors and Secretary

Directors	Secretary
a) Name / surname	a) Name / surname
b) Address	b) Address
c) Nationality	
d) Occupation	
e) Directorships in other concerns.	

2) **Time limit:** within 30 days of establishment of place and business.

Section 593: RETURN TO BE DELIVERED TO ROC BY FOREIGN COMPANY WHERE DOCUMENTS ETC TO BE ALTERED

If alteration is made with respect to (i) to (v) above, then a return should be filed with ROC incorporating the details of such alteration.

Section 594: ACCOUNTS OF FOREIGN COMPANY

1) Every foreign company should make out a Balance sheet and profit and loss a/c along with annexures & attachments (as required by companies act) – For every calendar year.
2) Three copies of above should be filed with ROC.
3) Along with the above documents, the company should file three copies of a list containing the places of business established by the company in India
4) CG has power to modify/ exempt any of the above requirements

Note:

- If documents are not in English, then a Certified translation should be annexed.
- The documents should be filed with ROC within 9 months.
- Where the foreign company has only a liaison office in India & does not carry on any trading, manufacturing or commercial activities in India, then it is enough if the following documents are filed:
    a) Copy of RBI letter giving it permission to open such office.
    b) Receipts & payments a/c relating to Indian operations (duly audited).
    c) Assets & liabilities in India (duly audited).
    d) Certificate that company doesn't carry any manufacturing / trading / business activity.

Section 595: OBLIGATION TO STATE THE NAME, COUNTRY, and LIABILITY ETC.

Document	Particulars
i. Prospectus	* Country in which the company is incorporated. * The fact that the liability of the company is limited. (In case of a limited Company)
ii. Billheads, letter paper, business letter, notices & other official publications & advertisements.	* Name of the Company * Country in which the Company is incorporated * The fact that the liability of the Company is limited (In case of a limited Company) (In legible English characters)
iii. Outside every office / place of business in India	* Name * Place of incorporation * Liability limited (in case of limited Company) * In addition to local languages also in English.

Section 596: SERVICE ON FOREIGN COMPANY

1) Notice, process or documents should be served on the person, who is authorised on behalf of the company to receive them.
2) But in the following situation, serving on the company at any place of business established in India is sufficient service:
   a) Company has not delivered to ROC, the name & address of the person to whom notice etc are to be served (or)
   b) Such person is dead (or)
   c) Such person has ceased to be in such address (or)
   d) Such person refuses to accept the notices etc served.

Section 597: OFFICE WHERE DOCUMENTS TO BE DELIVERED

Above documents should be delivered to

- ROC (New Delhi)
- ROC (State where principal place of business situate.)

Note: If a company ceases to have place of business in India, Notice should be given to ROC. Thereafter the company has no obligation to file any document with ROC.

Section 599: EFFECT OF NON-COMPLIANCE WITH SECTION 591 –603

(a) Contracts etc entered by the company is still valid and the Company can be sued with respect to such contracts but
(b) The Company cannot sue or initiate legal proceedings in respect of such contracts.

Section 600: REGISTRATION OF CHARGES, APPOINTMENT OF RECEIVER & BOOKS OF A/C

1) **Section 124 to 145** relating to registration of charges applies mutatis mutandis to foreign company also
2) **Section 118** Right to obtain copies of and inspect trust deed applies mutates mutandis to foreign company also
3) **Section 209, 209A, 233A, 233B, 234 and 246** applies to Indian business of foreign company. The books should be kept at the principal place of business in India.
4) **Section 159** relating to filing of annual return applies to foreign Company also.

Prospectus Section 603 to 608

Section 603: DATING OF PROSPECTUS & PARTICULARS TO BE CONTAINED THEREIN

1) Offering shares / Debentures for public subscription by a foreign company is prohibited.
2) But if the following conditions are fulfilled, then it is allowed:
   a) Prospectus should be dated.
   b) Prospectus should contain the following particulars:
      1. Instrument defining the constitution of the company.
      2. Enactment under which the company is incorporated
      3. Address in India where the above documents /instruments could be seen.
      4. Date of incorporation.
      5. Country in which the company is incorporated.
      6. Address of principal place of business in India.
      7. Matters specified in Schedule II Part I
      8. Reports specified in Schedule II Part II

Note: If the company is issuing prospectus after 2 years from the date on which the company is entitled to commence business, then it need not contain the particulars mentioned in (i) (ii) & (iii) above.

3) Any condition in prospecting requiring the applicants of shares/debentures to waive the above requirements is void.
4) Application form should be issued only along with prospectus.
5) Directors/ other persons, responsible for issue of prospectus are not liable for non-disclosure of the above particulars in the following cases: -
   a) If they prove that they have no knowledge of non-disclosure
   b) If non-compliance was due to a honest mistake on their part.
   c) If non-compliance was with respect to immaterial matters. (According to court)
6) This Section does not apply to: -
   a) Rights issue (whether shareholder has right to renounce rights issue or not)
   b) Issue of shares, which are same in all respects to previously, issued shares, which are listed in recognized stock exchange.

Section 604: PROVISION AS TO EXPERTS CONSENT AND ALLOTMENT

1) If any prospectus is issued containing a statement purporting to be made by an expert then, care should be taken to ensure that:
   a) The consent of the Expert is obtained to include such statement in the prospectus and
   b) It has been included in the prospectus in the correct form & context.

2) **Note:** Meaning of expert
Expert includes

a) Engineer b) Valuer c) Accountant or d) Any other person	Whose profession gives authority to a statement made by him?

Section 605: REGISTRATION OF PROSPECTUS

a) Prospectus should be certified by the chairman, and two other directors authorised by the BOD.
b) Certified copy of prospectus should be delivered to ROC for registration
c) Every copy of prospectus should state on its face that a copy has been delivered to ROC.
d) The following should be attached to prospectus:
   i) Expert's consent.
   ii) Copy of contract required under Schedule II

iii) Copy of Report under Schedule. II along with details of adjustments made & the reason for making them.

Note: All the above should be in English/ at least been translated.

Section 607: CIVIL LIABILITY FOR MISSTATEMENTS IN PROSPECTUS

Provisions of Sec 62 apply also to a prospectus issued by a foreign company.
Section 608: Provisions relating to deemed prospectus applies also to foreign Company.

Chapter 18

PRODUCER COMPANIES

(Section 581A – 581ZT)

(1) **Introduction:**

A Company is an association formed for the purpose of business or gain. The voting power in a company is proportionate to the shareholding of its members. The company is a Union subject covered in entries 42 & 44 of list-1 (Union List).

As against a company, a Co-operative Society is formed for the purpose of mutual assistance based on Co-operative principles. Here, every member is having only one vote irrespective of the shareholding. It is a state subject covered in entry32 list-2 (State list)

Reasons for enactment of Multiple State Co-operative Societies Act:

Cooperative principles have considerably helped the growth of rural economy in India. Since cooperative society is a state subject, its activities are required to be restricted to one state. This had all along been an impediment to the growth of the societies, which intends to extend its objective beyond one state. This was the reason, why precisely, the multi-state cooperative society Act was enacted in 1942. This Act had undergone changes twice (1984 & 2002).

Need for insertion of Part IX A in Companies Act.

Since the rural economy is growing and the technology is changing fast, there is a need to link the rural economy to the emerging opportunities. Thus it was felt the cooperative enterprises should have an alternative form to grow (i.e., a corporate from of organisation. This has made the parliament to insert. Part IX A in the companies Act (consisting of Sec 581A – 581ZT).

Constitutional background for insertion:

Entry 43 list-1 provides for incorporation & regulation of trading corporations but not cooperating societies. But entry-44 list-1 provides for incorporation of corporations, whether trading or not, with objects not confined to one state. Thus insertion & part IX-A in Companies Act (regarding cooperative enterprises) is constitutionally valid (as per entry-44, Supra).

(2) **Meaning of Producer Company: -**

A Producer company means a body corporate registered as such under Companies Act. It should have objects specified in Sec.581B. It is formed by producers / producer institutions.

Meaning of producer:

Person engaged in any activity connected with primary produce.

Meaning of Primary Produce:

Primary produce means

Produce of farmers from:	Produce of any person engaged in handloom handicraft and other cottage industries	Products resulting from ancillary activities	By-products of these products.
• Agriculture • Animal husbandry • Horticulture • Floriculture • Pisiculture • Viticulture • Forestry • Re-vegetation • Bee raising • Plantation • Any other Primary activity.			

Note: Primary activity will include any activity intended to increase production or improve quality of the primary produce.

Producer institution: **A producer institution means Producer Company or any other institution having only producers or producer companies as its member.**

Note: The other institutions may or may not be incorporated but these should have any of the objects specified in Sec. 581B and should agree to make use of services of producer companies.

(3) **Objects of Producer Company (Sec. 581-B)**

Objects of a producer company may relate to any or all of the following matters:

- Production, grading, marketing, harvesting, pooling, selling, procurement and handling export / import of primary produce of its members. These activities may be carried on directly or indirectly.
- **Processing including preserving, drying, distilling, brewing, vinting, canning packing of produce of its members.**
- Manufacture, sale or supply of machinery, equipment or consumable to its members.
- Providing education on the mutual assistance principles to its members & others.
- Rendering technical services, consultancy services, training, research and development for the promotion of the interests of its members.
- Generation, transmission and distribution of power, revitalization of land and water resources (for the purpose of primary produce)
- Insurance of producers or primary produce.
- Promoting techniques of mutuality and mutual assistance.
- Welfare measures for the benefit of members.
- Any other incidental activities.
- Financing of aforesaid activities.

(4) **Scheme of part IX –A.**

I	II	III	IV	V	VI	VII	VIII	IX
Incorporation of producer company and related matters	Management of producer Company.	General meetings.	Share Capital & member rights.	Finance Accounts & Audit.	Loan to members & investment.	Amalgamation merger or division.	Reconversion of Producer Company to Society.	Miscellaneous provision.

Producer Company

Incorporated newly under this Act.	**Inter-state cooperative society converted into producer company**

(5) **Incorporation and related matters.**

a) **Formation & registration: - (Sec. 581C)**

Minimum number of persons required for formation:

Producer company will be having only individuals.	Producer company will be having only producer institution.	Producer company will be having both.
Minimum persons = 10 producers	**Minimum Persons = 2 Producer institutions**	**Minimum Persons = 10 Producers & Producers institutions.**

Issue of certificate of incorporation by ROC: -

- If ROC is satisfied with all the formalities it shall register MOA, AOA & all other documents filed with it and issue a certificate of incorporation.
- These should be done within 30 days of filing of documents.

Effect of registration:

- It shall become a body corporate.
- It shall have the same status as that of private limited company.

Note:

There is no maximum limit on number of members.
Conversion into public company is impossible.

Liability of members: Limited to the extent of amount remaining unpaid on shares.
Re-imbursement of incorporation expenses: -

- The producer company shall reimburse all expenses of and incidental to promotion & registration of it. (e.g. Legal fees, registration fees, printing charges of AOA / MOA)
- The above payment should be approved in the 1st GM of members.

b) **Contents of MOA (Sec. 581F)**

- Name with "producer company Limited" as the last words.
- State in which the registered office is to situate.
- Main objects (from sec. 581B)
- Names & addresses of subscribers to MOA and shares taken by them.
- Share Capital and its division.
- Name, addresses and occupation of subscribers (being producers) who shall act as first director of the company.
- Limited liability.
- States to whose territories the objects extend.

c) **Amendment of MOA: (Sec. 581H)**

- Amendment is allowed only to the extent and in the manner specified in the Act.
- Alteration of objects needs special resolution and such alternation should not be inconsistent with the Sec. 581B.
- Alteration of location of registered office from one state to another requires confirmation by tribunal.
- A copy of amended MOA, along with the special resolution should be certified by two directors and a certified copy should be then filed with ROC within 30 days of passing the aforesaid resolutions.

- As a result of change in the registered office of the Producer Company, there may be changes in the jurisdiction of ROC, in such case, a copy of special resolution certified by two directors, shall be filed with both the ROC's. (Within 30 days). Thereafter the ROC losing jurisdiction shall forward all the documents relating to such producer company, to the ROC gaining jurisdiction.

d) **Contents of AOA: - (Sec. 581G)**

(i) **Mutual assistance principles: -**

- The membership shall be voluntary and available to all eligible persons, who can participate or avail of the facilities or services of the producer company and are willing to accept the duties of membership.
- **Each member shall have only one vote, irrespective of the shareholding.**
- BOD shall administer Producer Company and BOD is accountable to members.
- There shall be limited return on share capital.

Note: Limited return means maximum dividend specified in AOA.

- Surplus arising out of operations:
  - ⇨ Shall be used for development of its business.
  - ⇨ Shall be used for providing common facilities
  - ⇨ Shall be distributed among its members based on their participation in the business.
- Education of members, employees and others, on the principles of mutuality and techniques of mutual assistance.
- The Producer Company shall cooperate with other producer companies, operating at local, national or international level.

(ii) **Other Contents:**

Details regarding members:

- Qualifications for membership
- Conditions for continuance.
- Conditions for Cancellation.
- Terms, conditions & procedure for transfer of shares.
- Manner of ascertaining patronage.
- **Determination of voting right based on patronage.**

Note: Patronage means the use of services provided by producer companies to its members by participation in its business activities.

- Manner of disbursement of patronage bonus

Note: Patronage bonus means payment to the members out of surplus income in proportion to their respective patronage.

- Conditions for grant of credit to members.
- Matters relating to issue of bonus shares out of general reserve
- Manner of allotment of equity shares to the members in lieu of the sale proceeds of the products supplied by them.
- Manner of voting at General /Special Meetings.

Details regarding BOD

- Manner of constitution of BOD
- Minimum / maximum number of directors.
- Manner of election & appointment of directors.
- Retirement by rotation and term of office of directors
- Qualification for election.
- Powers &Duties of directors.
- Power to appoint additional directors
- Removal procedure.
- Procedure for filling vacancies.
- Procedure for appointment of chief executive.
- Procedure for voting in directors meeting.
- Election of chairman.
- Powers of Chairman.
- Circumstances under which he can exercise casting vote.

Details regarding raising funds:-

- Amount / ceiling on rising funds.
- Sources
- Restriction on usage of such funds.
- Conditions for raising debt & its extent.

Miscellaneous contents:

- Manner of sharing surplus after winding up.
- Authorisation for Demerger, Merger, Flotation of subsidiaries, Amalgamation, Entering into joint ventures.
- Laying down of MOA / AOA within 90 days of registration.
- Determination of withheld price & its distribution.

Note: withheld price means, part of the price payable to the goods supplied by any members, retained by Producer Company for payment on a subsequent date.

e) **Alteration of AOA (Sec. 581- I)**

Alteration shall be

Proposed by
Atleast 2 / 3 of directors
Or
Atleast 1/3 of elected members.

Adopted by
The company, by special resolution.

- 2 directors should certify altered AOA. It shall along with a certified copy of SR be, filed with ROC within 30 days of adoption.

6) Conversion of inter-state Co-operative society into producer companies. (Sec. 581J)

a) **Eligibility for conversion.**

Any inter state cooperative society with objects extending beyond one state may make an application to ROC for registration as Producer Company.

b) **Annexures to application.**

- A copy of special resolution agreeing for conversion into Producer Company (approved atleast by 2/3 members).
- A statement containing names, addresses and occupation of directors & chief executives.
- A list of members.
- A statement showing that it has any one of objects mentioned in Sec. 581B.
- Declaration as to the correctness of the aforesaid details.

Note: atleast 2 directors should sign declaration.

c) **Issue of certificate of incorporation.**

Once all the formalities are completed, ROC shall issue the COI (within 30 days of receipt of application).

d) **Intimation to registrar of co-operative societies.**

On incorporation, ROC shall intimate immediately to registrar of co-operative societies for cancellation of its name from the register.

e) **Effects of registration:- (Sec 581-J, 581-K, 581-L, 581-M, 581-N)**

- On incorporation "the words producers company limited" shall be added to its name in the last (Sec. 581J)
- Provisions of part IX-A shall apply. (Sec. 581J)

- **Shareholders of the society will become shareholders of Producer Company without any change in their interest. (Sec. 581K)**
- All assets of the society shall vest with the Producer Company (Sec. 581L)

Note: Assets = movable + immovable + actionable claims.

- All rights, debts, liabilities, interest, privileges and obligations of the Society shall vest with the Producer Company (Sec. 581L)
- All contracts to which the society was a party will instead now, have Producer Company as party. (Sec. 581L)
- The producer company shall, now manage every organisation managed earlier by the society. (581 L)
- Every organisation getting financial, managerial or technical assistance from the society may continue to get such assistance from the Producer Company. (Sec. 581L)
- Capital of Producer Company = Capital of society (Sec. 581 L)
- Any reference to the society in any law, any contract or instrument shall be deemed to refer the Producer Company. (Sec. 581L)
- Legal proceedings by / against the society shall continue by / against the producer company (Sec. 581L)
- Fiscal and other concession, licenses, benefits exemption and privileges granted to society shall be available to Producer Company. (Sec. 581M)
- All the directors in the society shall continue as directors in the Producer Company for a period of 1 year. (Sec. 581N)
- **Every officer / employee of the society shall continue as officer/ employee of the producer continue on same terms & conditions. (Sec. 581N)**

Note: If an employee decides otherwise, he shall be deemed to have resigned the office.

- No compensation shall be legally enforceable, for transfer of services from the society to the Producer Company (Sec. 581N)
- Officers / employees who retired before conversion, are entitled to receive the retirement benefits from the company (which they were receiving from the society) (Sec.581-N)
- PF & other welfare funds created for the welfare of the employees by the society shall be entrusted with the Producer Company. (Sec. 581-N)
- No director / MD / Chairman / any other managerial personnel shall be entitled for any compensation from the society / company for the premature termination of their office. (Sec. 581-N)

7) **General meeting: - (Sec. 581ZA)**

a) **Deadline for holding AGM:**

AGM

First AGM | Sub. AGM

First AGM: should be held within 90 days from the date of incorporation.

Subsequent AGM

- 31st December of each year (because the word used is "each year" year = calendar year)
- Gap between two AGMs should not be more than 15 months.

b) **Power of ROC to extend the dead line:**

AGM

1st AGM — No extension

Sub. AGM — Extension by Maximum 3 months possible

c) **Time, day, place of AGM:**

Time – business hours.
Day – any day other than a public holiday.
Place – Registered office/any place within the same city, town or village.

d) **Notice:**

⇒ Contents of notice: date, time & place

⇒ Documents to be accompanied with the notice:
- Agenda
- Minutes of previous AGM/EGM.
- Names, qualification etc of candidates standing for director's post.
- Audited B/S & P&L account.
- BOD's report.
- Text of draft resolution for auditor's appointment
- Text of draft resolution for amending MOA/AOA.

⇒ **Length of notice:** 14 days.

Note: BOD report's contents:

- The state of affairs of Producer Company.
- Amount proposed to be carried to reserves.
- Amount to be paid as limited return on share capital.
- Amount proposed to be disbursed as patronage bonus.
- Material changes & commitments.
- Details regarding energy conservation, environmental protection, Forex inflow / outflow.
- Any other matters.

e) **Quorum:** ¼ (of total members) for AGM. (AOA can provide higher quorum)
f) **Business at AGM:** adoption of AOA; appointment of directors.
g) **Filing of annual accounts minutes & annual return with ROC:** Within 60 days of AGM date.
h) **Appointment of representatives by producer institution:**

⇒ Chairman / chief executive can be appointed as representative.
⇒ Producer institutions cannot appoint a representative if the following situations:

- If it commits default in filing its annual accounts & returns for a period specified in sec. 581Q.
- If it fails to repay deposits, withheld price, patronage bonus etc for a specified period.
- If it fails in conducting election of directors.
- If it fails to call AGM/EGM in accordance with the provisions of the Act.

i) **Provisions relating to EGM:**

- BOD can call EGM on receipt of requisition from requisite number of members.
- Requisite number of members = 1/3 (members entitled to vote)
- Provisions of sec. 169-186 will apply to holding EGM.
- Quorum = ¼ of total number of members (unless to AOA specifies higher quorum. (Sec. 581Y))

8) **Share capital and member's right**

9)
a) **Share capital (section 581ZB)**

- Only equity shares can be issued.
- Shares held by a member in Producer Company shall be in proportion to the patronage.

b) **Transferability of shares (Sec. 581ZD)**

- Members can transfer shares only to an active member at par value.
- For the above, previous approval of the BOD is necessary.
- Within 3 months of becoming a member, the member shall appoint a nominee.
- On the death of a member, his shares shall vest the nominee.
- If the nominee is not a producer, the BOD shall direct the surrender of such shares at par value or such other value as may be determined by the BOD.
- If a member has ceased to be a primary producer or has failed to retain the prescribed qualification, the BOD shall direct the surrender of shares to the company at the par value or such other value as may be determined by it.

Note: opportunity of being heard should be given, before the BOD gives the aforesaid direction.

c) **Special user rights: (Sec. 581ZC)**

- Meaning: Special uses right means and right relating to supply of additional produce / or any other right relating to produce.
- Person entitled to it: only active members.
- Special uses rights can be conferred only when there is specific authorization in AOA.
- Provisions relating to transfer, nomination & surrender of shares apply mutatis mutandis to instruments conferring special rights.

d) **Membership & Voting rights: (Sec. 581D)**

⇨ Voting rights

Producer Company

Having only individuals as its members	Having only producer institutions as its members	Having both.
One member one vote	Voting right proportionate to the patronage. Note: In the first year, the voting right shall be in proportion to the shareholding.	One member one vote

⇨ AOA can restrict the voting rights to active members.

Note: The term active member means, the member who fulfils the quantum and period of patronage fixed by AOA.

⇨ **Qualification of membership:**

- AOA may prescribe qualification for becoming / continuation as members.
- Person having conflicting business interest with that of the producer company cannot become a member.
- On acquisition of the business interests that conflicts with that of the Producer Company, the me mber will cease to be so.

e) **Benefits to members. (Sec. 581 E)**

⇨ **Payment of consideration to members for produce supplied:**

Consideration

Balance (i.e. value determined by BOD)	With held price.
Initially paid to members – in cash	Distributed subsequently to the members in proportion to the produce supplied by the members.
	It can be in cash / in kind / by way of allotment of equity shares.

⇨ **Limited return:** Every member shall receive only a limited return (on the capital contributed by him).

⇨ **Bonus shares:** The company may allot bonus shares out of its general reserves in accordance with Sec. 581ZJ

⇨ **Condition for bonus issue: (sec. 581ZJ)**

- BOD should recommend.
- Resolution should be passed in the GM.
- Bonus shares shall be issued in proportion to the shares held by the members.

⇨ **Patronage bonus:**

- The company may pay patronage bonus to its members.
- It shall be in proportion to their participation in the business.
- It can be in cash / in kind / by way of allotment of equity shares.
- It should be only out of the surplus remaining after payment of limited return and transferring amount required to the general reserve.

- **Note:** General & other reserves (Sec. 581ZI)

Reserves

- General reserves
- Other reserves specified by AOA.

In case of insufficiency of funds, members shall contribute to such reserves in proportion to their patronage.

10) **Finance, accounts and audit (Sec. 581ZE – 581ZI)**

a) **Books of accounts:** (Sec. 581ZE)

- **Books should relate the what:**
  - Receipts & payments
  - Assets & Liabilities
  - Sales & Purchases
  - Instruments of liability executed on behalf of Producer Company.
  - Cost accounting records (if it happens to be a production company engaged in processing and manufacture)

- **Location:** Registered office.
- **B/S & P/L accounts:** should be as per sec. 211.

b) **Compulsory internal audit:** (Sec. 581ZF)

- Compulsory internal audit at such intervals and in such manner as prescribed by AOA.
- It shall be conducted by a chartered Accountant.

c) **Duties of auditor.** (Sec. 581ZG)

- Sec. 227 duties applicable here also
- Additional matters to be reported upon.
  - Amount of debts due (with particulars of bad debts)
  - Verification of cash balance and securities.
  - Details of assets & liabilities.
  - All transactions, which are contrary to this part.
  - Loans to directors.
  - Donations given by the company.
  - Such other matters. (Considered necessary by the auditors)

d) **Donations by Producer Company.** (Section 581ZH)

- **Nature of eligible donation.**

Donation / subscription

- For promoting social & economic welfare of producer members of producers.
  For promoting mutual assistance principles.
  - Permissible within the prescribed ceiling.
- To political party or for a political purpose.
  - Prohibited.

⇨ **Prescribed ceiling:** 3% of net profit of Producer Company in the financial year immediately preceding the year of donation.

10) **Management of Producer Company** (Section 581O to 581 Z)

(a) **Number of directors (Sec. 581O)**

- Minimum = 5 directors
- Maximum
  - Company
    - Freshly incorporated as producer company
      - Maximum = 15 directors
    - Inter-state Co.-operative society converted into producer company
      - First year after conversion
        - Maximum Can be > 15
      - Subsequent years
        - Maximum = 15 directors

(b) **Appointment of directors. (Section 581P)**

(i) **Designated directors.**

Producer Company

Newly incorporated	Inter-state cooperative society converted into producer company.
The subscribers to MOA & AOA will designate atleast 5 persons as the BOD.	Where at least 5 directors of the society continue as per sec. 581(N), the subscribers need not designate.
First directors shall be elected in the general meeting within 90 days of registration.	First directors shall be elected in the general meeting within 365 days of registration.

(ii) **First directors:** Shall be appointed at GM (Within 90/365 days of registration as the case may be)

(iii) **Subsequent directors:**

- Appointed in AGM.
- Term should be specified by AOA. (Minimum – 1 year; maximum – 5 years)
- On retirement, eligible for re-appointment.

(iv) **Power of the BOD to appoint expert directors or additional directors**

- [Expert directors + additional directors] $\leq 1/5^{th}$ of total directors.
- Term of office fixed by BOD (within the maximum period fixed by AOA)
- Expert directors can be elected as chairman
- But he cannot vote in the election of chairman.

(c) **Grounds for vacation: (Section 581Q)**

- ⇨ Convicted for an offence involving moral turpitude & sentenced to imprisonment by the court for atleast 6 months.
- ⇨ Committed default in repayment of loans & advances taken from a producer company in which he is a director.
- ⇨ If the producers company in which he is a director commits default:
  - In repayment of loans / advances.
  - In filing annual accounts / annual returns for a period of 3 consecutive financial years.

- In repayment of deposits / withheld price / patronage bonus / interest thereon within the due date and the default continues for one year.
- In conducting election of directors in accordance with the provisions of the Act.
- In calling AGM/EGM in accordance with the provisions of the Act.

Note: The director of a producer institution which commits the aforesaid defaults will also be disqualified for appointment & accordingly vacate the office.

(d) **Power and functions of BOD (Section 581R)**

The BOD has whatever powers which the company has and such powers shall be exercised within the framework of the Act, AOA & MOA.

Illustrative list of powers duties

- Determination of dividend payable.
- Quantification of with-held price.
- Recommendation of patronage bonus.
- Admission of new members.
- Formulation of organizational policies, objectives (long term as well as short term) & strategies.
- Appointment of chief executive and other officers.
- Exercising superintendence, direction & control over chief executive and other officers.
- Maintenance of proper books of accounts.
- Preparation of annual accounts & placing it before AGM.
- Answering audit qualifications.
- Acquisition & disposal of property in ordinary course of business.
- Investment of funds of the company.
- Sanction of loans or advances to any members (not being director/relative).
- Such other powers (necessary to discharge its duties)

The BOD shall exercise its powers only thro' its resolution passed at its meeting.

(e) **BOD's powers exercisable only on approval by members at AGM. (Section 581S)**

- Approval of budget.
- Adoption of accounts.
- Approval of patronage bonus
- Issue of bonus shares.
- Declaration of limited return.
- Determination of terms & conditions for loans to directors.
- Any transaction (which as per AOA requires approval act AGM).

(f) Committee of directors: (Section 581U)

- The BOD can constitute such number of committees as it considers necessary if such committees could assist the BOD in discharge of its duties.

- The BOD shall neither delegate its power of that of the chief executive.
- The committee should necessarily have a directors or chief executive.
- It shall function under the direction & control of the BOD (for such duration specified by the BOD).
- Remuneration to committee members shall be determined by BOD.
- Minutes of each committee meeting should be placed before the BOD. (In the next BOD meeting)

(g) **Meeting of BOD & Quorum (Section 581V)**

- Should be held atleast once in every 3 months and atleast four such meetings should be held in a year.

Directors

- In India
  - Notice should be served to him.
- Outside India
  - Notice shall be sent to his usual address in India.

- Length of notice = 7 days.
- Shorter notice possible (Reasons shall be recorded in writing by the BOD.)
- 1/3rd of total strength or three whichever is higher
- Sitting fees to directors including Co.-opted directors shall be determined at the GM.

(h) Liabilities of directors (Section 581T)

- Directors are jointly and severally liable to make good the loss to the company for any approval to things in contravention of this Act or any other law or AOA.
- If due to any contravention, a director makes profit, that should be surrendered to the company.
- The liability specified in this section shall be in addition to, not in derogation of a liability imposed on such directors under this Act or any other law.

(i) **Chief executive and his functions: (Section 581W)**

- Every producer company should have a chief executive.
- He shall be a non-member.
- He shall not retire by rotation. He is an ex-officio director of the BOD.
- The BOD shall determine the qualification, experience & terms & conditions of service (Subject to the provision of AOA)
- He is entrusted with substantial powers of management. He functions subject to the super intendance & Control of BOD.

- **Illustrative Powers & Duties**
  - ➢ Day – to – day administration.
  - ➢ Operation of bank accounts.
  - ➢ Custody of cash & other assets.

- Signing on behalf of BOD.
- Maintenance of proper books of accounts.
- Preparation of annual accounts & getting it audited.
- Placing it before BOD & GM.
- Supply of periodic information to members.
- Appointment of employees.
- Assisting BOD in formulation of policies, objective plans etc.
- Advising BOD on legal & regulatory matters etc.

(j) **Secretary of producer company (Section 581X)**

- If the average annual turnover of the producer company in three consecutive financial year > 5 crores then a WTS (whole-time-secretary) shall be appointed.
- WTS should be a member of ICSI.

11) **Loans to members & investments (Secton 581ZK and 581ZL)**

(a) **Loans etc. to members:**

Members

- Directors / relative
  - Approval of company at GM is necessary.
- Others
  - BOD shall decide subject to AOA.

Nature of loans

- Credit facility to members over a period not exceeding 6 months.
  - This is available only if it relates to business of producer company.
- Loans & advances against security.
  - Repayment period exceeding 3 months within 7 years

(b) **Investment in companies, formation of subsidiaries etc.**

Nature of investment:

- Investments in high yielding approved securities.
  - FD's, units, bonds issued by Government Co-operative society or schedule bank.
- Investment in shares of another producer company for promotion of its objectives.
- Investment in joint venture (For Promotion of its objects) Approval by special resolution necessary.
- Investment in any body corporate (Subject to ceiling)
- Flotation of subsidiaries. (for Promotion of its objects) Approval by special resolution necessary.

Note:

Ceiling = [Paid up capital + free reserves] x 30%
If investments are to be made in excess of the ceiling, special resolution at GM & prior approval of CG is required.

- Disposal of investments possible only by passing prior special resolution in the GM.
- **Register of investments.**
  - Contents
    - Names of investees
    - Number and value of shares.
    - Date of acquisition.
    - Manner and price of disposal.
  - Place of register. Registered office.
  - Inspection & taking extracts:
    - The register is open to inspection of members.
    - Extracts can be taken.

Chapter 19

REVIVAL & REHABILITATION OF SICK INDUSTRIAL COMPANIES

(Section 424A-424L)

(1) Meaning of the term industrial undertaking:

Any undertaking defined in section 3(aa) of IDRA. It means precisely, ancillary industrial undertaking.
The term does not include small-scale industrial undertaking.

Note: U/S 11B of IDRA, the CG has power to notify certain undertaking as

(a) Ancillary as industrial undertaking.
(b) The term industrial undertaking has been defined in a narrow sense, so as to exclude all other Industrial undertakings. This narrows down the scope of sec. 424A-424L.

(2) Meaning of the term industrial company:

First of all, it should be a company as per Section 3 of companies Act.
It should own one or more industrial undertakings.

(3) Meaning of sick industrial company: (2 (46AA))

It should an industrial company.
It should satisfy any of the following two criteria:
(a) Accumulated losses ≥ 50% of average net worth of preceeding four years.
(b) Default in debt servicing for 3 consecutive quarters. (i.e. repayment to creditors on specific demand made in writing.)

Note:

(a) What is important is the default in debt servicing and ability not a criteria.
(b) Quantum of debt is immaterial (contrast with sec. 434)
(c) The term creditor includes both secured as well as unsecured creditors.
(d) The term 'quarter' though not defined, in common parlance, it means 3 months.
(e) Net worth: Paid up capital + free reserves – provisions or expenses as may be prescribed.
(f) Preference share capital should also be included for computation of net worth.
(g) Free reserves = All reserves created out of profit & includes share premium account. (Note: Not securities premium)

The term does not include
* Revaluation reserve

* Write back of depreciation.
* Reserves created out of amalgamation.

(4) Reference to tribunal: (Section 424A)

(a) Who shall make a reference to tribunal if a company becomes sick:

Board of directors shall make reference (mandatory).
RBI, Central Government, State Government, Public Financial Institution, State Level Institution, Scheduled banks may make reference (not mandatory).

Note:
(i) State Government can make reference only if atleast one of the industrial undertaking of the company is situated in that state.
(ii) Public Financial Institutions, State Level Institutions, Scheduled banks can make reference only if they had provided financial assistance to such company and so interested in it.
(iii) Reference is not necessary in case of Government companies. If reference is to be made, approval of CG/SG is necessary.

(b) Duty of BOD with regard to reference:

A scheme of revival and rehabilitation should be prepared and submitted along with the application.
A certificate should be obtained from an auditor, as to the reasons for erosion of net worth or default in debt servicing.
Auditor here, means auditor from a panel of auditors set up by the tribunal.
The certificate should accompany the application.

(c) Time limit for making reference:

Reference as aforesaid shall be made within earlier of the following dates:
* 180 days from the knowledge about the sickness.
* 60 days of the final adoption of accounts.

(d) Final order by tribunal:

On receipt of reference, NCLT shall pass an order declaring the company as sick.

(5) Inquiry by Tribunal: (Section 424B)

a) Purpose:

On receipt of reference or upon its own knowledge as to the financial position of the company concerned the tribunal may order inquiry into the working of such company. The purpose of inquiry is to determine whether the company is sick or not.

b) Engaging operating agency for inquiry:

The tribunal may engage an operating agency to conduct the aforesaid inquiry. It may also require it to scan thro' the scheme of revival filed u/s 424A.

Note: Operating agency means any group of experts consisting of persons having special knowledge of business or industry in which the sick company is engaged and includes Public Financial Institutions, State Level Institutions, Scheduled bank and any other person authorised by tribunal.

Operating agency shall complete the inquiry & submit its report as quickly as possible. In any case, it should submit its report within 21 days of the order and for special reasons; the time limit can be extended up to 40 days.

c) Time limit for tribunal to conclude the inquiry & pass final order.

Within 60 days of commencement of inquiry, it should be completed. Under special circumstances extension up to 90 days possible.
Inquiry commences on receipt of reference or on possession of knowledge of the financial position of the company.

d) Appointment of special directors:

Purpose:

* To safe guard the financial / other interest of the company.
* To safe guard public interest.

Who can be appointed as special director:

Person possessing knowledge, experience and expertise in management and control of affairs of any other company can be appointed as special directors.

Directions by tribunal:

Tribunal has power to issue directions to the special directors, for effective discharge of their duties.

Privileges of special director:

* Appointment of special director overrides any provision in this Act, MOA, AOA etc.

* No age limit.
* No share qualification.
* No ceiling on number of director ship.
* Not to retire by rotation. (Not to be considered for determination of rotational directors)
* Remains in office at the pleasure of tribunal
* Not liable for acts done in good faith.

Duty of special director: They should submit a report, as to the state of affairs of the company, to the tribunal. The time limit for submission of such report is 60 days.

(6) Order by tribunal: (Section 424C)

On Completion of inquiry the tribunal feels

That company could make its net worth exceed its accumulated losses and revive on its own, within a reasonable time.	That company couldn't revive on its own.
It may give time for revival, to the company, subject to such term / conditions as it deems fit.	Then it will direct an operating agency to prepare a scheme of revival, incorporating such measurer referred to in section 424D.

If the company which was given time for revival, could not revive within the time granted or has contravened the terms / condition specified by the tribunal then it may direct on operating agency to prepare a scheme of revival for it also.

(7) Preparation and sanction of scheme of revival. (Section 424D)

(i) **Time limit for operating agency to prepare a scheme of revival.**

* Within 60 days of section 424C(3) order. RBI guidelines should be considered.
* Extension up to 90 days possible for special reasons.

(ii) **Measures for revival.**

(a) Financial reconstruction of the company.
(b) Proper management of the company, by change in the management of the company.

(c) Amalgamation of the sick company with any other company or vice versa.
(d) Sale/lease of whole/part of any industrial undertaking of the company.
(e) Rationalization of managerial personnel, supervisory personnel and workmen.
(f) Such other preventive, ameliorative & remedial measures.
(g) Repayment of debt.
(h) Such other incidental, consequential & supplemental measures.

(iii) **Such other matters that could be provided in the scheme.**

(a) In case of amalgamation, the constitution, name, capital, assets, registered office, power, rights, interests, duties, authority, privileges etc. of the resulting company.
(b) Terms & condition for transfer of business, property and assets / liabilities.
(c) Change in BOD, clearly specifying the authority who could effect change, terms & conditions on which new appointments can be made and term of office of new director.
(d) Alteration of MOA / AOA of sick company / transfer company for the purpose of altering the capital structure or for any other purpose to facilitate amalgamation / reconstruction.
(e) Continuation of legal proceedings by / against the company pending immediately before the date of sec 424C order.
(f) Reduction in the interest of shareholders, in the sick company, to such extent the tribunal considers necessary to facilitate revival, rehabilitation and reconstruction.
(g) Allotment of shares to the shareholders of sick company, in the company resulting from amalgamation. If the shareholders claim cash or if it not possible to allot shares, provision for payment of cash, in full satisfaction of their claim or to their reduced claim (where there is reduction in the interest).
(h) Sale of the industrial undertaking, free from all encumbrances or with such encumbrances as may be specified, to any person (including a cooperative society formed by the employees of the sick company.)
(i) Lease of industrial undertaking to any person (including the aforesaid Co-operative society)
(j) Manner of sale of assets of industrial undertaking (e.g. Public auction, invitation of tenders etc.)
(k) Issue of shares at face value / intrinsic value which may be discount value to any company or any person (including employees of sick company)
(l) Any other terms & condition to facilitate revival, reconstruction & amalgamation.

(m) Such other incidental, consequential and supplemental matters.

(iv) **Procedure involved in getting the scheme sanctioned.**

(a) Persons who could prepare a scheme for revival.

Operating agency | Creditors.

(b) Examination of the scheme by the tribunal.
(c) Modification of the scheme if tribunal deems fit.
(d) Sending a copy of Draft scheme to
- Sick Company.
- The transferee Company.
- The operating agency.

(e) Publication of the draft scheme, in the newspaper for receiving suggestion and objections from the persons concerned.
(f) Making available, a copy of the scheme referred above at the registered office for inspection by interested parties.
(g) Modification of the scheme in the light of suggestions and objections from
- The sick company
- Transferee Company
- Operating agency
- Employees
- Creditors
- Shareholders.

Note: In case of amalgamation, some other company is also involved. It should place the scheme at its GM, and get it approved by special resolution.

(h) The tribunal will thereafter sanction the scheme within 60 days, extension up to 90 days possible.
(i) A copy of sanctioned scheme should be filed with ROC.

(v) **Consequences of sanctioning the scheme:**

a) The property, assets & liabilities of the sick company vests with the company resulting from amalgamation.
b) The scheme, thereafter is binding on
- The sick company.
- Transferee Company.
- Shareholders

- Creditors and guarantors of the said companies.

c) It is a conclusive evidence of compliance of all the required formalities.

d) A certified copy of the scheme is evidence in all legal proceedings. (An officer of the tribunal should make Certification).

(vi) **Review of scheme, at the instance of operating agency:** The sanctioned scheme can be reviewed & modified by the tribunal, on the recommendation of operating agency. For such modification also, the procedure supra, should be followed.

(vii) **Removal of difficulty in implementation.** The tribunal has power to do anything to remove any difficulty arising in the course of implementation. But the provisions of sanctioned scheme, should not be contradicted.

(viii) Vesting the responsibility of implementation with the operating agency.

(ix) **Distribution of proceeds in accordance with Section 529A.** If the tribunal disposes off any industrial undertaking, the proceeds from such disposal should be disposed in accordance with section 529A.

(x) Monitoring of implementation of scheme by tribunal.

(8) Rehabilitation by giving financial assistance Section 424E

(a) **Circulation of scheme among financial assistance – providers**:

Where the scheme provides for financial assistance for rehabilitation from CG, SG, SB, other banks, PFI, SLI or any other authority then a copy of the scheme should be circulated among them.

(b) **Nature of financial assistance.**

* Loans, advances, guarantees, relief's, concessions sacrifices etc.

(c) **Deemed consent:**

These persons should give consent within 60 days of circulation but extension possible by 60 more days. If these persons do not respond within the specified period, then the consent is deemed to have been given.

(d) **Appointment of lead financial institution:**

The providers of financial assistance shall designate one among then as the lead financial institution for disbursement of financial assistance to the rehabilitation programme.

Such institution is responsible for coordinating such disbursement.

(e) **Action when consent is not given:**

Where the consent to provide financial assistance is not given then the tribunal may adopt such measures as it deems fit including the winding up of the sick industrial company.

(9) Arrangement for continuing operations etc. during inquiry. (Section 424F)

At any time before completion of inquiry, an application can be made to the tribunal

- Agreeing to an arrangement for continuing the operations of sick company.
- Suggesting a scheme for financial reconstruction by CG, SG, RBI, SB, SLI, PFI, etc.

The tribunal shall pass an order in this regard within 60 days.

(10) Winding up of sick industrial company. (Section 424G)

(a) **When can tribunal order winding up**:

After enquiry u/s 424B, if the tribunal comes to the following conclusions, it may order winding up of the sick industrial company.

(a) It is not possible for the sick company to make its net worth exceed the accumulated losses after meeting its entire financial obligation.
(b) It is not likely, that the company will be viable in the future.
(c) It is just and equitable to windup the company.

(b) **Opportunity of being heard:**

In deciding the matter supra, opportunity of being heard should be given to parties concerned.

(c) **Officer of operating agency as Liquidator:**

The tribunal can appoint an officer of an operating agency as the liquidator. He shall have all the powers of official liquidator under the Act.

(d) **Time Limit for completion of winding up:**

The winding up proceedings should be completed within 1 year of passing winding up order.

(e) **Distribution of precedes u/s 529A:**

If the tribunal disposes off, assets of sick company, the proceeds should be disbursed in accordance with sec. 529A.

(11) Duty of operating agency to prepare a complete list of inventory. (Section 424H)

The tribunal may require an operating agency to prepare a complete list of the following.

(a) All assets & liabilities.
(b) Books of accounts, registers, maps, plans, records, documents of title, etc.
(c) Shareholder & creditors (classified into secured & unsecured).
(d) A valuation report (in respect of shares & assets)
(e) An estimate of reserve price, lease rental & exchange ratio.

Note:

It helps in arriving at the resolve price for sale of an industrial undertaking of the company.

It may also help in fixation of lease – rental for lease of the aforesaid undertaking.

Using it, exchange ratio for shares can be fixed.

(f) Proforma accounts, (where no up-to-date accounts are not available).

(12) Directions not to dispose of assets. (Section 424I)

Directions: The tribunal can direct that the assets of the company should not be disposed without its consent.

When it can be issue: When directions can be issued.

(a) During the pending of inquiry u/s 424-B.
(b) During the preparation of scheme u/s 424-B.

Purpose of directions: To safeguard the interest of the company, its shareholders, creditors, or public in general.

(13) Power of tribunal to call for periodic information:(Section 424J)

After the receipt of the reference u/s 424A, the tribunal has got the power to call period information relating to the steps taken by the company:

- To make its net worth > accumulated losses.
- To repay its debts.

(14) Misfeasance Proceeding: (Section 424K)

In the course of inquiry or implementation of the scheme it is possible for the tribunal to become knowledgeable of the fact that persons who were actively engaged in promotion, formation or management of affairs of the sick company, or past or present directors, officers, employees etc, were guilty of:

- Misapplication of assets of the company
- Misfeasance, negligence or breach of trust,

In such case, the tribunal can order them to restore back the property so misapplied. In addition to this, it may also require such person to pay compensation to the affected parties. It may also report the matter to the central government for further actions.

It may also find that the funds of the company had been diverted for non-bonafide purposes or the affairs of the company had been managed in a manner highly detrimental to the public interest. In such case, it may direct PFI, SB or SLI not to provide any sort of financial assistance to such persons (who were guilty) for a period of 10 years.

Note: opportunity of being heard should be given before passing order.

(15) Levy by way of cess and formation of rehabilitation & revival fund

(Sec 441A-441G)

(a) **Levy & collection of cess: (Section 441A)**

- **Power to levy cess:** The central Government has been empowered to levy cess, which could be used for revival & rehabilitation of sick companies.
- **Quantum of cess:** Minimum–0.005% on annual turnover / gross receipts. Maximum–0.01% on above.
- **Time limit for payment:** cess should be paid within three months from the end of the financial year.
- **Manner of payment:** Will be prescribed thro' rules by Central Government.
- **Duty to furnish certain information:** Every Company shall furnish to details regarding its turnover & gross receipts.

(b) **Credit of cess proceeds to consolidated funds of India (Section 441B)**

Proceeds should first be credited to consolidated fund of India.
With the approval of parliament, Central Government may pay the tribunal such sum of money as it deem fit out of such proceeds, to be credited to revival & rehabilitation fund.

(c) **Sources of fund: (Section 441C)**

(1) Amount received under Section 441B.
(2) Grants by Central Government.
(3) Any other contributions.
(4) Income from investment.
(5) Amount refunded by sick company u/s 441G.

(d) **Application of fund: (Section 441D)**

(i) Making interim payment of workmen dues (pending revival of sick company)
(ii) Payment of workmen dues referred to u/s 529(3).
(iii) Protection of assets of sick company.
(iv) Revival of sick company.

(e) **Penalty for non-payment of cess: (Sec.441F)**

Levying authority: Tribunal
Quantum of penalty = 10 x cess. (Discretionary)
Opportunity of being heard should be given.

(f) **Refund by sick companies (sec. 441G)**

If the tribunal had applied the fund in accordance with sec. 441D, in relation to a sick company, then such amount should be recovered from such sick company after its rehabilitation.

If such company goes into winding up, then after discharge of all statutory liabilities, creditors etc. if there is any surplus, then out of it, the amount should be paid to the tribunal.

Chapter 20

FEMA

1999

(1) **Introduction:**

FERA came into force on 1.1.1974. When FERA was enacted there was scarcity of foreign exchange in the country, so the purpose of the enactment was to mainly control and regulate the foreign exchange. The scheme of FERA provided for obtaining general / special permission of RBI for most of the foreign-exchange transactions. It was considered a draconian law, as there was always a fear of being hauled up by enforcement Directorate.
After the opening up of the Indian economy in 1991, free and secured international trade was enabled, with the changed scenario; the foreign exchange is no longer a scarce commodity. So, it was felt that FERA was very stringent & rigid and to meet the dynamic need of the industries, foreign investors, exporters and importers, a more flexible, accommodation and facilitating Act was necessary, keeping in mind the above, the Foreign Exchange Management Act was enacted in the year 1999.

(2) **Similarities between FERA and FEMA.**

a) **Regulating authorities**

- RBI
- CG

b) **Presumption of extra-territorial jurisdiction:**

FERA and FEMA apply to even contravention committed outside India by any person to whom the Act applies.

Note: What is relevant is the applicability of the Act to the person and not the place where the contravention is committed.

c) **Enforcement directorate**: Agency for enforcing the law.

(3) **Difference between FERA and FEMA:**

Feature	FERA	FEMA
Number of sections	81	49
Nature	Controlling & regulating Foreign exchange.	Management of Foreign exchange.
Definition of terms.	Following terms not defined:	Terms-defined.

	*Capital account transactions. *Current account transactions. *Person. *Service.	
Definition of authorised dealer	Narrow	Wide (Reason: - Money changers & off – shore banking units included)
Definition of resident.	Quite distinct from the Income- tax Act.	Definition brought in harmony with the Income tax Act.
Presumptions of mens rea and abetment to contravention.	Presumed.	Not presumed.
Nature of offence.	Criminal offence - Punishable under code of criminal procedure.	Civil offence.
Provisions for Arrest	Sec. 35 of FERA gives sweeping powers for arrest of a person who is alleged to have committed an offence under the provisions of the Act.	Imprisonment is only a last resort. (i.e., only if monetary penalty is not paid – imprisonment is possible).
Appellate body	*Foreign exchange regulation appellate board *High court	*Special directors (appeal) *Appellate tribunal *High court
Amount of penalty.	Maximum – 5 times the amount contravened (Sec. 50)	Maximum – 3 times the amount contravened (Sec. 13)
Right of impleaded person.	No express provision allowing the impleaded person to take legal assistance.	Impleaded person can take assistance from legal practitioner / chartered accountant.

Structure of FEMA (Sec. 1-49)

Definitions	Regulation & management of	Provisions relating to	Contravention & Penalty	Adjudication & Appeals	Enforcement Directorate.	Miscellaneous

	Foreign exchange	authorised - persons.				
(Sec. 2)	Sec. 3 – 9	Sec. 2(c) & Sec. 10 – 12	Sec. 13 – 15	Sec. 16 – 35	Sec. 36 – 38	Sec. 39 – 49

(4)
Important definitions

Person	Person resident in India.	Person resident outside India.	Security	Foreign Security	Currency	Foreign currency	Indian Currency	Foreign exchange	Authorised dealer
Sec. 2(U)	Sec. 2(V)	Sec. 2(W)	Sec. 2(ZA)	Sec. 2(0)	Sec. 2(h)	Sec. 2(m)	Sec. 2(Q)	Sec. 2(n)	Sec. 2©

a) **Person Sec. 2(U)**

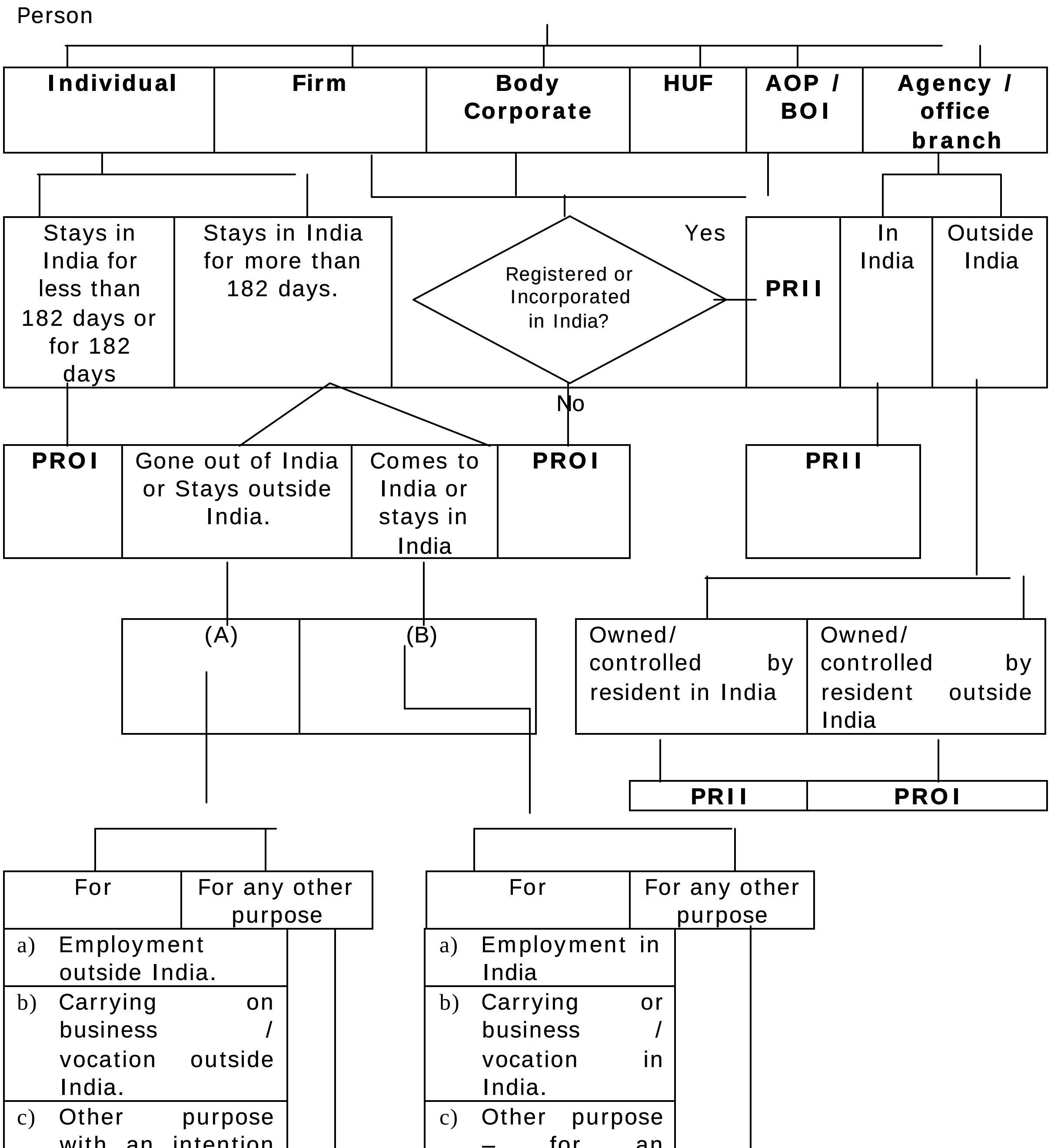
Person

Individual	HUF	FIRM	Body Corporate	AOP / BOI	Artificial Juridical person

Note: The term includes any agency, office or branch owned / controlled by such person.

b) **Person resident Outside India Sec. 2 (W):** Any person other than person resident in India.

c) **Person resident in India. Sec. 2(V):**



to stay outside India for an uncertain period.		uncertain period.	
PROI	**PRII**	**PRII**	**PROI**

Note: w.r.t. HUF, the Act is not clear w.r.t determination of residential status.

d) **Security (Sec. 2(Za)):**

Security

Shares	Stocks	Bonds	Debentures	Govt. Securities as per public Debt Act.	Savings certificate	Units of UTI/mutual funds	Deposit receipts	Instruments notified by RBI

Note: Non-Govt. pro-notes will not fall under the term "security".

e) **Foreign Security (Sec. 2(0)):**

Securities

Indian Securities	**Foreign Securities**
Securities other than Foreign Securities	Any Security expressed / denominated in Foreign currency. **Note**: It includes those securities expressed in foreign currency but (a) Whose redemption is in Indian currency. (b) Whose return (interest / dividend / in other form) is payable in Indian Currency

f) **Currency Sec. 2(h):**

Currency

Currency	Postal notes	Postal orders	Money order	Cheques	DD	Instruments	Traveller's cheque	Letter of	Credit cards	BOE	Pro-note

<u>Note</u>: The term currency includes Debit Cards, ATM Card Etc. **(Notification)**

g) **Foreign currency Sec. 2(m)**

Currency

Indian Currency Sec. 2(Q)	**Foreign Currency Sec. 2(m)**
Currency that is expressed or drawn in Indian rupees.	Any currency other than Indian currency.

Exceptions:

(a) Special bank notes
(b) Special one-rupee notes.

h) **Foreign exchange Sec. 2(n)**

Foreign Exchange

Foreign currency	Deposits, credits & balances payables in Foreign Currency	*Drafts, Traveller's cheque, LOC, BOE expressed / drawn in Indian currency but payable in Foreign Currency	Drafts, Traveller's cheques, LOC, BOE drawn by non-resident but payable in Indian Currency

i) Authorised person – Sec. 2(c) - (Discussed later)

(5)

Regulation & Management of foreign exchange (Sec. 3-9)

Dealings in Foreign exchange etc.	Restriction on holding Foreign exchange	Realisation & repatriation of Foreign exchange	Exemption to Sec. 4 & Sec. 8	Current account transactions	Capital account transactions	Export of goods / services
Sec. 3	Sec. 4	Sec. 8	Sec. 9	Sec. 5	Sec. 6	Sec.7

a) **Dealings in Foreign exchange (Sec. 3):**

Special / General permission of RBI is necessary for:

(a)	(b)	(c)	(d)
Dealing / transferring any foreign exchange / foreign security to any person other than an authorised person.	Making any payment to Persons resident outside India or making any payment to the credit of non-resident	Receiving any payment from a non-resident otherwise thro' an authorised dealer.	Entering into any financial transaction in India, for acquisition / transfer an asset outside India.

Important points w.r.t. clause (a):

⇒ **Notification FEMA – 18/2000 – RB, dated 3-5-2000** allows acquisition of foreign exchange from post-office thro' postal order/money order.

Note: post-office is not an authorised person. So prohibition u/s 3(a) is attracted. But the aforesaid notification gives permission for the aforesaid transaction.

Important points w.r.t. Clause (b): Notification FEMA 16/2000 – RB, dated 3-5-2000

⇒ **Expenses in relation to boarding lodging, travel etc, of a non-resident**:

Person resident in India	Incurs in rupees	Expenses relating to: *Boarding *Lodging *Travel (to / fro / within India)	(For the benefit of a non-resident visiting India)

Note:
Normally if the resident has not paid for the aforesaid expenses, the non-resident would have incurred it. So, in effect, this tantamount to making payment to a non-resident and

Sec. 3(b) is attracted but RBI, thro' the above notification has permitted the same.

⇒ **Purchase of Gold & Silvers.**

Person resident in India.	Sells gold / silvers.	Person resident outside India.

Pays consideration in Indian Rupees thro' crossed cheque / DD

If the purchase of gold / silvers is in accordance with the rules framed under the foreign trade(development & regulation)Act 1992; then the above payment is allowed by RBI (by virtue of the above notification)

⇒ **Payment of expenses relating to Non-WTD**:

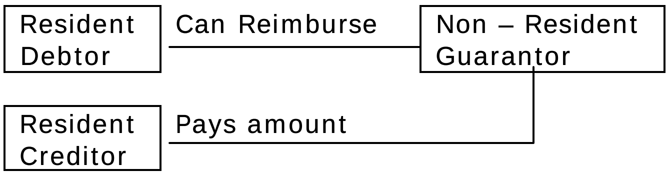
INDIA
I N D I A | Company | I N D I A
INDIA

Pays sitting fees, remuneration, travel exp., commission etc

Visits India for company's work

Non-WTD
Foreign Country

Note: The above payment, if authorised by MOA, AOA, resolution passed in GM or resolution passed in BOD meeting - then it is valid.



Note: Amount reimbursed should not be > the amount paid by NR Guarantor to Resident Creditor in equivalent Rupee terms.

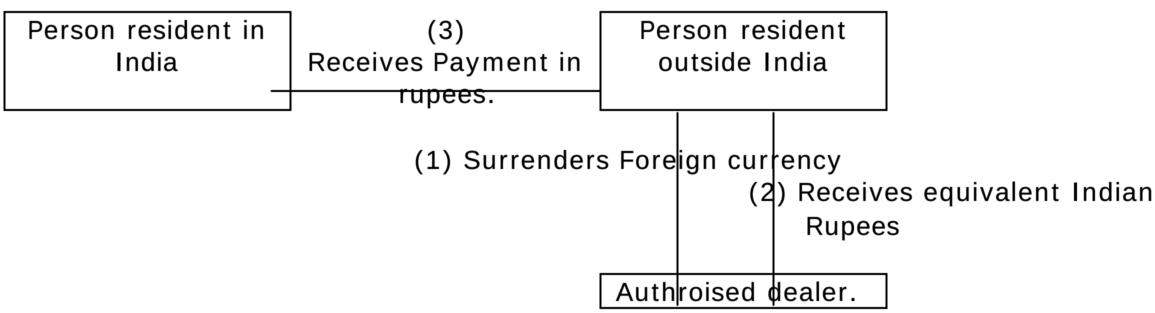
Note: If NR-Guarantor pays the Guarantee amount through funds held in NRNR/NRO/NRSR A/C, the Resident principal Debtor should not

(a) Remit the amount O/s India.
(b) Credit the amount to NRE a/c / FCNR a/c.

Important points w.r.t. Clause (c)

⇒ **Even, if any amount is rec'd thro' an authorised dealer, if there is no corresponding inward remittance, it is deemed to have been rec'd otherwise thro' an authorised dealer.**
⇒ **Notification 16/2000 – RB – date 3-5-2000:**

Receiving payment otherwise from an authorised dealer



The aforesaid transaction is permitted by virtue of aforesaid notification.

Receipt of a crossed cheque from a non-resident

Person resident in India — to — Crossed Cheque drawn on a foreign bank — Pays amt thro' — Person resident outside India.

By virtue of aforesaid notification, the transaction is perfectly valid.

Receipt of money thro' postal orders issued by foreign post office

Person resident in India | Foreign Post Office — Draws Postal order / money Order — Person resident outside India

Receives payment thro' such postal order / money order.

Important points w.r.t. Clause (d):

⇒ Meaning of financial transaction:

Making any payment	Receiving any payment	Drawing BOE, Pro-note etc	Transferring any securities	Acknowledging debts

Common points w.r.t. Clause (b), (c) & (d):

⇒ **Notification FEMA 17/2002 – RB – dated 3-5-2000**

Any Person

Transactions entered into in Indian Rupees

Branch situated in Nepal.

Branch situated in Bhutan.

(Owned / controlled by citizen of India Nepal Bhutan.)

Transaction entered into in Indian rupees.

Transaction entered into in Indian rupees.

Citizen of India

Citizen of Nepal

Citizen of Bhutan

(Residing either in Nepal or Bhutan)

Branch situated in Nepal.

Branch situated in Bhutan.

(Owned / controlled by a company incorporated in Nepal or Bhutan)

Note: By virtue of aforesaid notification, restriction placed in Sec. 3(a), (c) & (d) – will not apply.

b) **Holding of Foreign exchange etc. (Sec. 4)**

Person resident in India – shall not acquire/hold/own /transfer any foreign exchange, foreign security or Immovable property situated outside India.

Note: exceptions may be allowed in the Act / rules / notification

c) **Realisation & repatriation of Foreign exchange: (Sec. 8)**

Foreign exchange — (1) Due to — Person resident in India — (2) — Shall take reasonable steps to realize them

(3) Shall repatriate them within the time prescribed by RBI

⇒ **Meaning of "repatriation" Sec. 2(y)**

Selling Foreign exchange to an authorised dealer	Holding such Foreign exchange in an account with authorised person, up to limits specified by RBI	Using Foreign exchange to settle any debt in foreign exchange

⇒ **Time prescribed for repatriation**

Amount of Foreign exchange received is on account of service rendered or income on assets held outside India.	* Person went on a foreign trip. * He acquired Foreign exchange for meeting the expenses. * He returns to India. * There is some unspent Foreign exchange in his hand. **<u>(Surrender of forex acquired for foreign travel)</u>**	Other cases
Within 7 days of receipts	Unspent money in the form of:	**Within 90 days of receipt**

Currency notes	Traveller's cheque
Within 90 days of return	**Within 180 days.**

<u>FEMA (Realisation, Repatriation & Surrender of foreign exchange) Regulation 2000</u>

(i) Duty of resident to realise foreign exchange: -
- ♦ Should take all steps to realise & repatriate forex.
- ♦ Should refrain from closing anything which:-
  - Delays the realisation (or)
  - Waives the realisation.

(ii) Period of repatriation of realised forex. (See chart above)

(iii) Period of surrender of forex in certain cases: -
- ♦ If forex is obtained for a purpose specified in declaration u/s 10 and has not been used for that purpose (or) any other purpose allowed by law, then has to surrender within 60 days from date of acquisition.
- ♦ For foreign travel (see chart above).

(iv) This Regulation will not apply to currency of Nepal and Bhutan.

d) **Exemptions from Sec. 4 & Sec. 8 (Sec. 9)**

Clause (a)	**Clause (b)**	**Clause ©**	**Clause (d)**	**Clause (e)**	**Clause (f)**
Possession of Foreign currency & coins up to limits specified by RBI	Foreign currency accounts held by persons up to limits prescribed by RBI	Foreign exchange acquired before 1947 & held outside India and Income accrued on the above account.	Foreign exchange acquired by PRII by way of gift or inheritance from a person referred to under clause©	Foreign exchange acquired on account of * Employment * Business * Vocation * Trade * Services * Honorarium. * Gift * Inheritance * Any other legitimate means. (Up to limits prescribed by RBI)	Such other receipts RBI may specify

⇒ **Regulation under clause (a)&(e): FEM (Possession & Retention of foreign currency Regulation) 2000**

Authorised person can hold unlimited Foreign currency / coins
Any Person can hold unlimited foreign coins.
Any person resident in India – can hold foreign currency notes – not exceeding US$2000 subject to the following condition:

Such foreign currency was acquired by him

As remuneration for services rendered outside India.	From non-resident visiting India, as gift / honorarium / remuneration for services.	On his visit to a foreign country, as honorarium / gift	For meeting expenses in foreign trip There is some money remaining unspent

Person resident in India (not permanently resident)	(1)	Acquired Foreign exchange when he was outside India.
(2)	Brought the same into India.	
(3)	Disclosed the same to customer's authorities.	

Note: In this case, Foreign exchange can be held to the unlimited extent.

Regulation under clause (b): Foreign Exchange Management (For-currency accounts by PRII) Regulation 2000.

(1) Restriction on holding foreign currency a/c by PRII:-

- **PRII shall not hold FC a/c unless provided in act, rules etc.**
- **PRII holding foreign currency a/c before commencement of this regulation can be continued with RBI approval.**

(2) EEFC a/c:-

PRII can open, hold maintain with Authorised person Foreign currency a/c called "EEFC" a/c subject to scheme specified u/s schedule I.

(3) RFC a/c:-

PRII can open, hold & maintain RFC a/c out of foreign currency:-

(a) Recd as pension / retirement benefit from employment o/s India.
(b) Recd out of sale of assets u/s 6(4).
(c) Recd out of gift/Inheritance u/s 6(4).
(d) Recd as Gift / Inheritance under Sec. 9(c).

Funds in this a/c are free from all restrictions regarding utilisation of foreign currency including investment abroad.

(4) Opening & maintaining foreign currency a/c in India by

Airlines | **Shipping Co.**

Incorporated o/s India (or) Its branches/agents – for meeting expenses in India.

Note: **Credit to the a/c should only be freight / passenger fare / Inward remittance from HO o/s India.**

(5) Opening & maintaining foreign currency a/c o/s India:

The following persons are allowed to open foreign currency accounts outside India:

(a) **Authorised dealer.**
(b) **Branch o/s India of a Bank in India.**
(c) **Shipping / Airline company Incorporated in India.**
(d) **LIC / GIC**
(e) **PRII exporter who has undertaken turnkey project / civil construction contract o/s India and has been approved by RBI under export regulation.**
(f) **PRII gone abroad for studies.**

Note:

- **Should repatriate the balance in such accounts when he returns.**
- **Short Visit to India during leave is not return.**

(g) PRII gone out of India to participate in an exhibition / trade fair.

Note**: Balance in a/c to be repatriated within one year from the closure of exhibition.**

(h) Foreign national but PRII.

Come to India for employment on deputation of a foreign company having Branch/agency in India | **Come to India for specific job less than 3 years.**

Salaries can be credited to such a/c.

Note:

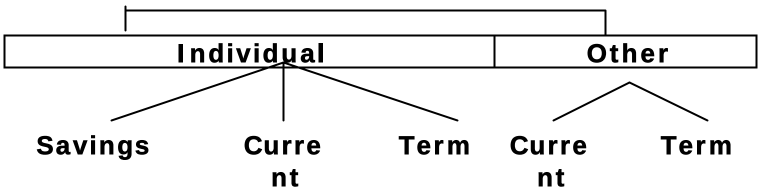
- **Only 75% of salary can be credited.**

- **Balance to be paid in India in rupees.**
- **TDS on entire salary should be deducted before crediting.**

(6) Limits on holding

Till now no limit specified.

(7) Types of accounts



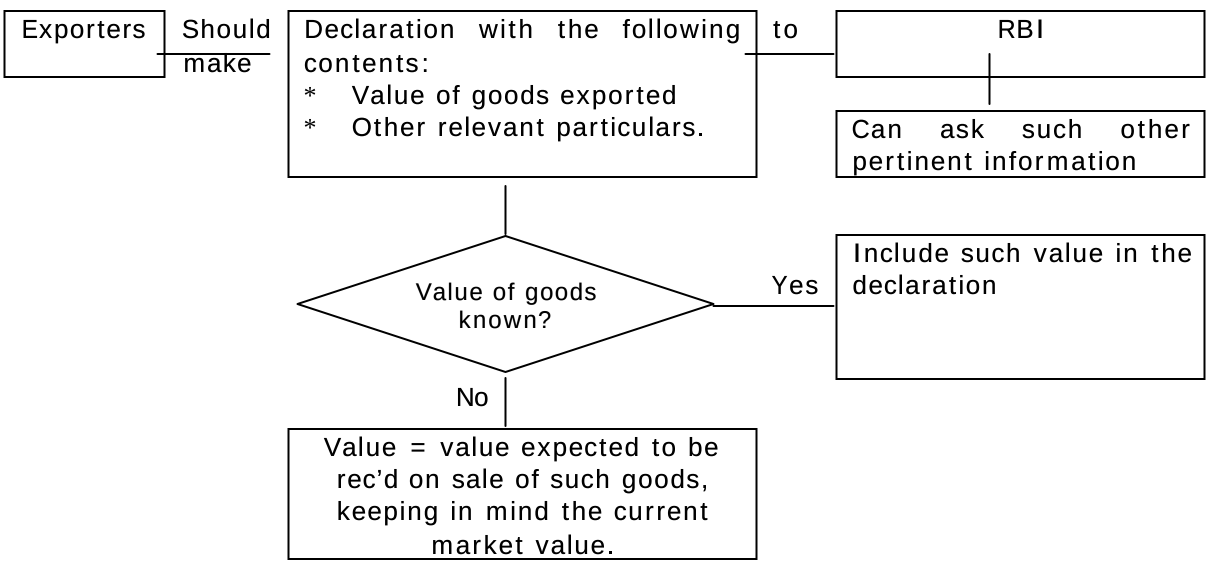
Note: EEFC: only non- Interest Current a/c

e) **Export of goods / services. (Sec. 7)**

Meaning of export sec. 2(L):

* Taking goods out of India to a place outside India
* Provision of service from India to a person outside India.

Declaration to RBI:



Note:

* The RBI has got the powers to issue directions for speedy collection of export value.

* The aforesaid provisions will apply also w.r.t the export of services.

Relevant Regulation: Foreign exchange management (export of goods and services) regulation 2000

(1) **No declaration need to be filed in the following cases:**

(a) Trade samples & publicity materials
(b) Personal effects of travelers (accompanied / unaccompanied)
(c) Ship stores, Transshipment cargo & Goods to meet Air force, navy or army requirements.
(d) Export of goods / software Rs.25, 000.
(e) Export to management U$1,000.
(f) Free Import & re-export
(g) Goods Imported by EPZ & FTZ & found to be defective / surplus & re-exported.
(h) Goods sent outside India for testing subject to re-import.

(2) Importer – Exporter code number allotted under Sec 7 of Foreign Trade Development and Regulation Act 1992, should be indicated in every declaration form filed under this Act u/s 7.

(3) **Forms for export:-**
GR: Export of goods and software in physical form.
PP: For exports through post
Softex: Export of software not in Physical form.

Note: No form still prescribed for export of services.

(4) **Authority to whom declaration should be furnished.**

GR: - 2 copies to commissioner of customs. He authenticates both and forwards original to nearest RBI and 2nd copy submitted by exporter to AP.

PP: - Submitted to AP in duplicate

The AP countersigns & gives original to the exporter

Exporter gives it to post office

After export, post office submits to nearest RBI.

Softex: - 3 copies submitted to the ministry of Information Technology.

One – RBI, 2nd exporter & 3rd retained.

Note: On realisation of export proceeds, AP should submit the GR/PP/Softex to the RBI.

(5) **Advance payment against export.**

Advance payment
- With Interest
  - Interest should be (LIBOR + 100 basis points)
- Without Interest

Shipment should be made within 1 year from date of receipt of advance.

Note: If the shipment could not be made within 1 year, then no remittance towards Refund of advance (or) Interest shall be made without RBI approval.
If there is an agreement for shipment beyond 1 year, it requires RBI approval.
Documents of shipment should be routed only through AP through whom advance has been received.

(6) **Manner of payment of export**

→ Full value of export should be paid thro' an Authorised Person in manner prescribed under Foreign Exchange Management (Manner of Receipt & Payment) Regulation 2000.

(7) **Time limit for realization of export value of Goods & Software**

Full value of Export

General Export	Export to a warehouse outside India	Export of goods by STZ units
Realize & Repatriate within 6 months	Repatriate within 15 months from date of export.	Realize and Repatriate within 12 months
Further 6 months extension possible	Further 15 month extension possible	Further 12 month extension possible

(8) **No export on elongated credit terms.**

Exporter should not give credit for goods exported, by more than 6 months without RBI approval.

(9) **Changing terms after filing declaration.**

→ After filing declaration with RBI Exporter should not:
- Change the manner of receiving payment.
- Change the full value of goods (i.e.,) decreasing it.

For the above, RBI Permission is required.

→ RBI cannot institute proceedings on above default unless the period specified for realisation and repatriation has expired.

(10) **Exports that require prior approval of RBI.**

[Foreign Exchange Management (Export Of Goods & Services) Regulation 2000.]

(a) Export on Lease, Hire Purchase.

(b) Export of goods on Counter trade agreement [an agreement whereby the value of export is adjusted against value of import]

(c) Project export: Turnkey project.

f) **Current account transactions:(sec 2(j) and sec 5)**

Current account transaction means a transaction other than a capital account transaction and it includes:

Payment due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business.
Payment due as interest on loans and as net income from investments.
Remittances for living expenses of parents, spouse and children residing abroad.
Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Any person is free to sell and buy foreign exchange from authorised person if such sale or drawal is on account of current account transaction but central government may in public interest and in consultation with RBI impose such restrictions as may be prescribed.
In exercising the above power the following restriction has been imposed:

⇒ **Current account transactions that are prohibited:**

Rule 3 of Foreign Exchange Management (Current Account Transaction) Rules, 2000 provides that the drawal of foreign exchange by a person is prohibited for the following purposes, namely:

- Transactions specified in Schedule 1 of the notification;
- Travel to Nepal and / or Bhutan;
- Transactions with the person resident in Nepal/or Bhutan.

Note: The prohibition on the transaction with a person resident in Nepal or Bhutan may be exempted by the Reserve Bank of India subject to such terms and conditions as it may

Note: The transactions that are specified in Schedule 1 and thereby absolutely prohibited are:

- Remittance out of lottery winnings;
- Remittance of income from racing/riding etc. or any other hobby;
- Remittance for purchase of lottery tickets, banned/prescribed magazines, foot-ball pools, sweepstakes etc.;
- Payment of commission on exports made towards equity investment in joint ventures / wholly owned subsidiaries abroad of Indian companies;
- Remittance of dividend by any company to which the requrement of dividend balancing is applicable;
- Payment of commission on exports under Rupee State Credit Route;
- Payment related to “Call Back Services” of telephone;
- Remittance of interest income on funds held in Non-Resident Special Rupee Scheme Account.

⇒ **Current account transactions that require prior approval of the government of India:**

Rule 4 provides that no person shall draw foreign exchange for the transaction included in Table-A without prior approval of the Government of India.

The proviso to this rule states that this rule shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account or Exchange Earners Foreign Currency (EEFC) Account of the remitter.

TABLE-A

Purpose of Remittance	Whose approval is required
* Cultural Tours	* Ministry of Human Resources Development, (Department of Education and Culture)
* Advertisement abroad by any PSU/State and Central Government Department	* Ministry of Finance, (Department of Economic Affairs)
* Remittance of freight of vessel charted by a PSU	* Ministry of Surface Transport, (Chartering Wing)
* Payment of import by a Government Department or a PSU on c.i.f. basis (i.e. other than f.o.b. and f.a.s. basis)	* Ministry of Surface Transport, (Chartering Wing)
* Multi-model transport operators making remittance to their agents abroad	* Registration Certificate from the Director General of Shipping.
* Remittance of hiring charges of transporters	* Ministry of Finance, (Department of Economic Affairs).
* Remittance of container detention charges exceeding the rate prescribed by Director General of shipping	* Ministry of Surface Transport (Director General of Shipping)
* Remittances under technical collaboration agreements where payment of royalty exceeds 5% on local sales and 8% on exports and lump-sum payment exceeds US$ 2 million.	* Ministry of Industry and Commerce.
* Remittance of prize money/ sponsorship of sports activity abroad by person other than International/National/State Level sports bodies, if the amount involved excess US$ 100,000	* Ministry of Human Resource Development (Department of Youth Affairs and Sports)
* Payment for securing Insurance for health from a company abroad	* Ministry of Finance, (Insurance Division)
* Remittance for membership of P & I Club	* Ministry of Finance, (Insurance Division)

⇒ **Current account transactions that require prior approval of the Reserve bank:**

There are certain transactions listed in below which cannot be undertaken without the prior approval of the Reserve Bank, these provisions shall not apply where the payment is made out of funds held in Resident Foreign Currency (RFC) Account or Exchange Earners Foreign Currency (EEFC) Account of the remitter.

The transactions for which prior approval of the Reserve Bank is needed are as follows:

- Remittance by artiste e.g. wrestler, dancer, entertainer etc. (This restriction is not applicable to artistes engaged by tourism related organisations in India like ITDC, State Tourism Development Corporations etc. during special festivals or those artistes engaged by hotels in five star categories, provided the expenditure is met out of EEFC account);
- Release of exchange exceeding US$ 5,000 or its equivalent in one calendar year, for one or more private visits to any country (except Nepal and Bhutan);
- Gift remittance exceeding US$ 5,000 per beneficiary per annum;
- Donation exceeding US$ 5,000 per annum per beneficiary;
- Exchange Facilities exceeding US$ 5,000 for persons going abroad for employment;
- Exchange Facilities for emigration exceeding US$ 5,000 or amount prescribed by country of emigration;
- Remittance for maintenance of close relatives abroad exceeding US$ 5,000 per year per recipient;
- Release of foreign exchange, exceeding US$ 25,000 to a person, irrespective of period of stay, for business travel, or attending a Conference or specialised training or for maintenance expenses of a patient going abroad for medical treatment or check-up abroad, or for accompanying as attendant to a patient going abroad for medical treatment/Check-up;
- Release of exchange for meeting expenses for medical treatment abroad exceeding the estimate from the doctor in India or hospital/doctor abroad;
- Release of exchange for studies abroad exceeding the estimates from the institution abroad or US$ 30,000, which ever is higher;
- Commission to agents abroad for sale of resident flats/commercial plots in India, exceeding 5% of the inward remittance;
- Short term credit to overseas offices of Indian companies;
- Remittance for advertisement on foreign television by a person whose export earnings are less than Rs. 10 lakhs during each of the preceding two years;
- Remittance of royalty and payment of lump-sum fee under the technical collaboration agreement which has not been registered with Reserve Bank;
- Remittance exceeding US$ 100,000 for architectural/consultancy services procured from abroad;
- Remittance for use and / or purchase of trade mark/franchises in India.

g) Capital account transactions (section 6 and section 2(c))

(1) **Definition [Sec. 2(c)]**

Transaction that alters asset & Liabilities position:

* Outside India for a person resident in India
* In India for a person resident outside India

(2) **Section 6:**

(1) Subject to subsection (2), any person may sell / draw foreign exchange to / from Authorised Person for capital account transaction.
(2) RBI in consultation with Central Government may specify capital account transactions: -
 (a) Which are permissible &
 (b) Limits up to which they are permissible.

Note:- RBI cannot impose any restriction on drawl of foreign exchange for amortisation of loan.

(3) Without prejudice to the generality of above, RBI can prohibit, restrict (or) regulate the following transactions:
 (a) Transfer / issue of foreign securities by PRII
 (b) Transfer / Issue of any Security by PROI
 (c) Transfer / Issue of Securities by Branch / Office / Agency in India owned / controlled by PROI.
 (d) Borrowings / lending in foreign exchange.
 (e) Borrowings/ lending in Rupees between PROI & PRII
 (f) Deposits between PROI & PRII
 (g) Export / Import / Holding of Currency / Notes.
 (h) Transfer of Immovable Property Outside India by PRII (except lease < 5 years)
 (i) Guarantee / Security /Surety given for debts / liabilities:-
  (i) Incurred by PRII & owed to PROI
  (ii) Incurred by PROI

(4) PRII can hold /own/ transfer /Invest in foreign Currency / Security/ Immovable Property outside India, if they are acquired / held when he was PROI (or) Inherited / gifted from PROI.
(5) Vice Versa.
(6) RBI has got the power to prohibit/restrict/regulate, Branch/office/agency in India established by PROI.

Special Points

(a) Foreign exchange management (Permissible Capital Account Transactions) Regulations 2000 classifies capital account transactions into two types:

Transaction made by PRII	Transaction made by PROI
(a) Investment in foreign Securities	(a) Investment in securities of Indian Companies and Capital of Indian firm
(b) Foreign Currency loans raised in India or abroad	(b) Transfer of immovable properties in India
(c) Transfer of Immovable property out side India.	(c) Guarantees given to PRII
(d) Export / Import / holding currency note.	(d) Deposits between PRII & PROI
(e) Loan & O/D taken from PROI.	
(f) Guarantees given to PROI.	
(g) Maintenance of for currency a/c	
(h) Taking Insurance policy from PROI.	
(i) Loan / OD given to PROI	
(j) Sale / Purchase of foreign exchange derivatives & commodity by derivatives.	

Note:
In this regulation, PROI has been prohibited by RBI in making investment in capital of firm /proprietary concern / company if they are engaged in business of:

(a) Chit funds
(b) Nidhis
(c) Agriculture or plantations
(d) Real estate (does not include development of township / Building/infrastructural facilities etc)

Trading in “Transferable Development Rights”[Certificate issued by CG/ SG for acquiring land for public purposes as a consideration to owner of the land which is transferable]

(b) **Immovable Properties**

(i) **Holding / acquisition / Transfer of Immovable Properties outside India.**

(A) **Holding**

PRII can hold	Immovable Property outside India acquired before 1947.
	Immovable property outside India acquired when he was PROI

(B) Acquisition

By way of Gift/Inheritance from PROI (or) from person who had acquired the property before 1947 is allowed.	By way of purchase out of amount held in RFC account.

(C) **Transfers**

(i) Can be made by way of Gift to a relative who is PRII.

(ii) **Immovable properties in India.**

(A) **Acquisition & Transfer by PROI but an Indian citizen.**

(a) Can acquire Immovable Properties other than agricultural land/ plantation/farmhouse.
(b) Can transfer Immovable properties to PRII.
(c) Can transfer Immovable properties to Indian Citizen / PIO who is PROI (except agricultural land/plantation/farmhouse)

(B) **Acquisition & Transfer of Immovable Properties by PIO (person of India origin)**

(a) Can acquire Immovable Properties except agricultural land/plantation/farmhouse, out of funds received in India thro' Inward remittance / amount in NR a/c held as per RBI.
(b) Can acquire Immovable Properties way of Gift/Inheritance from PRII or citizen of India or PIO (other than agricultural land/plantation/farmhouse)
(c) Can transfer Immovable Properties in India to PRII by way of sale.

(C) **Acquisition of Immovable Properties for permitted activities:**

India in accordance with Foreign Exchange Management (Establishment of Branch/Office/ Place of business in India) Regulation 2000, PROI can hold Immovable for such activities as may be permitted.

Should file declaration within 90 days in prescribed form with RBI.

(D) **Repatriation:**

→ PROI should not repatriate outside India sale proceeds except with RBI's permission.

→ Authorised Person can allow repatriation in following cases:-
(a) Immovable Properties acquisition in accordance with provision of Foreign Exchange Management (Acquisition of Immovable Properties in India) Regulation 2000 and
(b) Sales takes place 3 years after acquisition and
(c) Amount repatriated amount paid for acquisition from normal banking channels.

(6) Provisions relating to authorised persons [Section 10-12&section 2(c)]

Section 10:

(1) To act as authorised person RBI authorization is necessary.
(2) To obtain RBI authorization application should be made to the RBI.
(3) RBI may grant authorization subject to terms and conditions as it may impose.
(4) The authorised person shall in all his dealings in foreign exchange comply with directions/orders of RBI.
(5) He shouldn't engage in any transaction, not in conformity with the terms of authorization.
(6) If he wants to engage, then RBI permission is required.
(7) The authorised person shall before undertaking any transaction in foreign exchange on behalf of any person require such person:
⇒ To make a declaration that there will be no contravention of Act/Rules/Regulation/Notification/direction
⇒ To furnish such information considered necessary to conclude that the transaction does not involve contravention
(8) If such person refuses to comply, the authorised person shall refuse in writing to undertake such transaction.
(9) Further the authorised person has duty to report to RBI if such other person contemplates contravention.
(10) The RBI has got the power to revoke the authorization in the following situations:
- Revocation is necessary in the public interest

- Authorised person has defaulted in complying with the terms of authorization
- Has contravened the provisions of the act etc

Note: before revoking opportunity of being heard should be given to the authorised person.

Section 11: RBI's power to issue directions to authorised person

(1) In order to secure compliance with the act etc, RBI may give directions to authorised persons and can also require them to furnish such information as it deems fit.
(2) If authorised person contravenes the directions or commits default in filing the returns it may impose penalty on them.

Note: opportunity of being heard should be given.

Section 12: power of RBI to inspect authorised person

(1) The RBI may empower any of its officer to inspect the business of authorised person
(2) **Purpose of inspection:**
   ⇒ Verifying the correctness of any statement furnished to the RBI
   ⇒ Obtaining any information which authorised person has failed to furnish
   ⇒ Securing compliance with the provisions of the act etc
(3) Authorised person has got the duty to produce all such books, accounts and documents in his custody and to furnish any information relating to its affairs within such time and in such manner as the aforesaid officer directs.
(7) Contravention & penalties [section 13 and section 14]

1) **Section 13:**

(1) If a person contravenes
   - Any provision of this act.
   - Any rules, regulations, notifications or directions issued under this act

He is liable to penalty on adjudication.

(2)

Maximum penalty under the act

Contravention quantifiable	**Contravention not quantifiable**
Up to 3 times the amount contravened	Up to 2 lakhs

(3) **Confistication:** In addition for above penalty Currency, Security or Property in respect which contravention has taken place can be confistigated to CG.

Note: Property includes:

- **(a) Deposits – where such property has be converted into deposits**
- (b) Indian currency – where such property has been converted into currency.
- (c) Any other property – where such property has been converted into another property.

Note: Adjudicating authority has also power to order:

- Bringing Foreign exchange held outside India

(Or)

- **Not to bring foreign exchange held outside India into India.**

2) **Section 14**: **Power to arrest**

(a) If a person fails to pay the amount u/s 13 within 90 days of service of notice of demand he is liable for arrest & civil Imprisonment

(b) Adjudicating authority not to pass order for arrest:

Unless

Show cause notice has been served	He is satisfied that the defaulter
	(a) With the objective of obstructing recovery has dishonestly transferred, concealed or removed any property.
	Or
	(b) He has sufficient amount but neglects to pay the amount

(c) But Arrest warrant can be issued if Adjudicating authority is of the opinion that the defaulter is likely to abscond / leave the local limits of the jurisdiction of adjudicating authority.
(d) Once defaulter is arrested – he should forthwith be produced before Adjudicating authority (maximum within 24 hrs).
(e) If he pays penalty to arresting officer –immediately release him.
(f) In cause of HUF karta should be arrested.
(g) Adjudicating authority should give person arrested an opportunity of being heard.

Pending Conclusion of Inquiry

He can be kept under custody of an officer appointed by adjudicating authority.	Released on providing necessary security.

Conclusion of inquiry

Release him (or)	Order detention in civil prison. (Or)	Give him 15 days time: (a) Keep in custody. (b) Release on security.

(h)

Period of detention

Demand>1 crore	Demand<1 crore
Up to 3 yrs	Up to 6 months.

(i) Fact that defaulter is released by itself does not amount to discharge of his liability.

Chapter 21 SEBI

SEBI (Disclosure and Investor Protection) Guidelines

CHAPTER - I

Applicability to the Guidelines

- Public Issues
  - Listed companies
    - Applicable
  - Unlisted Companies
    - Applicable
- Rights issue & offer for sale
  - Less than Rs. 50 Lakhs
    - Not Applicable
  - More than Rs. 50 Lakhs
    - Listed Companies
      - Applicable
    - Unlisted Companies
      - Not Applicable

Note: In case of offer for sale by Unlisted Companies, this guideline will apply unless contrary is stated.

CHAPTER - II

ELIGIBILITY NORMS FOR COMPANIES ISSUING SECURITIES

(A) **Public Issue by Unlisted Companies:** (Equity Shares & Security convertible into Equity shares)

(a) Unlisted Companies can make Public Issue of Equity Shares only if the following conditions are satisfied:

(i) Pre-issue net worth is ≥ 1 crore during 3/5 preceeding years & should be ≥ 1 crore in preceeding 2 years.

(ii) Has track record of distributable profits as per Section 205, for atleast 3/5 preceeding years and

(iii) Issue size ≤ 5 time pre-issue net worth at the time of opening of issue (or) at the time of filing draft document with SEBI

Issue size = Offer through offer document + Firm allotment +

Promoters' contribution

Note

Net worth = Equity Share Capital + Free Reserve (excluding Revaluation Reserves) (-) Accumulated Losses & Deferred Expenditure not written off

(b) If condition (i), (ii) or (iii) are not satisfied, still Unlisted Companies can make public issue if:

(i) It is made through Book-building Process &
(ii) 60% of Issue size should be allotted to Q1B's (Qualified Institutional Buyers)

Special Points:

(i) While computing profits for the purpose of track record for the following Companies, only profits amounting from IT activities shall be considered.

- Companies in IT Sector.
- Companies whose name suggests that they are in IT business ("Software", ".com", "Hardware" etc)

(ii) When Partnership Firm is converted into Company, for computing profits for track record, the following should be done:

- Financial Statement of firm should be converted into format prescribed for Companies under Companies Act, 1956.
- Disclosure required under Schedule VI should be made.
- Financial Statement should be certified by a Chartered Accountant stating that:

(a) It is as per Companies Act format & accordance with Schedule VI and
(b) Accounting Standards have been followed and the Financial Statement represents true & fair view.

- Lead Merchant Banker should also certify that Financial Statement is as per Accounting Standard issued by ICA!.

(iii) In case of Unlisted Companies formed out of division of existing company, then also the above (ii) requirements (Partnership Requirements) should be complied with.

(iv) **QIB:**
(a) PFI (b) Scheduled Banking (c) Mutual Funds (d) FII's (e) Multi-lateral / Bilateral Development Financial Institutions (f) Venture Capital Funds (g) SIDC.

NOTE: Above conditions will apply even for offer for sale by Unlisted Companies.

(B) **Public Issue by Listed Companies: (Equity shares & security convertible into Equity shares)**

(i) Listed Company can make Public Issue subject to the following condition:

Issue size ≤ 5 x Pre-issue net worth as on date of opening the issue (Or) date of filing draft offer document with SEBI.

(ii) If the above condition is not satisfied then:

- Issue should be only through Book-building Process.
- 60% of Issue size should be allotted to QIB's.

(iii)

3 Year Prior —— During this Period changed its name to indicate that is a IT Company —— Filing of offer document with SEBI

In the above case, condition mentioned for listed companies will not apply instead conditions of unlisted company will apply.

C) **Exception from eligibility norms:** Nothing in (A) (or) (B) shall apply to:

(i) Banking Company
(ii) Infrastructure Companies:

- Whose project is appraised by PFI's / IDFC / IL & FS and
- Not less than 5% of the project cost is financed by PFI's / IDFC /1L&FS (as loans / equity / combination of both).

D) **Credit rating for Debt Instruments:** (Covers even Debt Instruments convertible into Equity shares)

- Should compulsorily obtain credit rating from a Credit Rating Agency & disclosure in the offer document of the rating.
- Where credit rating from more than one Credit Rating Agency is obtained should disclose all ratings.
- Issue size > 100 crores rating should be obtained atleast from 2 Agencies.
- Credit rating obtained during preceeding 3 years of Issue should be disclosed in offer document.

E) **Misc. conditions / restrictions for Issue of Securities (Both equity & debt):**

(1) **Filing of offer document:**

- Public Issue of Securities (Listed & Unlisted)
  - ⇨ Draft offer document should be submitted through eligible Merchant Bankers to SEBI atleast 21 days before filing Prospectus with ROC.
  - ⇨ If SEBI intimates any change within 21 days make such change & file the Prospectus with ROC.

- **Rights Issue above Rs.50 Lakhs (Listed):** same as above (only one change: substitute ROC with RSE).

(2) If a company is barred by SEBI to access Capital Market, it cannot issue securities.

(3) Securities cannot be issued unless application has been made for listing those securities.

(4) **Dematerialization:**

(a) Agreement with a depository for Dematerialization of Securities already issued / proposed to be issued should be entered into

&

(b) Option should be given to Subscribers or Shareholders, to receive security certificates / hold it in dematerialized form.

These 2 should be done for both Public & Rights issue.

(5) If there is already a partly paid up shares, it should be made fully Paid up or forfeited before making Public or Rights issue

CHAPTER - III

Pricing of issues

(A) **Free pricing: (of shares & Security convertible to shares on a later date)**

Companies

Listed Companies	Unlisted Companies	Infrastructure Companies	Banks
Can freely price both Public / Rights Issues.	Can freely price its public issues	Freely price its Equity share subject to compliance with the disclosure norms specified by SEBI from time to time.	Can freely Price, IPO's subject to Approval of RBI.

(B) **Differential pricing:**

(i)

- Public Issue of Shares / Securities convertible to shares by Listed / Unlisted Companies made to
  - Person's on firm allotment basis
  - General Public (Net offer to Public)
- Can have different issue price to the above 2 categories.
- But Price to Firm Allotment Category should be $\geq$ Price to Public

(ii)

Listed companies making Composite issue

- Public Issue
- Rights Issue

- Differential Prices for Public & Rights issue allowed.

Note 1: When Differential Pricing is made, justification for price difference should be given in offer document.

Note 2: Meaning of firm allotment: Allotment on firm basis made to: (a) Indian & Multilateral Development Financial Institutions. (b) Mutual funds (c) FII's (d) NRI's (e) Permanent / Regular Employees of issuing company.

C) **Price Band:**

- Price band = Floor price + Cap (Cap should not exceed 20% of floor price)
- When offer document is filed with the Board, it is not compulsory to state the actual price of shares; it is enough even if the Price Band is stated
- But actual price should be determined before the offer doc. is filed with ROC.
- Where BOD is authorised to fix price within the price band, they should fix it through a resolution & Lead Merchant Banker of a Listed Company, should give a notice of such BOD meeting atleast 8 hrs before the meeting to RSE.
- Final offer doc. should contain only one price.

D) **Payment of Discounts / Commission:**

No direct/indirect discounts/commission/allowance should be paid by issuer company or Promoters to persons who have received firm allotment.

E) **Denomination of Shares:**

- Shares can be of any denomination
- Existing shares with denomination of 10/100 can also be changed by splitting / consolidating them.
- Conditions to be complied with respect to denomination:
    - Denomination should not be in the form of decimal of a Rupee
    - Company seeking of changing denomination can do so only after amending MOA & AOA.
    - At any given time there shall be only one denomination of shares.

CHAPTER - IV

PROMOTERS CONTRIBUTION & LOCK IN REOUIREMENTS

PART – I

A) Promoter's contribution

Promoters Contribution

Public Issue by unlisted Companies	Offer for sale	Public issue by Listed Companies	Composite issues (Public + Right)
PC=20% shareholding in Post-issue capital	PC=20% shareholding in Post-issue capital	PC=Participate in 20% of proposed issue (or) 20% shareholding in post-issue capital	PC= Participate in 20% of Proposed Public Issue or 20% shareholding in Post-issue capital

Note: Right issue component of Composite Issue should be excluded while calculating post-issue capital

B) Securities not eligible for computing Promoters Contribution

(1)

3 Year Prior ——— Acquired equity shares during this period ——— Filing of offer document with SEBI

The above shares shall not be taken for computing promoter's contribution if:

(i) It is acquired for consideration other than cash & revaluation of assets/capitalization of intangible assets is involved in such transaction.

(Or)

(ii) It is acquired as a result of Bonus issue out of revaluation reserves/reserves without cash accrual.

(2)

1 Year Prior ——— Acquired equity shares during this period ——— Public Issue by unlisted company

The above shares shall not be taken from computing promoter's contribution if acquisition Price < Price offered to public in public issue.

Note: If the difference between the above two prices is brought in by promoters and the company has complied with Companies Act requirements such as (passing revised resolution by BOD, filing revised return on allotment etc.), such shares can be taken for Promoter's Contribution.

(3)

- ➩ Partnership firm converted into Company.
- ➩ Partners of the firm & Promoters of the company same

1 Year Prior ———— Shares allotted for funds brought in during this period ———— Date of conversion

The above shares will not be considered for computing promoter's contribution
Note: If price of share allotted = Public offer, then it is ok.

(C) How to compute Promoters Contribution in case of Issue of convertible Security

➩ Promoters has got two options in case of issue of convertible securities

Bring in their subscription by way of Equity	(or)	Subscribe to the Convertible Security
(a)		(b)

Note: Where Conversion price of emerging equity is not pre-determined in the offer document but instead a conversion price formula is only stated, then option (a) is not available.

- ➩ Where Conversion is at stages, then PC in terms of Equity Capital should not be at a price < weight average Conversion price.
- ➩ PC by way of convertible Securities will not be continued unless, he gives an undertaking in writing to accept fill conversion.
- ➩ In case of convertible securities it will be assumed that all the securities will be converted.

(D) Promoter's Participation> minimum PC

- ➩ Excess treated as preferential allotment.
- ➩ If issue price < price as per preferential allotment guidelines, then guidelines for preferential allotment will apply for determining the price.

(E) When PC should be brought in & procedure for allotment

(a) Full amount should be brought in before issue opening date
(b) Amount brought in should be kept in an escrow a/c with a Scheduled Bank & will be realised to the company along with public issue proceeds.
(c) BOD shall pass resolution for allotment of shares/convertible securities against money received.
(d) Copy of resolution (+) CA certificate that PC has be brought in should be filed with SEBI before Issue opens.

Note:

(i) Where minimum PC > 100 crores, then promoter can bring 100 crores before Issue opens & balance on pro-rata basis before calls are made.
(ii) Where PC is brought before public issue & the amount is deployed by the company, then CFS disclosing use of such funds should be included in offer documents.

(F) Exceptions from requirements of PC:

(1) Company listed for atleast 3 years & has background of dividend payment for 3 preceeding financial years.
(2) Companies where no identifiable promoter / promoter group exist
(3) Rights issue.

But in case of (1) & (3) Promoter should disclose (i) extent of existing share holding & (ii) extent of their participation in proposed issue, in offer document.

PART- II: LOCK-IN REQUIREMENTS

Lock-in

Minimum PC | Excess PC over minimum

(1) **Lock—in of minimum promoters Contribution:**

(a) Shall be locked in for a period of 3 years
(b) Lock-in should start from: Date of allotment of Proposed Issue.

Last date of Lock-in: [Date of commercial production or date of allotment of Public Issue] + three years

(2) **Lock—in Excess Promoter's contribution in Proposed Issue:**

(a) Excess promoters contribution shall be locked in for a period of one year

(b) Where a short fall in firm allotment is met by Promoter, that part shall be locked in for 3 years

(3) **Lock-in of Pre-Issue share capital of Unlisted Company:**

Pre-Issue Share Capital

Locked-in as PC	Held by capital funds & Foreign Venture Capital Investors registered with SEBI	Held for a period of atleast 1 year on the date of filing draft offer doc.	Others
Earlier part takes care	Lock in as per: (i) SEBI (Ven. Cap. Regn.) 1996 (ii) SEBI (Foreign Ven. Cap. Inv.) Reg. 2000	No lock-in	Lock-in for 1 year

PART-III: OTHER REQUIREMENT WITH RESPECT TO LOCK-IN:

(a) Locked-in Securities can be pledged only with Bank / FI's as collateral Securities for loans granted. The pledge should be only one of the conditions for sanctioning the loan.
(b) Promoters can transfer locked in securities among themselves.
(c) Locked-in Securities should bear the inscription non-transferable upto.. date.

CHAPTER - V

PRE- ISSUE OBLIGATIONS

(1) **Lead Manager shall exercise due diligence:**

- Due diligence: should satisfy himself about all aspects of offering, veracity & disclosure in offer document.
- Above liability continues even after completion of issue process.
- LMB shall pay requisite fees as specified in SEBI (Merchant Banker) Rules & Regulations 1992, along with filing draft offer doc. with SEBI.

(2) **Document to be filed along with offer documents by LMB:**

(a) **MOU**

- A company cannot make public/rights issue unless a MOU has been entered between LMB & Issuer Company.
- Contents of MOU: Mutual rights, liabilities & obligation (Governed by Sch. 1) to the issue.
- Should not contain any clause which diminishes the liabilities imposed by Co's Act/SEBI on LMB/Issuer Company
- LMB should ensure that this MOU is submitted along with draft offer document with SEBI.

(b) **Inter - se allocation of responsibilities**

- Where more than one merchant banker is appointed, responsibility of each merchant Banker shall be demarcated as specified in Sch. II.

(c) **Due Diligence Certificate by LMB to SEBI**

To be given at the time of filing draft offer doc.	To be given at the time of filing prospectus with ROC.	To be given at the time of opening of issue.	To be given after issue opens but before closing
Schedule – III	Schedule – IV (also state that corrections said by SEBI has been made)	Schedule - V	Schedule - VI

(d) **Certificate of CA/CS in case of listed company making further issue of capital:**

LMB should furnish following certificates duly signed by CA/CS:

- All refund orders of previous issue has been despatched within prescribed time & in prescribed manner.

- All Security certificates were despatched to allotters in time.
- Securities were listed in stock exchange as specified in offer doc.

(e) **Undertaking:**

Issuer company should give an undertaking to Board that, transactions in securities by promoter/promoter group after date of filing offer doc. with ROC & before of closure of Issue, shall be reported to stock exchange within 24 hrs.

(f) List of persons who constitutes promoter group & their shareholding should be given to Board.

(3) **Appointment of Intermediaries:**

(a) **Merchant Banker:**

- MB associated with Co. as Director/Promoter cannot be appointed as LMB.
- LMB holding security in the Issuer Co. can lead manage the Issue if:
  - ⇨ Such Security are listed/proposed to be listed in the OTCEI &
  - ⇨ Market makers are appointed/proposed to be appointed as per offer doc.

(b) **Appointment to Co-managers:**

- LMB's should ensure that number of co-managers is < number of LMB's &
- There is only one advisor to the issue. ***

(c) **Other Intermediaries:**

- LMB's should ensure that, other Intermediaries appointed are duly registered with Board.
- LMB's should independently assess the capacity & capability of the intermediaries to carry out assignments before recommending to the Issuer Co.
- LMB should ensure MOU between Issuer & Intermediaries.
- LMB should ensure appointment of "Bankers to Issue" at all mandatory collection centres.
- LMB shall ensure that for an Public & Rights Issue a "Registrar to Issue" is appointed & where the Issue Co. itself is a "Registrar to Issue" then a Independent outside "Registrar to issue" should he appointed.
- "Registrar to Issue" which is associated with Issue Company as Director / Promoter should not be appointed as "Registrar to Issue".
- Number of application in public Issue is expected to be large — LMB an appoint more than one 'Registrar to Issue", for collecting appointed firms different Centres & forwarding it to designated "Registrar to Issue" mentioned in offer doc.

(4) **Undertaking**

- LMB should satisfy about the capability of underwriting to discharge their obligations.
- Should obtain underwriters consent before including their name in final offer doc.
- LMB shall incorporate a statement in the offer doc. that in his opinion the underwriter's assets arc adequate to meet their underwriting obligation.
- LMB should underwrite 5% of Total Underwriting Commit ment/ Rs.25 Lakhs whichever is less.
- O/s underwriting commitment of merchant bankers should be 20 x net worth.

(5) **Offer document to he made public:**

(a) Draft offer doc. Filed with SEBI should be made public for 21 days from date of filing it.

(b) **Duty of LMB:**

(i) While filing draft offer doc. with SEBI, also file the same with stock exchange where securities are proposed be listed.
(ii) Make Copies of Draft offer doc. made available to public.
(iii) Obtain & furnish to SEBI in-principle approval of stock exchange to list securities (should be given within 15 days from filing draft offer doe. with stock exchange)

(c) LMB / Stock exchange are entitled to charge a appropriate sum of money from persons requesting copy of draft offer doe.

(6) **Despatch of Issue materials:**

	Issue	
Public issue		Right Issue
LMB should ensure that issue material are despatched to stock exchange / Brokers / Underwriters / Bankers / Investors association etc.		LMB should ensure that letter of offer is sent to all shareholders.

(7) **No complaints certificates:**

After 21 days from date of making draft offer doc. Public, LMB shall file a statement with the SEBI:

(i) Giving list of Complaints received by it.
(ii) A statement whether it is proposed to amend Draft offer doc. / not.
(iii) Highlight of those amendments.

(8) **Mandatory collection Centres:**

All 4 metropolitan Centres: Chennai, Mumbai, Calcutta & Delhi	Regional Division of collection centres mentioned in Schedule VII	In the version where Registered Office of the company is situated all such centres where stock exchanges are present in that region

In addition to above, a company can have as many collection centres as it may want.

(9) **Authorised Collection Agents:**

(a) Issuer Company can appoint Authorised Collection Agents in Consultation with LMB. LMB should ensure that Collection Agent selected are properly equipped with respect to Infrastructure & man power.
(b) Collection agent can collect application along with Cheque / DD / stock invest & should deposit the same in special share application alc with Scheduled bank on the same day (or) next day.
(c) They are not entitled to collect application money on cash.
(d) Within 2 weeks from the closure of public Issue, the Collection Agent shall send a duly reconciled schedule of application forms received, amount realised, cheque returned etc. along with application forms to Registrars to the Issue.
(e) Application accompanied by stock Invest should be directly sent to Registrar to the Issues with I week from r of Issues.
(f) Offer document & application form should specifically indicate that, acknowledgement of receipt of application moneys given by Authorised Collection Agent shall be binding on the co.
(g) Investors residing at places other than where there is mandatory collection centres & Authorised Collection agents can forward their application along with stock Invest to Registrar to the Issue through Register Post.

(10) **Advertisement for Rights Issues:**

(a) LMB should ensure that, the date of completion of despatch of letter of offer is advertised in atleast one English national daily, a Regional language daily circulated at the area where registered office of the Co is situated — 7 .days before opening of issue.
(b) Advertisement should indicate — centres where duplicate copy ,of Composite application form can be detained if they do not receive tile original in reasonable time.
(c) Where shareholders do not get original nor they have in position to obtain duplicate — they can make the application for rights in plain paper
(d) The advertisement should contain the format of application to enable share holders to apply in plain paper.
(e) Advertisement should state that, the shareholders who make application in plain paper should not later use standard form to renounce their right if such form is received by them subsequently.
(f) If a person makes Application in standard form & plain papers, there is a risk of rejection of both.

(11) **Appointment of Compliance Officer:**

(a) Issuer Co shall appoint a compliance officer to liaise with SEBI with respect to Compliance with various laws, rules, regulations etc.
(b) Name of Compliance officer appointed should be intimated to SEBI.

(12) **Abridged Prospectus:**

(a) Application form distributed by Issuer Co. / anyone should be accompanied by abridged prospectus.
(b) Application form may be stapled to form part of Abridged Prospectus (or) may be a perforated part of Abridged Prospectus.
(c) Abridged Prospectus should be printed in 7 point size & with adequate line spacing. It should not contain any matter which is not there in original prospectus.
(d) Application forms should have enough space for applicants to fill the details.

(13) **Agreement with depositories:**

LMB should ensure:

- Dematerialization &
- Option given to Investors

Chapter VII

1) Post issue obligations:

Irrespective of level of subscription, post issue LMB must ensure submission of post issue monitoring reports in the format specified in Schedule XVI

Issues

Public issues

3 day post issue monitoring report

Due date = 3 day from date of closure of subscription of the issue.

78 day post issue monitoring report

Due Date = 78 day from date of closure of subscription of the issue.

Rights issues

3 day post issue monitoring report

Due date = 3 day from date of closure of subscription of issue.

50 day post issue monitoring report

Due date = 50^{th} day from date of closure of issue

The post issue monitoring report should be submitted within three working days from the due date.

2) Redressal of investor grievances

Post issue LMB should actively associate himself with:

- allotment
- refunds
- dispatch

And also address investor's grievances

3) Co-ordination with intermediaries:

- LMB should maintain close coordination with registrar of issue.
- LMB should depute his officers to the offices of various intermediaries at regular intervals after closure of issues.
- They should monitor flow of application from collecting branches of banks, processing of application etc. till the basis of allotment is finalized and certificates and refunds dispatched.
- If they find any act of omission and commission on the part of intermediaries, they should immediately report to SEBI.
- Stock Invest:

  LMB should ensure that instructions issued by RBI for handling stock invest has been complied with by the Registrar of issue.

- Underwriters:
  a) If the issue is proposed to be closed at the earliest closing date, then LMB should ensure that the issue is fully subscribed,
  b) If there is no definite information about subscription figures, it should be, kept open for required no. of days to take care of underwriters interest to avoid any future dispatches.
  c) In case where there is a devolvement on underwriters, LMB should ensure that they honor their commitment within 60 days of closure and should report to SEBI about underwriters who fail to honour their commitments.

- Bankers to issue:
  a) LMB should ensure that money's received in pursuant to issue are kept in a separate bank account (as per Sec 73(3))
  b) It is released by bank only after permission for listing has been obtained by the company from all Stock exchanges where securities are proposed to be listed as per listing agreement

4) Post issue advertisement:

a) Details relating to
- Oversubscription.
- Number, value of application received.
- Number, value and percentage of successful allotees who have applied through stock invest.
- Date of completion of dispatch of refund orders and share certificates etc.

is advertised with in ten days from the date of completion of various activities, in one English/Hindi/Regional paper.

b) The issuer company/brokers/advisors / any other person connected with issue should not publish any advertisement stating that " Issue is oversubscribed " or indicating public response to issue before the closure of the issue.

5) Allotment procedure:

If public issue is oversubscribed, then the post issue LMB and registrar to issue should ensure that allotment is made in the following manner:

I) Proportionate allotment procedure: (steps)

a) Applicants should be categorized according to number of shares applied for
b) Total number of shares to be allotted to each category = total number of shares applied in that category * inverse of oversubscription.
   Example: Number of applications in category of 100's = 1500
   Total number of shares applies for = 1500*100 = 150000
   Number of times oversubscribed = 3

Proportional allot to category = 150000*1/3 = 50000 shares.

c) Number of shares to be allotted to successful allotees = shares applied for by each applicant * Inverse of Oversubscription.
Example: Number of shares applied by each applicant = 100
(in 100 category)
Number of times oversubscribed = 3
Proportionate allotment to successful applicant = 100 * 1/3 = 33 (rounded to 100).

d) In Case of applicants where proportionate allotment works out to less than 100 shares (say 100 category and 200 category), then allot minimum 100 securities to each successful applicant.
Note: Successful applicant in that category should be determined by draw of lots.

e) If proportionate allotment of works out to more than 100 but not multiple of 100 then,
Excess in 50 or more (Eg 260)
---- round of to higher multiple of 100 (say 300)
Less than 50 (Eg 240)
---- round of to lower multiple of 100 (say 200)

f) If Share allotted on proportionate basis to a particular category > actual allot to applicants of that category, then this excess can be used category which is opposite to the above circumstances and balance still remaining can be called to category of applicants applying for minimum number of shares

II) Reservation for small individual applicants:

The above proportionate allotment should be subject to reservation for small individual investors as specified below:

Investors

Small Individual investors – Minimum 50% of net offer to public should be reserved for them,

Others

Balance of net offer to public allotted to them

Example:

S.No	Category	No. of applicant	Total shares allotted	Prop. Allotment to category	No. of shares allotted per applicant	No. of successful applicants	Total shares allotted
1	2	3	4	5=4*1/3	6=2*1/3		
1	100	1500	150000	50000	100	500	50000+9900
2	200	400	80000	26700	100	267	26700
3	300	300	90000	30000	100	300	30000
4	400	300	120000	40000	100	300	30000
5	500	200	100000	33300+100	200	167	33400
6	600	100	60000	20000	200	100	20000
			600000	200000			200000

If the small individual investors are entitled to say 70% of net offer to public as per proportionate allotment formula, then do not restrict it to 50%. But if they are entitled to say 30% of net offer to public as per proportionate allotment formula, then 50% should be reserved for them.

Note:

i. Small individual investors means category of individual applicants applying upto 10 marketable lots.
ii. The drawls of lots shall be done in the presence of a public representative on the governing board of the RSE
iii. Basis of allotment shall be signed as correct by ED/MD of stock exchange, public representative (where applicable), LMB and registrar of issue.

6) Other responsibilities:

a) LMB should ensure that dispatch of refund, share certificates and cancelled stock invest and demat credit is completed with in 2 days of finalization of basis of allotment. The allotment and listing document is submitted to stock exchanges within 2 days of finalization of basis of allot ment.
b) LMB shall ensure payment of interest for delayed. Dispatch of refund order/letter of allotment as prescribed in offer document.
c) LMB shall ensure that the dispatch of refund order/share certificate/letter of allotment is by Registered post/certificat e of posting.
d) The post issue LMB shall continue to be responsible for all post issue activities till the subscribers have refund order / share certificates and the listing permission is obtained.

7) Certificate regarding release of stock invest:

- date of allotment
- within this period should submit a certificate to SEBI stating that stock invests on the basis of which allot was finalized and
- 2 weeks

CHAPTER – IX
GUIDELINES FOR ADVERTISEMENT

LMB should ensure Compliance with Guidelines-on Advertisement by Issuer Co:

(a) Advertisement should be true, fair & clear & should contain any statement which is untrue / misleading.

(b) If an advertisement intends to reproduce any Information contained in offer documents, it shall reproduce it in full & disclosure all relevant facts. Such reproduction should not be restricted to select extracts of that item.

(c) An Issue advertisement is considered misleading if:
   - (i) It contains any statement about the performance of the company without necessary explanatory / qualification & it is exaggerating such performance.
   - (ii) It inaccurately portrays past performance / portrays in a manner which implies that the past will be accepted.

(d) Issue advertisement should not guarantee rapid increase in Profits.

(e) Issue advertisement should not contain Information not indicated in offer documents.

(f) No models, celebrities, fictional characters etc. shall be displayed / form part of Advertisement / offer document.

(g) Issue advertisement shall not appear in form of crawlers, on Televisions.

(h) Slogans / Brand names are all prohibited in such advertisement.

(i) Financial data of such advertisement should include sales, GP, NP, share capital, reserves, EPS., Data fees past 3 years should be given.

(j) Risk factors
   - Issue advertisement in newspapers / magazines / brochures / pamphlets etc. containing highlights of Issue shall also contain risk factors given in equal Importance in all respects including Print size.
   - Minimum print size for risk factor -7.
   - Shall also contain name & registered address of Issuer Company, LMB & Registrar to Issue.

   Note: Opening / closing Issue advance, which does not contain any highlights need not contain risk factors.

(k) Ban on corporate Advertisement:

21 days after filing of offer doc with SEBI —— Close of Issue

No Corporate advertisement allowed unless risk factors mentioned.

(l) Ban on product advertisement:
   For the period mentioned in (k) → product advertisement containing reference directly / indirectly to performance of the Company — not allowed.

(m) Details such as “fully subscribed” (or) “over subscription” should not be advertised.

(n) In case of reservation of part of Issue to NRI’s, the same should be stated in Advertisement.

CHAPTER X

GUIDELINES FOR ISSUE OF DEBT INSTRUMENTS

A company issuing convertible/non convertible debt instruments shall comply with following provisions in addition to relevant provision of other chapters in this guideline:

1) Requirement in respect of debenture trustee:

a) Where a company issues debentures with maturity period > 18 months then should appoint debenture trustees, where name should be included in the offer document.
b) A trust deed should be executed by the issuer company in favour of debenture trustees with 6 months of closure of issues.
c) Trustees should be vested with requisite power to protect the interest of debenture holders including power to appoint nominee director in consultation with institutional debenture holder,
d) Assets on which security is to be created —
   - Free from any encumbrance --- certificate from bankers that they are free from encumbrance should be attained.
   - Assets are encumbered --- No objection certificate to be obtained from FT's Banks for creation of second charge.

     The above certificates should be filed by LMB with SEBI along with draft offer document.
e) The debenture trustee should ensure that:
   i) The lead financial/investment institution monitors the progress of the project for which debentures are raised.
   ii) Where the debentures are raised for working capital finance, the lead bank monitors the same.
f) Trustees should obtain a certificate from auditors of the company:
   i) w.r.t utilization of funds during implementation period of projects
   ii) In case the debenture is for working capital, certificate at the end of each accounting period.
g) Trustees shall ensure that, the company does not issue debenture for acquisition of shares providing loan to any company belonging to the same group.

   Note: A company can issue shares (equity) for the purpose of Repayment of loans in group companies.

Note: Debenture trustees

(a) Trustee for a trust deed needed to secure any issue of Debentures by a company.
(b) to act as Debentures trustee - a certificate from SEBI is necessary

(c) only scheduled banks/PFI's/Insurance companies/companies are entitled to act as Debentures trustees
(d) SEBI will take in to account infrastructure/past experience/employment of atleast one person with professional qualification on finance, law, accounts and business management, before granting registration.
(e) Registration — maximum 3 years but renewable.

2) Creation of Debenture redemption reserve (DRR)

i) DRR should be created if maturity period > 18 months.
ii) Debentures.
   PCD --- Create DRR for non-convertible portion
   FCD --- Create DRR for entire amount
iii) Creation of DRR should commence from the year when the company earns profits.
iv) Before redemption of Debentures commences. DRR equivalent to 50% of Debentures amount should be created.
v) DRR is treated as part of General reserve for purpose of bonus issue.
vi) Drawls from DRR are allowed only after 10% of Debentures liquidity is reduced.
vii) Infrastructure companies issuing debt instruments need not create DRR

3) Distribution of dividend:

New company: Distribution of Dividend requires approval of trustees and Lead institution if any,

Existing company: Approval of Lead institutions required if
a) Dividend > 20% (or)
b) As per loan covenants it is required, if the company defaults in conditions relating to Interest and DSCR.
c) Dividend can be distributed out of profits only after transfer of amount to DRR after transfer to DRR, the profits are insufficient, then it can be declared out of general reserve.

4) Issuer company should redeem its Debenture as per offer Document.
5) Disclosure and creation of charges:

(a) Offer document shall specifically state the assets on which securities created and the ranking of the charges. In case of second/residual charge, it should also disclose the risk associated with such charge.

(b) Offer document should state the securities/asset cover to be maintained, mode of valuation and periodicity of valuation.
Note: Security/asset cover should be obtained after deducting value of first / prior charges the charge for Debenture happens to be second/residual charge.

(c) Relevant consent for creation of security such as pari passu letter consent of lessor in case of leasehold property etc. should be obtained and submitted to debenture trustees before opening of issue.

(d) **Security to be created within six months of date of issue.**
- If not created with 12 months, then company is liable to pay 2% penal interest to debenture holders.
- If even after 18 months, security is not created, then meeting of debenture holders should be called within 21 days and reason for non creation of and date by which it will be created should be given in such meeting.

(e) Issue proceeds shall be kept in an escrow a/c till security as mentioned in offer document is created.
(f) In case of debenture whose maturity period < 18 months it has two options
Option 1: Create charges
Option 2: Not to create charges: in this case the company has to ensure compliance with companies (acceptance of deposit) rules 1975, as unsecured debenture are treated as "deposit" as per this rule.

7) Requirement of letter of option:

Eligible merchant banker should file letter of option with SEBI in the following cases:

A) Roll over of non convertible portion of PCD / Non convertible debenture:

1) An option should be given to Debentures holders to redeem the Debentures as per terms of offer.
2) Before roll over credit rating should be obtained prior to 6 months before due date of redemption and should be communicated to Debentures holders.
3) Roll over can be done only in cases where Debentures holders have given their positive consent and non receipt and non reply is not consent.
4) Fresh trust deed and fresh security should be created at the time of roll over.

B) Conversion of PCD / FCD in to equity capital:

1) If value of Debentures > 50 lakhs and no conversion price is fixed at time of issue, the compulsory option not to convert should be given to Debentures

holders. But in cases where Cap price for conversion along with justification is given at the time of issue, no option needs to be given.

2) Conversion to be done only in cases where the Debenture holders have given positive consent.
3) In case where a Debenture holder does not exercise his option to convert the such Debentures should be redeemed within one month from the date on which the option could be exercised, at a price> = face value.

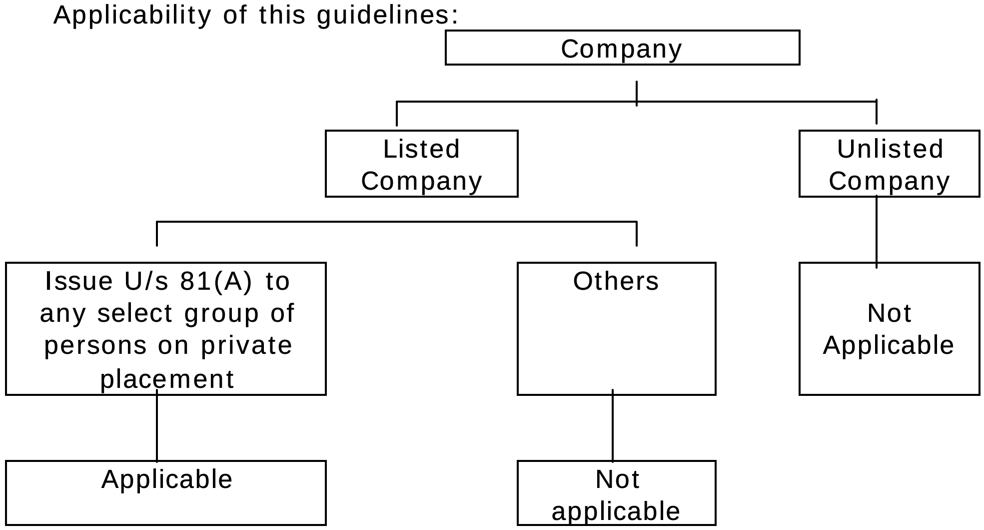
Note: Point 3 will not apply ii redemption is made as per original terms of issue.

Contents of the above letter of option
Disclosure regarding:

- credit rating
- debenture holders resolution
- option for conversion
- justification of conversion price
- such other particulars required by SEBI.

CHAPTER – XIII
GUIDELINES FOR PREFERENTIAL ISSUES

(1) Applicability of this guidelines:



Types of securities covered: Equity shares / FCD / PCD any other financial instruments convertible into Equity Shares at a later date.

(2) **Pricing of the Issue:**

Pricing provisions mentioned below should be followed in making the above preferential issues:

a) The price should not be lower than the following:

(i) Average of weekly high & low closing prices of related shares during 6 months preceding relevant date. (OR)
(ii) Average of weekly high & low closing prices of related shares during 2 weeks preceding relevant date.

b) Provision relating to warrant:

Warrants can also be allotted on preferential basis with an option to apply for shares at later date. In such case, an amount equivalent to atleast 10% of the price fixed as in (a) above shall become payable for the warrants on the date of their allotment. When subsequently they acquired shares, then the above amount shall be adjusted. If the option to acquired shares is not exercised, the above amount shall stand forfeited.

(3) **Contents of explanatory statement to the above GM U/s 173:**

(i) Object of the preferential offer.
(ii) Intention of promoter/Director/key management persons to subscribe.
(iii) Proposed time within which allotment shall be complete.
(iv) Identity of proposed allotees & % of proposed post issue capital that may be held by them.

(4) Currency of warrants/FCD/PCD/Finance Institution convertible to Equity Shares:
Should not exceed 18 months from the date of issue.

(5) **Lock-in requirements:**

(a) Instruments Issued on preferential basis to promoter / promoter group shall be locked in for period of 3 years from date of allotment.
(b) In case of shares acquired by convertible Instrument, the lock-in period shall be reduced to on extent the convertible Instrument has already been held.
(c) Transfer of shares between promoter I promoter group is allowed.

(6) **Currency of shareholder's resolution:**

(a) Within 3 months from date of passing such resolution, the shares / FCD's etc. should be allotted.

(b) The Equity Shares / security convertible into equity shares allotted shall be made fully paid up at the time of allotment. Exception: Warrant as per point (b) (2).

(c) If allotment & issue of certificate is not completed within 3 months, the fresh resolution is required & relevant date for the purpose of point (2) shall be the date of new resolution.

(7)

Certificate from auditors

- Should certify that the issue is in accordance with the guidelines
- Copy of auditor's certificate shall be laid before the GM

(8)

Details of utilization of money form preferential issues

- Details of all monies utilized shall be disclosed under appropriated head in Balance Sheet also indicating the purpose of such utilization
- Details of unlisted money shall also be given in the Balance sheet also indicating the form in which they are invested.

(9) Preferential issues of FII's shall also be governed by this guideline.

(10)

Non-applicability of the guidelines:

- Further shares allotted in accordance with scheme of Merger & Amalgamation approved by HC
- Further shares allotted in accordance with rehabilitation package approved by BIFR.
- Further share allotted to All India PFI's in accordance with loan agreement before 1994.

CHAPTER XIV

Guidelines for OTCEI issues

About OTCEI

a) At present India has only two nation wide stock exchange namely NSE and OTCEI.
b) OTCEI incorporated in 1990 U/s 25 of companies Act, 1956
c) Main aim is to help enterprising promoters set up new project and expand their activities by helping them to raise capital in capital market.
d) It is totally computerized and dependent on telecom network.
e) It has been promoted by following institution: UTI/IDBI/ICICI/IFCI/SBI/CANARA BANK/LIC/GIC

Bought out deals of OTCEI:

a) Floating public issue in primary market involves lot of formalities and time lag. Entrepreneurs with good projects but no track record cannot access capital market due to SEBI restrictions.
b) In above cases, the company with good project can approach a Sponsor and convince him about the project. This sponsor can get the companies shares listed on OTCEI.
c) The sponsor will then buy the entire equity share capital which the company intends to offer to public and later would sell the same to public through "offer for sale". This is called bought out deals

Benefits to company

- Fast way to get money.
- No worry of under subscription etc.
- Issue cost nil.
- New promoter with no track record can approach capital market.
- Company need not have market name, the success of issue depends on name of sponsor.

Guidelines of SEBI

1) Company making IPO of equity shares / Convertible securities through OTCEI need not comply with eligibility norms in chapter II.
   Note: For issue through OTCEI the company should be
   - Sponsored by a member of OTCEI &
   - has appointment two makers (one CMM and one AMM)

2) Offer for sale resulting out of bought deal is exempted from eligibility norms in Chap II (to avail the above two exemption the company should not delist its securities from OTCEI for three years from listing).

3) **Exemption from pricing norms:**
“Offer for sale” as result of bought out deal is exempted from pricing norms if following conditions fulfilled:

(a) Promoters retain 20% of total issued capital and lock in for three years.
(b) Two market makers (CMM and AMM) appointed.

Chapter — XV

Guidelines for Bonus Issue

1) AOA shall contain provision for capitalization of reserves. Resolution at GM should be passed to amend AOA.
2) Bonus issue shall be made out of free reserves created out of genuine profits only/share premium collected in cash only. Revaluation reserve should not be capitalized.
3) Bonus issue in lieu of dividend should not be made.
4) Company should not have defaulted in payment of its interest/principal amount on deposits/debentures and in payment of its statutory due to its employees such as PF, gratuity, Bonus etc
5) A company should not issue bonus shares if its FCD/PCD are pending conversion unless such benefit is also extended to FCD/PCD '5.
6) In order to make bonus issue Company should make its existing partly paid up capital frilly paid.
7) If because of Bonus issue, subscribed /paid capital increases beyond authorized capital then resolution should be passed by company to increase authorized capital.

Chapter 22

Securities Contracts (Regulation) Act, 1956

Recognised Stock Exchange (Section 3 – 12)

Section3: Application for Recognition of stock exchange.
Sub. Section 1:

- Any stock exchange wanting to be recognised may make an application in the prescribed manner to the Central Government.

Sub. Section 2:

- Application shall contain prescribed particulars.
- Application must be accompanied by:-
  - Bye-Laws of stock exchange
  - Rules of stock exchange
  - Particulars on following matters
    - (a) Governing body of stock exchange, its constitution powers & manner in which business is transacted.
    - (b) Powers & duties of office bearers of stock exchange.
    - (c) Qualification for membership, Admission, expulsion, suspension etc.

Special Points

- "Stock exchange" means any Body of Individuals, whether Incorporated / not, constituted far the purpose of aquisting, Regulating & Controlling the business of buying, selling (or) dealing in securities (Section 2(j)).
- Stock exchange cannot begin its operation unless it is recognised as stock exchange under this section.
- "Prescribed manner": - means in the manner given in Rule 3 to 6 of SCR Rules 1957.
- Under Rule 3 the application should be made in Form A with SEBI.
- Rule 4 prescribed fees for application.
- Rule 5 prescribes the document to accompany the application.
- SEBI has got power to make inquiries & call for information before granting recognition under rule 5A.
- Farm of recognition is prescribed under Rule 6.

Section 4: Grant of Recognition to Stock exchange.
Sub Section 1:

If after making enquiry & obtaining further Information, the central government is satisfied: -

(a) That rules & bye-laws of stock exchange are in confirmity with such conditions as may be prescribed & it ensures fair dealing & protection to Investor.
(b) That the stock exchange is willing to comply with any other conditions (Including conditions as to no. of members) which CG may Impose in consultation with Governing body of stock exchange.
(c) That it is necessary to grant recognition to the stock exchange in Public Interest/Interest of trade.

The CG will grant recognition to the stock exchange if it is satisfied with the above conditions.

Sub Section 2: Some examples of conditions which CG may impose under sub Section (1) (a):

(i) Qualification for membership.
(ii) Manner in which contracts shall be entered into & enforced by members.
(iii) Representation by CG in each of the stock exchange by such no. of persons not exceeding three.
(iv) Maintenance of Books of accounts & their audit by chartered Accountants whenever such audit is required by CG.

Sub. Section 3: Every Recognition of stock exchanges are to be published by CG in official gazette & the recognition shall be effect from the date on which it was published on OG.

Sub. Section 4:No application shall be refused unless reasonable opportunity of being heard is given to the stock exchange & the reasons for refused should be communicated to the stock exchange.

Sub. Section 5: Rules of stock exchanges pertaining to matter specified under Section 3 (2) shall not be amended without approval of Central Government.

Note: - No appeal like under the act to “securities Appellate Tribunal” (or) any other judicial authority u/s 22A. Only option is to file a writ petition to HC under article 226 of Indian Constitution.

Section 5: Withdrawal of recognition

If central Government feels that in the Public Interest (or) In the Interest of trade, it is necessary to withdraw the recognition granted, it may serve a notice on the Governing body of the Recognition stock exchange & after giving opportunity of being heard, it may be notification in official Gazette, withdraw the recognition.

Proviso: such withdrawal shall not affect the validity of any contract entered into before the date of notification.

Special Points:

(a) Power to withdraw recognition is delegated by CG to SEBI.
(b) Written notice to Governing body shall be given in Form C.

Section 6: Power of Central Government to call for periodical returns (Or) direct Inquiries: -

Sub. Section 1:

- Stock exchanges shall furnish to SEBI "Periodical returns" as may be prescribed.

Sub. Section 2:

- Stock exchanges shall maintain Books of accounts & other documents as may be prescribed by Central Government for a period of 5 years.
- They are subject to Inspection at all reasonable times by SEBI.

Sub. Section 3: In additio n to powers under sub. Section (1) & (2) SEBI has the fall powers:
(a) Call upon a stock exchange / member to furnish in writing such Information relating to affairs of stock exchange / the member of such stock exchange.
(b) Appoint persons to make inquiry in the prescribed manner & ask them to submit report within the time prescribed.

Sub. Section 4: Where an inquiry under Sub Section (3) is undertaken,
(a) Every Director/Manager/Secretary/Other officer of stock exchange
(b) Every member of such stock exchange
(c) If member is a firm, every partner/manager/secretary/ other officer of the firm 7.
(d) Any other person who has dealings in the course of business with any of them mentioned above,
Shall be bond to produce all Information required by the Inspecting authority.

Special Point:
- Sub. Section 1 specifies "Periodical returns as may be prescribed" – Rule 17A of SCR Rules prescribed the contents of periodical returns.

Section 7: Annual Reports to be furnished to Central Government.

Every Recognised stock exchange shall furnish a copy of Annual Report containing such particulars as may be prescribed, to the CG.

Special Points:

(1) Contents of Annual Report are prescribed under sub Rule 1 to Rule 17.
(2) Rule 17 ask the report to be submitted to SEBI.
(3) Though section 7 does not require, Rule 17 requires Audit report & Audited Financial statements to be submitted along with Annual report.
(4) The above should be submitted within 1 month of AGM.

Section 7A: Power of Stock exchanges to make Rules restricting voting rights.
Sub sec 1: The stock exchange is empowered to make /amend any rules to provide for following matters:
(a) Restricting voting rights of members only to certain matters placed before the meeting (or)
(b) Regulating voting rights by providing that "one member, one vote" irrespective of paid up capital held.
(c) Restricting the right of a member to appoint proxy to vote at a meeting.

Sub. Section 2: The above will not have affect unless it has been approved by CG by publishing is official Gazette.

Special Points:
(1) This section applies to an incorporated stock exchange & not to an unincorporated stock exchange.
(2) The members discussed have are those members who hold share capital & not the trading members of a stock exchange.
(3) This section is a overriding section. Nothing contained in Section 87 (variation of Rights) & Section 176 (Proxy) of companies Act will affect this section.
(4) The CG has delegated the power to SEBI to grant approval.

Section 8: Power of CG to direct Rules to be made (or) Make Rules: -
Sub Section 1:

- CG has got the power to ask stock exchanges generally / any stock exchange in particulars, to amend rules already made / make rules.
- This CG has to do only after consultation with the Governing bodies of stock exchanges.
- The stock exchanges should amend / make rates within 2 months from the date of order.

Sub. Section 2: If the stock exchanges neglects to make / amend rates, the CG can Suo motto mathe / amend the rickes.

Sub. Section 3:
- Where rules made / amended under this section, it shall be published by CG in the official Gazette.
- The amendments will afterride any provisions of companies Act (or) any law for time being in force.

Section 9: Power of recognised stock exchanges to make Bye-laws

(1) Any recognized stock exchange may, subject to the previous approval of the Securities and Exchange Board of India, make bye-laws for the regulations and control of contracts.

(2) In particulars, and without prejudice to the generally of the foregoing power, such bye-laws may provide for:

- (a) The opening and closing of markets and the regulation of the hours of trade;
- (b) A clearing house for the periodical settlement of contracts and differences thereunder, the delivery of and payment for securities, the passing on of delivering orders and the regulation and maintenance of such clearing house;
- (c) The submission to the Securities and Exchange Board of India by the clearing house as soon as may be after each periodical settlement of all or any of the following particulars as the Securities and Exchange Board of India may, from time to time, require, namely:-
    - (i) The total number of each category of security carried over from one settlement period to another;
    - (ii) The total number of each category of security, contracts in respect of which have been squared up during the course of each settlement period;
    - (iii) The total number of each category of security actually delivered at each clearing;
- (d) The publication by the clearing house of all or any of the particulars submitted to the Securities and Exchange Board of India under clause (c) subject to the directions, if any, issued by the Securities and Exchange Board of India in this behalf;
- (e) The regulation or prohibition of blank transferss;
- (f) The number and classes of contracts in respect of which settlements shall be made or differences paid through the clearing house;
- (g) The regulation, or prohibition of budlas or carry-over facilities;
- (h) The fixing, altering or postponing of days for settlements;
- (i) The determination and declaration of market rates, including the opening, closing highest and lowest rates for securities;
- (j) The terms, conditions and incidents of contracts, including the prescription of margin requirements, if any, and conditions relating thereto, and the forms of contracts in writing;
- (k) The regulation of the entering into, making, performance, recession and termination, of contracts, including contracts between members or between a member and his constituent or between a member and a person who is not a members, and the consequences of default or insolvency on the part of a seller or buyer or intermediary, the

consequences of the breach or omission by seller or buyer, and the responsibility of members who are not parties to such contracts;

(l) The regulation of taravani business including the placing of limitations thereon;

(m) The listing of securities on the stock exchange, the inclusion of any security for the purpose of dealings and the suspension or withdrawal of any such securities, and the suspension or prohibition of trading in any specified securities;

(n) The method and procedure for the settlement of claims or disputes, including settlement by arbitration;

(o) The levy and recovery of fees, fines and penalties;

(p) The regulation of the course of business between parties to contracts in any capacity;

(q) The fixing of a scale of brokerage and other charges;

(r) The making, comparing, settling and closing of bargains;

(s) The emergencies in trade which may arise, whether as a result of pool or syndicated operations or cornering or otherwise, and the exercise of powers in such emergencies, including the power to fix maximum and minimum prices for securities;

(t) The regulation of dealings by members for their own account;

(u) The separation of the functions of jobbers and brokers;

(v) The limitations on the volume of trade done by any individual member in exceptional circumstances.

(w) The obligation of members to supply such information or explanation and to produce such documents relating to the business as the governing body may require.

(3) The bye-laws made under this section may –

(a) Specify the bye-laws the contravention of which shall make a contract entered into otherwise than in accordance with the bye-laws void under sub-section (1) of section 14;

(b) Provide that the contravention of any of the bye-laws shall render the member concerned liable to one or more of the following punishments, namely:-

(i) Fine.

(ii) Expulsion from membership,

(iii) Suspension from membership for a specified period,

(iv) Any other penalty of a like nature not involving the payment of money.

(4) Any bye-laws made under this section shall be subject to such conditions in regard to previous publication as may be prescribed, and, when approved by the Securities and Exchange Board of India, shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognized stock exchange is situate, and shall have effect as from the date of its publication in the Gazette of India:

Provided that if the Securities and Exchange Board of India is satisfied in any case that in the interest of the trade or in the public interest any bye-law should be made immediately, it may, by order in writing specifying the reasons therefor, dispense with the condition of previous publication.

Commentary

General comments

Every recognize stock exchange shall have –
(1) Its own rules and
(2) Bye-laws

A copy of following shall accompany every application for recognition of stock exchange under section 3 –
(1) The Bye-Laws of stock exchange "for regulating and control of the contracts".
(2) Rules "relating in general to the constitution of stock exchange and in particulars" relating to the management of Government body of such Stock Exchange. Contract is defined in Clause "a" of section 2 of contract for or relating to the purchase of sale of securities. The rules are defines in Clause "g" of section 2 as –

With reference to the rules relating to general to the constitution and management of stock exchange, includes, in the case of stock exchange, which is an incorporated association, its memorandum and article of association.

Sub-section 1

Every recognize stock exchange shall have Bye-Laws for the regulation and control of contracts i.e. for the purchase and sell of contracts [see section 2(a)]. These Bye-Laws shall be approved by the Central Government (SEBI).

Sub-section 2

This sub-section mentioned the matters on which Bye-Laws are required to be framed by every stock exchange.

Sub-section 3

(Clause a)
One of the principles of the legislation is that a contract may be declared void only by legislation by legislature and institution by its Bye-Laws cannot legally provide that a contract entered into by a member shall be void under any circumstances. However under this Clause the legislature namely the parliament has been given power to an institution like a stock exchange to enact a Bye-Law declaring that a contract entered

into by a member shall be void. In case of non-compliance of Bye-Laws or acting in contravention of a particulars of Bye-Law by the member.

(Clause b)
A stock exchange may by its Bye-Laws provide the consequences that may contravention of any Bye-Laws by a members. This sub-section must be read with rule 18 of securities contract (Regulation) rules 1957.

This sub-section requires the manner of the publication of Bye-Laws “to be prescribe” accordingly rule 18 of securities contract (Regulation) rule 1957 has been enacted.

N.B. Every amendment of the Bye-Laws is also required to be published in accordance with rule 18.

Firstly the Bye-Laws or any amendment thereof is required to be published under rule 18 read with section 23 of the general Clauses Act, 1897.

Under the proviso –

SEBI may dispense with the conditions of previous publication in the interest of trade or in the public interest.

Section 10 Power of Securities and Exchange Board of India to make or amend by-laws or recognised stock exchanges.

(1) The Securities and Exchange Board in India may, either on a request in writing received by it in this behalf from the governing body of a recognised stock exchange or on its own motion, if it is satisfied after consultation with the governing body of the stock exchange that it is necessary or expedient so to do and after recording its reasons for so doing, make bye-laws for all or any of the matters specified in section 9 or amend any by-laws made by such stock exchange under that section.

(2) Where in pursuance of this section any bye-laws have been made or amended the bye-laws so made or amended shall be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognised stock exchange is situate, and on the publication thereof in the Gazette of India, the bye-laws so made or amended shall have effect as if they had been made or amended by the recognised stock exchange concerned.

(3) Notwithstanding anything contained in this section, where the governing body of a recognised stock exchange objects to any bye-laws made or amended under this section by the Securities and Exchange Board of India on its own motion, it may, within two months of the publication thereof in the Gazette of India under sub-section (2), apply to the Securities and Exchange Board of India for revision thereof, and the Securities and Exchange Board of India may,

after giving an opportunity to the governing body of the stock exchange to be heard in the matter, revise the bye-laws so made or amended, anywhere any bye-laws so made or amended are revised as a result of any action taken under this sub-section, the bye-laws so revised shall be published and shall become effective as provided in sub-section (2).

(4) The making or the amendment or revision of any bye-laws under this section shall in all cases be subject to the condition of previous publication:

Provided that if the Securities and Exchange Board of India is satisfied in any case that in the interest of the trade or in the public interest any bye-laws should be made, amended or revised immediately, it may, by order in writing specifying the reasons therefore, dispense with the condition of previous publication.

Commentary

Sub-section 1

Under this sub-section a stock exchange instead of making or amending a Bye-Law itself as under section 9, may request SEBI to make the Bye-Law for it.

Secondly, SEBI may make a main Bye-Law on its own motion particulars stock exchange.

Sub-section 2

Sub-section 2 requires publication of the Bye-Law made or amended under sub-section 1. It is not to be published in according to getting with in accordance with rule 18 but in accordance with this sub-section.

Sub-section 3

This sub-section gives power to SEBI to revise any Bye-Laws made or amendment thereof made under sub-section 2 on being objected by the stock exchange. The objection must be made within 2 months of its publication. The procedure for the revising is prescribed in the section. The Bye-Laws enacted or any amendment made under sub-section 2 shall remain in operation till it is revise by SEBI and published and there is no provision for interim stay.

Sub-section 4

Previous publication under section 23 of general Clauses Act, 1897 require for the making or the amendment or revision of any Bye-Laws under this section unless exempted by SEBI under the proviso. (See rule 18 of securities contract (Regulation) rules 1957 also).

Superseding of Stock Exchange (Section 11)

SEBI/Central Government are vested with power to supersede the Board of Stock exchange after serving on governing body a notice in writing and after giving opportunity to the governing Board to be heard in the matter. SEBI may by notification in official gazette declare governing Board of an Exchange as superseded and may appoint person/s to perform and exercise all powers of Board.

Power to suspend business of Recognised Stock Exchanges (Section 12):

Central Government if it deems it is vested with power to suspend business for period not exceeding 7 days by notification in gazette. Central Government also has power to extend this period by a like notification.

CONTRACTS AND OPTIONS IN SECURITIES

Section 13: Contracts in notified areas illegal in certain circumstances.

If the Central Government is satisfied having regard to the nature or the volume of Transactions in securities in any State or area, that it is necessary so to do, it may, by notification in the Official Gazette, declared this section to apply to such State or area, and thereupon every contract in such State or area which is entered into after the date of the notification otherwise than between members of a recognised stock exchange in such State or area or through or with such member shall be illegal.

Commentary

Under this section the Central Government or SEBI may prohibit contract i.e. transactions in securities in any state or area of a state outside the stock exchange in that state or area.

“Otherwise than between members of recognized stock exchange”

Even though transaction in the securities are prohibited in a state or any area in a state, transaction in that securities may continue to take place between the members of recognized stock exchange situated within that state or within that area.

Section 15: Members may not act as principals in certain circumstances.

No member of a recognised stock exchange shall in respect of any securities enter into any contract as a principal with any person other than a member of recognised stock exchange, unless he has secured the consent or authority of such person and disclose in the note, memorandum or agreement of sale or purchase that he is acting as a principals:

Provided that where the member has secured the consent or authority of such person otherwise than in writing he shall secure written confirmation by such person or such consent or authority within three days from the date of the contract:

Provided further that no such written consent or authority of such person shall be necessary for closing out any outstanding contract entered into by such person in accordance with the bye-laws, if the member discloses in the note, memorandum or agreement of sale or purchase in respect of such closing out that he is acting as a principal.

Commentary

Under this section a member of stock exchange may enter into a contract as a principal with only another member of that stock exchange. In other words a member cannot buy or sell in his personnel capacity from any other person who is not a member of stock exchange, if he has secured the –

(a) Consent or authority of such person
(b) Disclose to that person that he is acting as principal by way of
  (i) The note
  (ii) Memorandum
  (iii) Agreement of sale or purchase

Under the first proviso oral consent is sufficient in the first instance but within three days he must obtain the written consent from that person.

No consent or authority is required under the second provisio, for “closing out any outstanding contract entered into by such person in accordance with the Bye-Laws”.

Section 18A: Contracts in derivative.

Notwithstanding anything contained in any other law for the time being in force, contracts in derivative shall be legal and valid if such contracts are –

(a) Traded on a recognised stock exchange;
(b) Settled on the clearing house of the recognised stock exchange,

In accordance with the rules and bye-laws of such stock exchange.

Commentary

Contracts in (purchase and sale) of derivative may be only enter into on recognize stock exchange and that to only if two conditions complied with mentioned in sections.

Definition of derivative

Derivative includes –

(a) A security derived from a debt instrument, share, loan, whether secure or unsecured, risk instruments or contract for differences or any other form of securities.

(b) Contracts, which derive its value from the prices, or index of prices of, underline securities.

Section 19: Stock exchange other than recognised stock exchange Prohibited.

(1) No person shall, except with the permission of the Central Government organise or assist in organising or be a member of any stock exchange (other than a recognised stock exchange) for the purpose of assisting in, entering into or performing any contracts in securities.

(2) This section shall come into force in any State or area on such date as the Central Government may, by notification in the Official Gazette, appoint.

LISTING OF SECURITIES

SECTION 21: Conditions for listing.

Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.

Commentary

Where the securities are listed on the recognized stock exchange in accordance with the procedure by rule 19 of securities contracts (Regulation) rules 1957 read with the relevant Bye-laws and regulations of the stock exchange. After the listing is granted an agreement in prescribed. Form has to be entered into with the concerned recognize stock exchange and the section 21 requires a person to whom the listing has been granted shall comply with the conditions of the listing agreement with that stock exchange.

Refusal of Listing & Appeal: (Section 22)

When Stock Exchanges refuses listing to a company it has to furnish reasons for refusal to the company. Section 73(1) of Companies Act specifies the time period within which stock exchange has to grant listing permission. If Exchange fails to do so within the time limit or refuses to list, Company may within 15 days make an appeal to the Central Government. The Central Government may after hearing the Stock Exchange vary or set aside the decision of the Stock Exchange or grant permission for listing. No appeal under this section shall be allowed after commencement of Securities Laws (Second Amendment) Act, 1999., since appeal before Securities Appellate Tribunal is permitted under Section 22A.

Appeal before Securities Appellate tribunal: (Section 22A)

Where a Stock Exchange refuses listing or is unable to grant listing within time frame prescribed, company is entitled to appeal to Securities Appellate Tribunal (SAT). SAT after hearing the exchange may vary or set aside Exchange’s order or grant or refuse permission.

Powers of SAT (22B)

SAT shall have power to regulate their own procedures and will be vested with power vested in Civil Court under code of civil procedure 1908 in respect of following matters:

(a) Summoning and enforcing attendance of any person and examing him on oath.
(b) requiring discovery and product of documents
(c) receiving evidence on affidavits;
(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;
(f) dismissing an application for default or deciding it ex parte;
(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; and
(h) Any other matte which may be prescribed.

Legal Representation (22C)

Appellant may appear in person or authorise one or more CAS, CS or ICWA or Legal practitioners to represent the case.

Section 22D: Limitation.

The provisions of the Limitation Act, 1963 (36 of 1963) shall, as far as may be, apply to an appeal made to a Securities Appellate Tribunal.

Section 22E: Civil court not to have jurisdiction.

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by a or under this Act.

Section 22F: Appeal to High Court.

Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of fact or law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

PENALTIES AND PROCEDURE

Section 23: Penalties

(1) Any person who –
- (a) Without reasonable excuse (the burden of providing which shall be on him) fails to comply with any requisition made under sub-section (4) of section 6; or
- (b) Enters into any contracts in contravention of any of the provisions contained in section 13 or section 16; or
- (c) Contravences the provisions contained in section 17, or section 19; or
- (d) Enters into any contract in derivative in contravention of section 18A or the rules made under section 30;

(e) Owns or keeps a place other than that of a recognised Stock Exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act and knowingly permits such place to be used for such purposes; or

(f) Manages, controls, or assists in keeping any place other than that of a recognised Stock Exchange which is used for the purpose of entering into or performing any contracts in contravention of any of the provisions of this Act or at which contracts are recorded or adjusted or rights or liabilities arising out of contracts are adjusted, regulated or enforced in any manner whatsoever; or

(g) Not being a member of a recognised Stock Exchange or his agent authorised as such under the rules or bye-laws of such Stock Exchange or not being a dealer in securities licensed under section 17 wilfully represents to or induces any person to believe that contracts can be entered into or performed under this Act through him; or

(h) Not being a member of a recognised Stock Exchange or his agent authorised as such under the rules or bye-laws of such Stock Exchange or not being a dealer in securities licensed under section 17, canvasses, advertises or touts in any manner either for himself or on behalf of any other persons for any business connected with contracts in contravention of any of the provisions of this Act; or

(i) Joins, gathers or assists in gathering at any place other than the place of business specified in the bye-laws of a recognised Stock Exchange any person or persons for making bids or offers or for entering into or performing any contracts in contravention of any of the provisions of this Act;

Shall, on conviction, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) Any person who enters into any contracts in contravention of the provisions contained in section 15 or who fails to comply with the provisions of section 21 or with the orders of or section 22 or with the orders of the Securities Appellate Tribunal shall, on conviction, be punishable with fine, which may extend to one thousand rupees.

Commentary

Jurisdiction – see section 26.
Offence cognizable – see section 25.
Offence by companies – see section 24.

Section 24: Offences by companies.

(1) Where an offence has been committed by a company, every person who, at the time when the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any gross negligence on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company, shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. – For the purpose of this section, -

- (a) "company" means any body corporate and includes a firm or other association of individuals, and
- (b) "director", in relation to –
  - (i) a firm, means a partner in the firm;
  - (ii) Any association of persons or a body of individuals, means any member controlling the affairs thereof.

(3) The provision of this section shall be in addition to, and not in derogation of, the provisions of section 22A.

Sub-section 1:Persons deemed guilty when offence committed By Company:

This is a deeming section when any contravention of the provisions of the Act or Regulations or bye-laws is committed by a company, in addition to the persons covered under the expression "whoever contravenes", contained in Section 20 of the Act, every person who was in charge of and was responsible for the conduct of the business of the company is deemed to have committed an offence under It is only a director who is in charge of the business of the company who would be liable and not the other directors. The expression "in charge" indicates that the person should be in overall charge of the day-to-day business of the company or partnership firm (Gurdharial Gupta v/s Mehta D.N. AIR 1971 SC 2162 (1971) 3 SCC 189.)

A person will, however, not be convicted under this section merely because he has the right to participate in the business of the firm under the terms of the partnership deed. (State of Karnataka v/s Pratap Chand. (1981) 128 IRT 573 (SC)).

Unless the Managing Director under the Companies Act is entrusted with powers of management by virtue of an agreement with the company or by virtue of its Memorandum of Association or Articles of Association, be cannot be said to be in charge and responsible to the company for the conduct of the business of the company. (E. Merck India Ltd. v/s Director of Enforcement (1988) 39 Taxman 47 (Corp. mag.) (FERAB)) Separate prosecution of the person in charge or the officer of the company without prosecuting the company itself is permissible. (Sheoratan Agarwal v/s State of Madhya Pradesh AIR 1984 SC 1824.)

Defenses

The proviso provides two defenses to a person prosecuted under sub-section (1), being the person who was in charge of and responsible to the company for the conduct of the business of the company:

(i) That he held no knowledge of the offence.

Or

(ii) That he had exercised due diligence to prevent the commission of such offence.

The term "due diligence" has been defined as "such" watchful caution and foresight as the circumstances of the particular case demands" (P Ramanatha Aiyar's The Law Lexicon' 2nd edition).

Black's Dictionary of Law (5th ed.) defines "due diligence" as "such measure of prudent, activity or assiduity, as is properly to be expected from, and ordinary exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but relative of the facts of the each case".

It is submitted that in the context of the Depositories Act, 1996, the defence of "due diligence" would be available only if it can be shown:

(i) That the person entrusted with the task of complying with the provision of the Act/Regulation/bye-laws was adequately qualified to do so.

(ii) That the company had in place such systems incorporating adequate checks and balances as would enable the company to detect any contravention of the Act/Regulation/Bye-laws; and

(iii) That adequate control and supervision was in fact exercised by the person entrusted with the aforesaid task.

Subsection (a) Additional persons deemed guilty:

Mens Rea:

When an offence is committed by a company, in addition to the company itself, firstly, under sub-section (1), 'every person (there may be more than one person) in charge of the business of the company is liable for the offence; secondly, in addition to a person on persons in charge of the conduct of the business of the company, under sub-section (2), if it is proved that the offence was committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such a person shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

The provisions of Section 20 and 21 imposing penal liability for non-compliance with the provisions of the Act of any regulation or bye-laws do not follow the modern trend in imposing penal liability for non-compliance of any provision of law on the person charged by the Board of Directors with the responsibility of complying with that provision. It is submitted that whereas Section 5 of the Companies Act has done away with the concept of mens rea quo directors, officers of company in respect committed by the company, it would appear that the present section has retained the concept of mens rea.

Explanation. – Offence committed by a firm or other association of persons: -

Where contravention (or attempt to contravene or abetment of contravention) of the provisions of the Act or any regulation or bye-laws made thereunder is committed by a firm or other association of persons, the person who was in charge of, and was responsible to the firm or association of persons as well as the partners of the firm would be liable.

Section 25: Certain offences to be cognizable.

Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1989), any offence punishable under sub-section (1) of section 23 shall be deemed to be a cognizable offence within the meaning of that Code.

Commentary

Definition of cognizable offence in code of Criminal Procedure, 1898 is provided in section (2)(c) – means an offence for which, and cognizable case means a case in which a police officer may in accordance with first schedule or under any other law or the time being in force arrest without warrant.

MISCELLANEOUS

SECTION 27: Title to dividends.

(1) It shall be lawful for the holder of any security whose name appears on the books of the company issuing the said security to receive and retain any dividend declared by the company in respect thereof for any year,

notwithstanding that the said security has already been transferred by him for consideration, unless the transferee who claims the dividend from the transferor has lodged the security and all other documents relating to the transfer which may be required by the company with the company for being registered in his name within fifteen days of the date of which the dividend became due.

Explanation. – The period specified in this section shall be extended –

(i) In case of death of the transferee, by the actual period taken by his legal representative to establish his claim to the dividend;

(ii) In case of loss of the transfer deed by theft or any other cause beyond the control of the transferee, by the actual period taken for the replacement thereof; and

(iii) In case of delay in the lodging of any security and other documents relating to the transfer due to causes connected with the post, by the actual period of the delay.

(2) Nothing contained in sub-section (1) shall affect –

(a) The right of a company to pay any dividend which has become due to any person whose name is for the time being registered in the books of the company as the holder of the security in respect of which the dividend has become due; or

(b) The right of the transferee of any security to enforce against the transferor or any other person his rights, if any, in relation to the transfer in any case where the company has refused to register the transfer of the security in the name of the transferee.

Commentary

Sub-section 1: Rule of law relating to dividend

(1) Dividend is payable after it is declared by the company to a person whose name appears on the books of company issuing the securities namely shares of receive such dividend. The books referred to is registered of members maintained by a company under section 150 of Companies Act 1956 after the amendment of 2000, the dividend include interim dividend (see section 2(14A) of Companies Act, 1956) and therefore the same rule apply as to interim dividend. Under the newly inserted sub-section (1A) of section 205. The Board of Directors may declare the interim dividend. Therefore now same rule will be apply to interim dividend also. Namely, it is payable to persons whose name stands on the register of members on the record date.

Pending registration

Pending registration of transfer of the security to the name of the transferee, dividend may be paid to the transferee if the condition mentioned in the section complied with by the transferee. However the provisions of the Companies Act, 1956 in this respect are different.

Under section 206A of the Companies Act, 1956.

Where any instruments of the transfer have been delivered to any company for registration and the transfer of such shares has not being registered by the company. It shall pay such dividend to the transferee if the transferor has authorised company in writing to do so. Otherwise transfer the dividend in relation to such shares to the special account referred to in section 205A.

May a company pay the dividend declare to the transferee pending registration of transfer, under this section 27 without complying section 206A of the Companies Act, 1956?

Sub-section 2

Clause (a) – Under Clause (a) of this sub-section 2 a company may pay dividend to the transferor in spite of the fact that the transferee comply with sub-section 1.

Clause (b) – Under Clause (b) of the sub-section 2 if the company refuses to registered the transfer of security to the name of the transfree, the transfree may pursue all the remedies that he has against the company and the transferor against the refusal by the company to the transfer the securities to his name by remedy (by way of appeal etc.)

Section 27A: Right to receive income from collective investment scheme.

This section 27A is enacted with reference to the income from units and other instruments issued by the collective investment scheme as section 27 is enacted in respect of dividend declared on shares issued by the companies, and the two sections mainly 27A and 27 are enacted in the same terms. This section also provides the requirement of paying income from the units or other instruments to the transferee before the entering of his name in the register or other books of the collective investments scheme and the commentary. Therefore the commentary under previous section namely section 27 may be refer to.

The scheme namely the collective investment scheme may be issued by the incorporated company registered under companies Act, 1956 and further governed and regulated by the SEBI as one of the intermediary under section 12 of SEBI Act, 1992. And these schemes are governed by SEBI (collective investment scheme) regulation 1999. According these regulation the one of the condition for eligibility is that the applicant is settle and registered as a company under Companies Act, 1956.

Section 28: Act not to apply in certain cases.

(1) The provisions of this Act shall not apply to –
  (a) The Government, the Reserve Bank of India, any local authority or any corporation set-up by a special law or any person who has effected any transaction with or through the agency of any such authority as is referred to in this clause;
  (b) Any convertible bond or share warrant or any option or right in relation thereto, insofar as it entitles the person in whose favour any of the foregoing has been issued to obtain at his option from the company of other body corporate, issuing the same or from any of its shareholders or duly appointed agents' shares of the Company or other body corporate, whether by conversion of the bond or warrant or otherwise, on the basis of the price agreed upon when the same was issued.

(2) Without prejudice to the provisions contained in sub-section (1), if the Central Government 1 is satisfied that in the interests of trade and commerce or the economic development of the country it is necessary or expedient so to do, it may, by notification in the Official Gazette, specify any class of contracts as contracts to which this Act or any provision contained therein shall not apply, and also the conditions, limitations or restrictions, if any, subject to which it shall not so apply.

Commentary

Sub-section 1

This sub-section specifies the organization and the types of securities to which this Act does not apply.

Sub-section 2

This sub-section gives power to Central Government (i.e. SEBI also) to specify "Class" of contracts to which this contract will not apply and impose the conditions, limitations and restrictions subject to which the act will not apply.

Section 30: Power to make rules

(1) The Central Government may, by notification in the Official Gazette, make rules for the purpose of carrying into effect the objects of this Act.

(2) In particular, and without prejudice to the generally of the foregoing power, such rules may provide for, -
  (a) The manner in which applications may be made, the particulars which they should contain and the levy of a fee in respect of such applications;
  (b) The manner in which any inquiry for the purpose of recognising any Stock Exchange may be made, the conditions which may be imposed for the grant of such recognition, including conditions as to the admission of members if the Stock Exchange concerned is to be the only recognised

Stock Exchange in the area; and the form in which such recognition shall be granted;

(c) The particulars which should be contained in the periodical returns and annual reports to be furnished to the Central Government;

(d) The documents which should be maintained and preserved under section 6 and the periods for which they should be preserved;

(e) The manner in which any inquiry by the governing body of a Stock Exchange shall be made under section 6.

(f) The manner in which the bye-laws to be made or amended under this Act shall before being so made or amended be published for criticism;

(g) The manner in which applications may be made by dealers in securities for licences under section 17, the fee payable in respect thereof and the period of such licences, the conditions subject to which licences may be granted, including conditions relating to the forms which may be used in making contracts, the documents to be maintained by licensed dealers and the furnishing of periodical information to such authority as may be specified and the revocation of licences for breach of conditions;

(h) The requirements which shall be complied with –

(A) By public companies for the purpose of getting their securities listed on any Stock Exchange;

(B) By collective investment scheme for the purpose of getting their units listed on any Stock Exchange;

(ha) the form in which an appeal may be filed before the Securities Appellate Tribunal under section 22A and the fees payable in respect of such appeal; and

(i) Any other matter which is to be or may be prescribed.

(3) Every rule made under this section shall, as soon as may be, after its publication in the Official Gazette, be laid before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both House agree in making any modification in the rule or both Houses agree that the rule should no be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Commentary

Sub-section 2

The Central Government has framed one set of rule known as securities contract (Regulation) rules 1957 providing rules on all matters mentioned in sub-section 2.

Sub-section 3

This is the usual provision requiring rules framed by Central Government, under the prowers delegated to them by a parliament under the Act, to be laid before parliament with power to modify or annual them.

Annexure

RECENT AMENDMENTS
(Section 424-560)

Amendment in provisions relating to winding up (Sec. 424 – 560)

(1) **Sec. 425 – modes of winding up.:**

Only two modes of winding up
- Winding up by tribunal
- Voluntary winding up.

General note:
- ⁎ Winding up under Supervision of court has been deleted.
- ⁎ Word “court” replaced by “National company law tribunal”.

(2) **Section 433: Grounds for Winding up thro’ tribunal.**

⇒ Three new clauses (Grounds) have been added.

Clauses (g)
Default in filing annual accounts / annual returns for 5 consecutive financial years

Clauses (h)
Company has acted
- ⇒ Against the interest of sovereignty & integrity of India.
- ⇒ Against the security of the state.
- ⇒ Against the friendly relations with foreign states.
- ⇒ Public order, decency or morality.

Clauses (I)
Winding up of sick Company by tribunal u/s 424G.

(3) **Sec. 434: unable to pay debts:** ⇒ “Rs.500” substituted by “Rs.1, 00,000”.
(4) **Sec. 439: Petition to the tribunal:** If sec. 433(h) is attracted, application should be made to the tribunal only by CG/SG.

(5) **Sec. 439A: Statement of affairs to be filed on winding up of a company:-**

(i) A company, interalia, can file a winding up petition to the tribunal. In such case, a statement of affairs should accompany the petition.

(ii) If a winding up petition had been preferred by some other person referred to u/s 439 then, if the company opposes, it has to file a statement of affairs.

(iii) **Contents of such statement:**

* Last known addresses of all directors and company secretary.
* Details of location of assets of the company & their value.
* Details of all debtors & creditors with their complete addresses.
* Details of workmen & other employees of the amount outstanding to them.
* Such other details as may be specified by the tribunal.

(6) **Sec. 442 (Power of court to stay / restrain proceeding (deleted).**

∴ The tribunal has no power to Stay / restrain legal proceedings before ordering winding up.

(7) **Sec. 446A: Responsibility of directors & officers to submit to tribunal audited books & accounts.**

⇒ Audited accounts up to the date of winding up order.

⇒ Penalty for default.

(8) **Sec. 448: Appointment of official liquidator.**

(a) **Who can be appointed as official liquidator:**

* Firm of chartered accountants.
* Firm of advocates.
* Firm of company secretaries
* Firm of cost and works accountants.
* A body corporate consisting of above professionals.
* A whole time / Past time officer of CG.

Note: Views of secured creditors / workmen should be considered.

(b) **Terms & conditions of appointment:**

* Determined by the tribunal (For the person other than CG Officers)
* Maximum Remuneration = 5% of value of debt recovered and realisation of sale of assets.

For the person (officer) appointed by CG the terms & conditions are determined by CG. The CG has power to appoint additional, cv Deputy etc to assist the official liquidators in discharges of his duties. Terms & condition of these are also determined by CG (In accordance with the rules made by it).

(c) **Priority of liquidator's remuneration:**

- It shall be treated as first charge on the realisation of assets.
- It can be either paid to central govt. or the official liquidator (as the case may be).

(d) **Certain Powers of tribunal.**

* Powers to transfer cases from one lice to another. (reason to be recorded in writing)
* Power to remove official liquidator. (Sufficient cause to be shown).
* Power to proceed against the official liquidators for professional misconduct.

(9) **Power of Court (Sec. 457)**

As per sec 458 courts can say that its sanction is not necessary for exercising the powers u/s 457 (1)

Sub. Sec. (1) Powers (Sanction of court is necessary)	Sub. Sec. (2) Powers (Sanction of court – not necessary)
⇒ Power to carry on the business of the company for beneficial winding up.	⇒ Power to execute deeds, documents.
⇒ Power to institute / defend legal proceedings.	⇒ Power to use common seal.
⇒ Power to sell movable or immovable properties.	⇒ Power to prove, rank, claim, against the estate of the insolvent contribution.
⇒ Power to raise money on the security of assets of the company.	⇒ Power to execute negotiable instrument.
⇒ Power to sell whole of the undertaking of the company as a going concern.	⇒ Power to appoint an agent to carry on such business which he is not capable to carry on.

Duties of official liquidator:-

(a) Appointment of security guards & Preparation of inventory of assets:

⇒ To protect the assets.
⇒ Secured creditors shall be consulted in preparation of inventory of assets.

(b) Appointment of valuer:

⇒ The liquidator shall appoint a valuer to assess the value of company's assets.
⇒ **Who can be appointed as valuer:**
  * Chartered surveyors.
  * Chartered accountants.
⇒ **Time limit for appointment**. Within 15 days of taking the property in to his custody. (Note: The directions of tribunal should be honoured.)

(c) Advertisement inviting bids for sale of assets.

(i) **Time limit for giving advertisement:** Within 15 days of receiving valuation report.

(ii) **Contents of the advertisement (supra):**

(a) Name, address of registered office of company, its branches & offices.
(b) Place where the assets of the company are kept.
(c) Last date of submission of bid.

Note: It shall not exceed 90 days of issued of ad.

(d) Inspection hours.
(e) Last date for the withdrawing hid.
(f) Financial guarantee (note: It should be atleast half the value of bid)
(g) Validity period of bids.
(h) Place and date of opening the bids in public.
(i) Reserve price & EMD.
(j) Any other terms & condition necessary.

(iii) **Offer to make a bid.**

⇒ Shall be deposited with the official liquidator within 45 days of advertisement.
⇒ Shall be in the manner prescribed.

⇒ Inspection of the assets to be bidded, (until 15 days before closure of bid) should allowed.

⇒ Bid may be withdrawn – within 3 days of closure of bid.

(d) **Opening of new bank account.** New separate bank account shall be opened for crediting the sale of proceeds of assets recovery of debts.

(e) **Maintenance of books of accounts**. proper books of accounts in respect of all receipts & payments shall be maintained. An half – yearly return of receipts & payments should be submitted to the tribunal.

(f) **Service of notice to certain person**. The liquidators shall serve a notice, to the persons referred to in sec. 454(Z) to submit at verify a statement of affairs.

Note: The official liquidator has power to call for any information relating to the state of affairs of the company for the purpose of investigating into the affairs of the company. (From the persons referred to in sec. 439A & 454 & any other person).

(10) **Sec. 459 provision for legal assistance to liquidator:-**

⇒ **Who can provide legal assistance:**

* Chartered Accountants.
* Company Secretaries.
* Cost Accountants.
* Legal practioners.

(11) **Sec. 478: Public examination of delinquent directors etc.**

* Chartered Accountant.
* Company secretaries
* Cost Accountants.

Can also be allowed to provide legal assistance.

(12) **Sec. 483: Appeal to NCL (Appellate) tribunal.**

Order made / decision given before 2002 : court; after 2002 : tribunal (Appellate)

(13) **Sec 509: Final meeting & dissolution.**

The term official liquidator refers to the official liquidator who are Officers of CG– Whole time /Part time.

(14) **Sec. 513: Who can be appointed as liquidator:**

A body corporate, consisting of such professionals as may be prescribed by CG – shall be qualified for appointment as official liquidator (u/s. 448)

Note: Sec. 490 & Sec. 502 not specified here.