Indian Companies Act – 2013, Part –II

- Member of a Company –Concept, Who can become a member, Modes of acquiring membership, Cessation of membership, Right & Liabilities of Members.
- Director – Qualifications& Disqualification, Classification, Director Identification Number (DIN), Legal Position of Directors.
- Meetings – Types, Legal Provisions of Statutory Meeting, Annual General Meeting, Extra-Ordinary Meeting, Board Meeting.

Member of a company

Concept –

Member in relation to a company means —

- the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
- every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;
- every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

As per the definition, a person can't be treated as member of the company unless his name is entered in the Register of members of the company.

The term 'member' is different from that of 'shareholder'. A shareholder can be shareholder by acquiring shares but will not be member till his name entered in the Register of Members of the company. This definition is relaxed in case of section 244 where even a shareholder is treated as a 'member'.

In case of a company limited by guarantee and not having share capital the person who provides the guarantee will become its member as soon as his name is entered in the Register of Members.

Who can become a member

Subject to the Memorandum and Articles, any sui juris (a person who is competent to contract) except the company itself, can become a member of a company. However, it is important to note the following points in relation to certain organisations and persons:

1. **Company as a member of another company** : A company is a legal person and so is competent to contract. Therefore, it can become a member of any other company. However, it must be authorised by its Memorandum of Association to invest in the shares of that company or any other company. A subsidiary company cannot become a member of its holding company. Also a company cannot become a member of itself.

2. **Partnership firm as a member** : A partnership firm is not a legal person and as such it cannot, in its own name, become a member of a company. However, its partners may become joint shareholders of a company and their names be entered in the register of members. However, it can become a member of a Section 25 Company, but on dissolution of the firm its membership of such a company ceases. Section 25 company :

A non-profit making company licensed under Section 25 of the Companies Act can become a member of another company if it is authorised by its Memorandum of Association to invest into shares of the other company.

3. **Foreigners as members** : A foreigner may take shares in an Indian company and become a member subject to the provisions of the Foreign Exchange Management Act, 1999, but in the event of war with his country, he becomes an alien enemy and his power of voting and his right to receive notices are suspended.

4. **Minor as member** : A member who is not a sui juris e.g., a minor, is wholly incompetent to enter into a contract and as such cannot become a member of a company. Consequently, an agreement by a minor to take shares is void ab-initio.
5. It has been held by the Company Law Board that an agreement in writing for a minor to become a member may be signed on behalf of the minor by his lawful guardian and the registration of transfer of shares in the name of the minor, acting through his or her guardian, especially where the shares are fully paid

6. **Receiver** : A receiver whose name is not entered in the register of members cannot exercise any of the membership rights attached to a share unless in a proceeding to which company is a party and an order is made therein. Mere appointment of a receiver in respect of certain shares of a company without more rights cannot, deprive the holder of the shares whose name is entered in the register of members of the company, the right to vote at the meeting of the company [Balakrishna Gupta v. Swadeshi Polytex Ltd., (1985) 58 Comp. Cas. 563 (S.C.)].

7. **Bankrupt** : A bankrupt may be a member of a company, as long as he is on the register of members. He is entitled to vote [Morgan v. Gray, (1953) Ch. 83]. Persons taking shares in fictitious names : A person who takes shares in the name of a fictitious person, becomes liable as a member besides incurring criminal liability under Section 68A of the Act, wherein punishment provided is imprisonment up to five years.

8. **Trade Union as member** : A trade union registered under the Trade Union Act, can be registered as a member and can hold shares in a company in its own corporate name.

Mode of acquiring membership of a company

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

1. By subscribing to the Memorandum of Association: The subscriber to the Memorandum of a company are deemed to have agreed to become a member of the company and on the registration of the company their names are entered as members on the register of members

2. By agreeing to take qualification Shares: According to the section 266 directors of the company on delivering to registrar a written undertaking to take their qualification shares and to pay for them become the members of the company and they are in same position as if they were subscribers to the Memorandum.

3. By transfer of shares: Shares in a company are movable property and are transferable in the same way as provided in the Articles of the company. Thus one person possesses the right to transfer his shares to another person. On the registration of transfer the transferee becomes the member of the company.

4. By application and allotment of shares: A person may become a member of a company by an application for shares to the formal acceptance by the company. On valid allotment, the name of the shareholder is entered in the register of members

5. By succession: On the basis of the succession certificate the legal heirs of the deceased member/shareholder get the right to be a member of the company. The company on this basis enters their name in the register of members.

6. By estoppel or acquiescence: A person who knowingly permits entering his name in the register of members, becomes a member by estoppel or acquiescence.

Cessation/ Termination of Membership :

A person may cease to be a member of a company, at any time, one of the following ways:

1. When he transfers his shares and the transfer is duly registered in the books of the company.
2. By forfeiture of shares for non-payment of calls, if articles so provide.
3. By a valid surrender of shares. It is a short cut to forfeiture as it involves no legal formalities.
4. When the company sells the shares, in exercise of its right or line over them, by giving a 14 days notice to a debtor shareholder.
5. When a shareholder dies and his shares stand transmitted to his legal representative, upon registration of the share;, in the successor's name.
6. When he is declared insolvent and the Official Assignee disclaims the shares under his right of 'disclaimer of onerous properly.'
7. By repudiating the contract of membership on the ground of misrepresentation in the prospectus or on the ground of irregular allotment.
8. By conversion of share certificate into share warrant, unless the articles provide otherwise. In this case one ceases to be a 'member' in the strict sense of the term, that is, his name being removed from the Register of Members, although he continues to be a shareholder of the company.

Right & Liabilities of Members.

Rights of a Member:

1. Right to obtain the share certificate from the company.
2. Right to have his name entered in the register of members.
3. Right to transfer his securities (subject to the restrictions contained in the articles and the Act.
4. Right to receive the notice of general meetings, attend the general meetings and vote thereat.
5. Right to receive the dividend, where a dividend is declared by the company.
6. Right to apply to the Court seeking an injunction restraining the directors from paying dividend out of capitals.
7. Right to inspect and obtain extracts and copies of the registers and indices of members, debenture-holders and other security holders, and annual returns.

8. Right to obtain copies of Memorandum and Articles.
9. First right to have the shares offered to him in case of further issue of shares.
10. Right to apply to the Court to set aside any variation in the rights attached to any class of shares.
11. Right to give a special notice so as to move a resolution requiring special notice.
12. Right to receive a copy of special notice when special notice is served on the company.
13. Right to obtain a copy of the minutes of the general meeting.
14. Right to requisition an Extra-ordinary General meeting (EGM) of the company.
15. Right to vote at a general meeting in respect of any matter requiring an ordinary resolution or a special resolution.
16. Right to vote by means of electronic mode in respect of any matter requiring an ordinary resolution or a special resolution.
17. Right to vote by postal ballot when a resolution is put to vote by the company by way of postal ballot.
18. Right to obtain copies of profit and loss account, balance sheet, auditor's report and other documents.
19. Right to make an application to the Company Law Board seeking an order for calling the AGM.
20. Right to make an application to the Company Law Board seeking an order for calling an EGM.

Liabilities of a Member:

1. Companies limited by shares: Companies limited by shares are the most common and may be a public company or a private company, where the liability of members of a company is limited to amount unpaid on the shares.
2. Companies limited by guarantee: In this type of companies liability of members of a company is limited to a fixed amount which members undertake to contribute to the assets of company in the event of its being would up.
3. Unlimited companies: Unlimited companies are those companies without limited liability. Section 3 specifically provides that any 7 or more persons (2 or more in case of a private company) may form an incorporated company, with or without limited liability.

Directors

Following are the categories of directors who constitute 'Board' of a Company:

1. Ordinary directors: Ordinary directors are also referred to as simple director who attend board meeting of a company and participate in the matters put before the board. These directors are neither whole time directors nor managing directors.

2. Managing Director: According to Sec.2 (54) of the Indian Companies Act "managing director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is

entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of managing director, by whatever name called.

3. Whole-time directors: A whole-time executive director includes a director in the whole-time employment of the company.

4. Alternate director: The Board Meeting may be held at a time when a director is, absent for a period of more than three months from the state and in such a situation, an 'alternate director' is appointed. The Board of Directors can appoint the additional director in the absence of a director if so authorized by articles or by a resolution passed by the company in general meeting. The alternate director shall work until the original director return or up to the period permitted to the original director.

5. Professional Directors: Any director possessing professional qualifications and do not have any pecuniary interest in the company are called as "professional directors".

6. Independent directors: Sec. 2(47) defines independent directors to mean an independent director referred to in Sec. 149(5).

7. Nominee Directors: The banks and financial institutions which grants loans to a company generally impose a condition as to appointment of their representative on the board of the concerned company. These nominated persons are called as nominee directors.

Qualifications of a Director:

As regards to the qualification of directors, there is no direct provision in the Companies Act, 2013.But, according to the different provisions relating to the directors; the following qualifications may be mentioned:
1. A director must be a person of sound mind.
2. A director must hold share qualification, if the article of association provides such.
3. A director must be an individual.
4. A director should be a solvent person.
5. A director should not be convicted by the Court for any offence, etc.

Disqualifications of a director:

Section 164 of Companies Act, 2013, has mentioned the disqualification as mentioned below:
1) A person shall not be capable of being appointed director of a company, if the director is
(a) Of unsound mind by a court of competent jurisdiction and the finding is in force;
(b) An undischarged insolvent;
(c) Has applied to be adjudicated as an insolvent and his application is pending;
(d) Has been convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence;
(e) Has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call; or
(f) An order disqualifying him for appointment as director has been passed by a court in pursuance of section 203 and is in force, unless the leave of the court has been obtained for his appointment in pursuance of that section;

2) Such person is already a director of a public company which:

(a) Has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or
(b) Has failed to repay its deposits or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more:
Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of five years from the date on which such public company, in which he is a director, failed to file annual accounts and annual returns under sub-clause (A) or has failed to repay its deposit or interest or redeem its debentures on due date or paid dividend referred to in clause (B).

Position of Directors

It is very difficult to define precisely the position of directors in a company. The Companies Act, 2013, is also silent on this issue. Directors have been described sometimes as trustees, sometimes as agents or sometimes as managing partners. They have some attributes of all of them, but they are neither trustees nor managing partner in full sense of the term. The legal position can be discussed as under:

1. Directors as Agent: Directors are, in the eyes of law, agents of the company for which they act. The company itself cannot act, it can act only through directors and by the reason of which a relation of principal and agent is established between the company and the directors. Wherever as agent is liable those directors would be liable; where the liability would attach to the principal and principal only, the liability is the liability of the company.

Where the directors make contracts on behalf of the company, they incur no personal liability. But the position of directors differ from that of the agents because an agent can enter into a contract in his own name but a director cannot. Again an agent may not disclose the name of his principal but a director must disclose the name of his principal. Hence, the directors are not agents in the true sense.

2) Directors as trustees: The directors have also been described as trustees of the company. They are trustees of the company's money or property which comes into their hands or which is actually under their control and of the powers entrusted to them. But in real sense, the position of directors is differ from that of the trustees because a trustee can't be an employee of the trust but a director can be an employee of the company. Again, an artificial person can become a trustee but an artificial person cannot become a director. As, only individual can be a director. Hence, directors may better be considered as quasi trustee.

3) Directors as officers: Under sec. 2(59) of the Companies Act, they are liable to certain penalties if the provisions of the Companies Act are not complied with. Moreover whether or not a director is in the employment of the company, he shall be treated as an officer of the company.

4) Directors as employees: Although directors are agents of the company, they are not employees or servants of the company. Hence they cannot claim their remuneration as a preferential creditor in the event of winding up of a company under sec. 327 of the Companies Act, 2013. But where any director, besides being a director, is also in the service or employment of the company, such as secretary, manager, accountant or otherwise, he will be treated as an employee. As such he will be entitled to the remuneration and other benefits admissible to his as an employee in addition to his rights as a director to sitting fee, etc.

5) Directors as managing partners: The directors are also sometimes described as managing partners because like a partner of a firm, they manage the affairs of the company and they are also usually important shareholders of the company. They do all proprietorial functions like allotting shares, making calls, forfeiting shares etc.
However, all the partners of a firm act on the principal of mutual agency. But it is not so in the case of directors. A director has no authority to bind the other directors and shareholders. Moreover, directors are subject to retirement by rotation whereas partners of a firm are not. Hence, the directors are not managing partners in the full sense.

Thus, directors are described as trustees, agents or managing partners. The board of directors are the brain and the only brain of the company which is the body and the company can act only through them.

Meetings

1) Statutory Meeting:

A public company limited by shares or a guarantee company having share capital is required to hold a statutory meeting. Such a statutory meeting is held only once in the lifetime of the company. Such a meeting must be held within a period of not less than one month or within a period not more than six months from the date on which it is entitled to commence business i.e. it obtains certificate of commencement of business. In a statutory meeting, the following matters only can be discussed:
• Floatation of shares / debentures by the company
• Modification to contracts mentioned in the prospectus

The purpose of the meeting is to enable members to know all important matters pertaining to the formation of the company and its initial life history. The matters discussed include which shares have been taken up, what money has been received, what contracts have been entered into, what sums have been spent on preliminary expenses, etc. The members of the company present at the meeting may discuss any other matter relating to the formation of the Company or arising out of the statutory report also, even if no prior notice has been given for such other discussions but no resolution can be passed of which notice have not been given in accordance with the provisions of the Act.

2) Board Meeting:

The directors are to act collectively in the form of a board, and the decisions are taken at the meetings of the Board of directors. These meetings may again be of two types:
a) Meetings of the Board of directors; and (Sec. 173 of the Companies Act, 2013)
b) Meetings of the committee of directors.

A. Meeting of the Board of Directors: As the affairs of a company are managed by the board of directors, therefore it is necessary that the directors should often meet to discuss various matters regarding management and administration of affairs of the companies in the best interest of shareholders.

B. Meeting of a Committee of the Board: As per sec. 179(3), the board my, by a resolution passed at a meeting, delegate various powers to a committee of directors, managing directors, manager or any other principle officer of the company.

Provisions of the Companies Act, 2013 for Board Meeting

1. Frequency of Meeting:

a) First Meeting: First Meeting of Board of Directors within 30 (Thirty) days from the date of Incorporation of company.

b) Subsequent Meetings:
One person Company, Small company and Dormant company: At least one meeting of Board of directors in each half of calendar year and minimum gap between two meetings should be at least 90 days.

Other than Companies mentioned above: Minimum No. of 4 meetings of Board of Director in a calendar year and maximum gap between two meetings should not be more the 120 days.

2. Calling of Meeting: Meeting of Board of Director should be called by giving 7 days notice to Directors at his registered address through:
a) By hand delivery
b) By post
c) By Electronic means

Meeting at shorter Notice: A meeting of Board of Directors can be called by shorter notice subject to the conditions:
If the company is require to have independent director:

a) Presence of at least one Independent director is required.
b) In case of absence, decision taken at such meeting shall be circulated to all the directors, and
c) shall be final only on ratification thereof by at least one Independent Director
If the company doesn't require to have independent director: The meeting can be called at a shorter notice without any conditions to be complied with.

3. Quorum of Board Meeting: 1/3 rd of total strength OR 2 (Two) Directors, whichever is higher. Where meeting of Board could not be held for want of quorum, the meeting shall automatically adjourn to same time, same place at next week (Not being national holiday). If number of directors reduced below quorum, then the remaining directors may hold the meeting for the following purposes:
a) To call a General meeting
b) Increase the number of directors.
c) Quorum in case of Interested Directors:
d) If interested director exceed or equal to 2/3 of total strength the remaining directors not being less than 2 (two) shall be the quorum.

4. Participation of Directors in Board Meetings: directors may, apart from attending the meeting physically, participate in the meeting by way of video conferencing & other audio visual means. Matter which can't be dealt at a meeting held though Video conferencing:
a) Approval of the annual financial statements;
b) Approval of the Board's report;

c) Approval of the prospectus;
d) Audit Committee Meetings for consideration of accounts; and
e) Approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

3) Extra Ordinary General Meeting

Every general meeting (i.e. meeting of members of the company) other than the statutory meeting and the annual general meeting or any adjournment thereof, is an extraordinary general meeting. Such meeting is usually called by the Board of Directors for some urgent business which cannot wait to be decided till the next AGM. Every business transacted at such a meeting is special business. An explanatory statement of the special business must also accompany the notice calling the meeting. The Articles of Association of a Company may contain provisions for convening an extraordinary general meeting.

Objectives (Purposes) of Extraordinary General Meeting:
The main purpose (Objectives) to hold these meetings are:
a) Change in memorandum of association.
b) Change in articles of association.
c) Reduction or reorganization of share capital.
d) Issue of debentures.
e) Removal of directors.
f) Removal of auditors.

The business transacted at an extraordinary general meeting, being special business, every notice of such meeting must be accompanied by an explanatory statement.

Legal Provisions Relating to Extraordinary General Meeting (EGM):
1. By Whom EGM is called:

a) By the Board of directors: EGM may be called by the board whenever it deems fit by depositing a valid requisition at the registered office. On receipt of a valid requisition, the board shall within 21 days proceed to call an EGM to be held not later than 45 days from the date of deposit of requisition. The notice shall be given to those members whose names appear in the register of members within 3 days of receipt of a valid requisition.

b) On the Requisition of shareholders: EGM may be called on requisition of members holding 1/10th or more of the paid up equity share capital if company have share capital. If company do not have share capital, on requisition of members holding 1/10th or more of total voting power. The requisition shall specify the matters for the consideration of which EGM is to be called and it is signed by all the requisitionists or a requisitionist duly authorised.

c) By the requisitionists themselves: If the board fails to call an EGM, it may be called by the requisitionists themselves as follows:
• The EGM shall be held within 3 months from the date of deposit of the requisition.
• The EGM shall be called in the same manner in which a meeting is called by the board of directors.
• The requisitionists shall be entitled to receive a list of members from the company.
• The EGM should be convened on a working day at the registered office or in the same city or town in which the registered office is situated.

• The notice of EGM shall be given by speed post or registered post or electronic mode.
• The notice of EGM shall disclose the place, date, day, hours and business to be transacted at the meeting.

d) By the tribunal: If for any reason it is impractible to call a meeting of a company, other than annual general meeting, in any manner in which meeting of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this act or the articles, the tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting order a meeting of the company to be called, held and conducted in such manner as the tribunal thinks fit and give such ancillary directions as the tribunals thinks necessary.

4) Annual General Meeting

Provisions of the Company's Act relating to Annual General Meeting: (Sec. 96 of the Companies Act, 2013)
As the term denotes, annual general meeting is the meeting under section 96 which has to be held annually. It is the meeting of the members through which they get the opportunity to express their views on the management of the company. Through this meeting, the shareholders can exercise control over the affairs of the company. The 'Annual General Meeting' is sometimes called '"Ordinary General Meeting" as it usually deals with the so-called 'Ordinary Business'.

Purpose (Objectives) to hold these meetings are:
1. To submit the annual account, balance sheet, director's report and auditor's report.
2. To declare the dividend.
3. Special business- any other business to be transacted will be deemed special business likes:
4. To increase share capital
5. To alter Article of Association
6. To appoint auditors and fix their remuneration.
7. To elect directors are that liable to retire by rotation.

Legal Provisions Relating to Annual General Meeting
Every company is required to hold this meeting. But, there are certain legal provisions which have to be followed, relating to the annual general meeting as contained in sections 96 and 97. There are:

1. First Annual general meeting: A company may hold its first annual general meeting within a period of 9 months from the date of incorporation. However this should not be more than 9 months from close of financial years.

2. Subsequent meeting: There must be one meeting held in each year. The gap between two annual general meetings must not be more than 15 months. Meeting must be held not later than 6 months from close of financial year.

3. Extension of time: the registrar has the power to extend the time of 15 months by 3 more months in special cases.

4. Day, hour and place of meeting: The meeting can be held at any working place, on any working day and working hours. If the day scheduled for meeting is declared by the Central

Government to be a public holiday after the issue of the notice, it shall not be deemed as a holiday.

5. Notice of the meeting: 21 clear days notice or any shorter notice if agreed by all shareholders must be given.

6. Business to be transected: At every AGM, the following matters must be discussed and decided. Since such matters are discussed at every AGM, they are known as ordinary business. All other matters and business to be discussed at the AGM are special business.

The following matters constitute ordinary business at an AGM :
i. Consideration of annual accounts, director's report and the auditor's report
ii. Declaration of dividend
iii. Appointment of directors in the place of those retiring
iv. Appointment of and the fixing of the remuneration of the statutory auditors.

• Ordinary business is transacted by passing ordinary resolution.

Special Business: All matters other than ordinary business are treated as special business at an annual general meeting. For transacting special business at a meeting, there shall be annexed to the notice of meeting an explanatory statement setting out:
(a) All material facts concerning each item of such business, and
(b) In particular, nature of the concern or interest, if any, of every director or manager in each item.
(c) Statement must also state time and place where document, if any, proposed for approval at the meeting can be inspected by members.
(d) The items constituting special business are transacted either by an ordinary resolution or by a special resolution depending on the requirements of the Companies Act 2013 or articles of the company in respect of each particular item.

7. Default in holding Annual general meeting: As mentioned earlier, every company is required to hold this meeting according to the provision of the Companies Act. If any company fails to hold the annual general meeting the consequences are as follows:
A. As mentioned above, the annual general meeting provides the opportunity to the members to express views on the management of the company. Any member can apply to the Central Government for the failure of the company to call the meeting. The Central Government may give direction to the company for calling the meeting.

B. The company as well as every officer will become liable if they fail to held the meeting and shall be punishable with fine upto Rs. 50,000, and if the default continues , with a further fine of Rs. 2,500 for every day after the first day of default during which the default continues.