

While drafting a trust deed, it be seen that every clause in the deed is clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out. In case reference to these is to be repeated in the deed it is better to first define them and use the abbreviation in the deed subsequently.

The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal. The intention is expressed clearly in the recitals of the deed and in the operative part also. If the trustee is a stranger the property is transferable to him “upon trust”. If the author is himself the trustee, he declares in the operative part that he “dedicates” or “sets apart” the property in trust for such and such purpose and constitutes himself as the trustee.

Different directions are given to the trustees by the author as to the manner in which the trust is to be worked. These are the conditions and provisions of the trust and vary in different kinds of trusts according to the circumstances. These conditions should be clearly incorporated in the trust deed. If the situation so warrants, provision for the appointment of new trustees should also be made in the deed.

### **Acceptance of Trust**

Acceptance of trust by trustee may be either express, e.g. by executing the deed of trust or by verbal assent, or inferred from conduct, e.g., by entering into possession of the property and on the duties as trustee. But it is always safer to have the deed of trust executed by the trustee also.

### **Registration and Stamp Duty**

A trust created by will requires neither registration nor stamp duty. But a trust in relation to movable or immovable property which is declared by a non-testamentary instrument must be registered, irrespective of the value of the property. Deeds of *wakf* or of religious and charitable endowments must be registered if they relate to immovable property worth Rs. 100 and upwards.

A trust declared otherwise than by a will is chargeable to stamp duty under Article 64, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State.

### **Revocation and Extinction of Trusts**

A trust cannot be revoked unless (1) all the beneficiaries consent; (2) a power of revocation has been reserved in the deed; and (3) in case of a trust for payment of debts, it has not been communicated to the creditors. If the trust property is to be applied for the author’s own benefit the trust can be revoked. A power of revocation may with advantage always be reserved in the deed. The declaration of trust for creating provident fund, pension fund, superannuation fund, gratuity fund etc. should be irrevocable. If they are otherwise the recognition under the Income Tax Act, 1961 will not be available to such trusts and in consequence the payment made to such funds will not be allowed as deduction in the hands of the authors of the trusts in their income tax assessments.

A trust is extinguished:

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise;  
or
- (d) when the trust, being revocable, is expressly revoked.

**A Specimen Deed of Revocation of a Trust**

THIS DEED is made on the..... day of..... by A.B. etc. (hereinafter called “the Settlor”) of the one part AND C.D. etc. (hereinafter called “the Trustee”) of the other part.

WHEREAS by a deed of trust dated..... the Settlor transferred him property specified therein to the Trustee upon trust to sell the same and with the proceeds of the sale to pay the debts due from the Settlor to the several creditors named in the said deed;

AND WHEREAS the trust created as aforesaid has not yet been communicated to any of the aforesaid creditors;

AND WHEREAS the Settlor now desires to revoke the said trust and to make other arrangements for the discharge of his aforesaid debts.

NOW THIS DEED WITNESSES that the Settlor hereby revokes the trust created by the aforesaid deed of trust. IN WITNESS WHEREOF parties have signed this deed on the..... day of.....

Signed by.....

In the presence of.....

and of.....

**Debenture Trust Deeds**

Companies in the course of their normal business borrow funds by various modes, one such mode being the issue of debentures. An issue of debentures is usually secured by a trust deed, whereunder movable and immovable properties of the company are mortgaged in favour of the trustees for the benefit of the debenture holders. The trust deed so created, as in the case of a trust, should specify all the details which have been mentioned earlier.

In addition, the usual important conditions of debenture trust deeds may be stated as follows:

1. The trust deed usually gives a legal mortgage on block capital and a floating security on the other assets of the company in favour of the trustee on behalf of the debenture holders.
2. The trust deed gives in detail the conditions under which the loan is advanced.
3. The trust deed should specify in some detail the remuneration payable to the trustee, their duties and responsibilities in relation to the trust property.
4. It also gives in detail rights of debenture holders to be exercised through the trustees in case of default by the company in payment of interest and principal as agreed upon

For detailed reference, see precedent given in *Annexure IV*.

The duty chargeable on a debenture is provided for by Article 27, Schedule I of the Indian Stamp Act, 1899. The stamp duty varies from State to State. But when a trust-deed accompanying a series of debentures is duly stamped, no stamp is necessary to be affixed on the debentures if they are expressed to be issued in terms of the said trust deed. See exceptions to the Article referred to.

The debenture trust deed is registrable and can be registered with the Registrar of Assurances at the place where the registered office of the company is situated or at the place where a part of the immovable property roposed to be given in the mortgage is situate or at the metropolitan cities, namely, Delhi, Bombay, Calcutta and Madras.

**Trust Deeds Constituting Provident Fund, Superannuation Fund, Pension Fund, etc.**

The companies create provident fund, superannuation fund, pension fund, gratuity fund etc. through declaration of trust for the benefit of their employees. Such funds, as we have seen earlier, will have to be irrevocable and

should be drafted, keeping in view the provisions of Schedule IV appended to the Income Tax Act, 1961 and the provisions of the Income Tax Rules, 1962 made thereunder.

It is essential that there should be a clause in the trust deed giving necessary powers to the trustees to make Rules for the smooth functioning of the trust on residuary matters not provided in the trust deed.

A company cannot create a provident fund trust to cover the employees governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952 and the Employees provident Fund Scheme, 1952 framed thereunder unless exemption has been obtained from the appropriate Government for establishing such a fund. Therefore, the provident fund trust established by the company should ordinarily cover only those employees who are not governed by the Employees Provident Funds and Miscellaneous Provisions Act, 1952. Likewise the gratuity fund established by companies should ordinarily cover only those employees who are not governed by the Payment of Gratuity Act, 1972. If any company wants to have a gratuity fund covering even employees who are governed by the Payment of Gratuity Act, 1972 then they will have to obtain the approval of the appropriate Government for this purpose.

The companies so creating the trusts will have to make an application to the Commissioner of Income-tax for recognition of the respective funds. Only on receipt of the recognition from the Commissioner of Income-tax the contribution made by a company to these will be allowed as a deduction in its assessment(s).

Various forms for trust deeds constituting Provident Fund (Annexure I), Pension Fund (Annexure II), Superannuation Fund (Annexure III) and the Debenture Trust Deed (Annexure IV) are given

## ANNEXURES

### ANNEXURE I

#### DRAFT TRUST DEED

##### (Provident Fund)

DECLARATION OF TRUST is made this..... day of..... 2018, between..... having its registered office at..... (hereinafter called 'the Company') of the One part and (1) Shri....., (2) Shri..... and, (3) Shri..... (hereinafter called 'the Trustees') of the Other Part.

W HEREAS THE COMPANY intends to creating a Provident Fund for the benefit of the employees; AND WHEREAS it is necessary to execute a declaration of trust in respect of the contribution of the company and of the members to the fund.

THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That the above-named persons, namely (1) Shri....., (2) Shri..... and, (3) Shri..... are hereby appointed as the first trustees for administering the Provident Fund of the Company and the income thereof as provided in the Provident Fund Rules of the Company (hereinafter called the Rules) in force for the time being.
2. That the trustees shall stand possessed of the existing fund as also all contributions made in future time to time with all accumulation to the said fund upon trust for the benefit of the employees of the company who are covered under the Rules.
3. In these presents, unless there is anything repugnant to the subject or context:
  - (a) "The Fund" means the Provident Fund constituted by these presents.
  - (b) "Member" means an employee of the company subscribing to the Fund.
  - (c) "Subscription" means any sum credited by or on behalf of a member out of his salary to his

individual account but does not include any sum credited as interest.

The company by way of employer's contribution for credit to the member's account, but does not include any sum credited as interest.

- (d) "The Balance to the Credit of a Member" means the total amount to the credit of a member to the Fund at any time.
  - (e) "The Accumulated Balance due to a member" means the balance to the credit of the Member's Provident Fund Account or such portion thereof as may be claimable by him on the day he ceases to be a member of the Fund.
  - (f) "Year" means the period of twelve calendar months from the 1st of July to the 30th June or such other period of twelve months as the Company may from time to time adopt for making up its own accounts.
  - (g) "Salary" includes dearness allowance and commission, if the terms of employment so provide, but excludes all other allowances and perquisites.
4. That this Trust shall not be revocable except with the consent of all the members to the Fund.
  5. That the money for the time being constituting the Fund shall be invested by the Trustees in such manner as may be specified from time to time by the Income-tax Rules, 1962.

Provided that in execution of the Trust and in the performance of his duties and powers hereunder conferred no trustee shall be made liable for any loss caused to the trust arising by reason of any improper investment made *bona fide* and in good faith or for the negligence or fraud of any agent employed by them or by reason of any error of judgement or act, default, mistake or omission done in good faith and under *bona fide* relief by any trustee or by reason of any other matter or thing except wilful and individual wrong or fraud on the part of the Trustee or for breach of trust who is sought to be made liable.

6. (i) The number of trustees at all times shall be three.
  - (ii) One of the trustees shall be nominated by the Board of directors of the company, who may be either a director or an officer of the company. The other two trustees shall be elected from among the members of the Provident Fund.
  - (iii) The nominees of the Board of directors of the company shall be the Chairman of the Trust.

The Trustees other than the nominee of the Board of directors shall be elected by ballot by members hereof and shall hold office as Trustees for 3 years, unless their seat become vacant earlier under Clause 7 hereafter.

- (iv) The nominee of the Board of directors of the company shall hold office until a new representative is appointed by the Board of directors to take his place.
7. The place of a trustee shall become vacant if a Trustee (a) dies, or (b) resign his office, or (c) is adjudged an insolvent, or (d) becomes of unsound mind, or (e) is convicted of an offence involving moral turpitude, or (f) in the case of a nominee of the Board of directors of the company ceases to be a director or an officer of the company and in the case of an elected trustee ceases to be a member of the fund, or (g) fails to attend three consecutive meetings of the trustees for any reason which the trustees do not consider to be satisfactory.
  8. (i) Any casual vacancy under Clause 7 above shall also be filled by holding a fresh election, in case the vacancy occurs in a seat held by an elected trustee.
    - (ii) If a seat of an elected trustee remains vacant for more than one month, the Board of directors of the

company may fill the casual vacancy by appointing a trustee from among the members for such period as the election does not take place.

(iii) The person elected or nominated to a casual vacancy shall be a trustee for the residue of the term for which the person whose place he fills would have been a trustee.

9. (i) The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. The Chairman and an elected trustee shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes and in case of equality of votes the Chairman of the Trust shall have a casting vote.

(ii) A resolution in writing signed by all the trustees for the time being shall be as valid and effectual as if it had been passed at a meeting of the Board of Trustees duly called and constituted.

10. (i) The Board of Trustees shall be authorised to delegate any of their powers to such one or more of themselves as they may think fit, from time to time, and they may vary, alter, or rescind such powers or any of them as they from time to time think fit.

(ii) No act or proceedings of the trustees shall be invalidated merely by reason of the existence of a vacancy among the trustees.

(iii) The trustees shall cause proper minutes to be kept and entered in hand, in a book provided for the purpose, of all their resolutions and proceedings and any such minutes of any meeting of the trustees, if purporting to be signed by the Chairman of the trustees shall be receivable as *prima facie* evidence of the matters stated in such minutes.

11. The Fund shall be exclusively managed and administered by the Trustees in accordance with these rules, and the decision of the trustees upon any question relating to the fund or any rights or benefits in connection therewith or generally upon the interpretation of any provision of these rules shall be absolutely final and binding on all members, their executors, administrators, representatives, widows, or relatives and the employers.

The costs, charges and expenses of administering the fund and of the determination of any question arising under these rules or otherwise, including expenses incurred by the trustees in the discharge of their duties shall be charged to the fund and may be properly paid therefrom, from time to time.

Any decision of the trustees may be given under the hand of any one or more of them.

12. The trustees shall have power to employ any person or persons (including any one or more of their numbers) to do any secretarial, legal, accountancy or other work which they may consider necessary or expedient in connection with the management of the fund and to pay therefor in addition to all other proper disbursements, all ordinary or reasonable charges out of the fund.

13. (i) Every member shall subscribe to the fund at the rate of 10 per cent of his monthly salary and such percentage shall be deducted from his salary, at the time of payment thereof and shall, as soon as practicable, be paid to the trustees who shall credit the same to the account of the member in the books of the Fund.

(ii) The monthly contribution payable by the company in respect of each member shall be equal to the subscription payable by each member.

(iii) It shall be open for members to pay additional subscription to the Fund which shall be a definite proportion of his salary for that year as provided in the "Rules".

14. Subject to the previous approval by the Commissioner of Income tax, the trustees shall, with the approval of the Board of directors, be competent to vary, alter, omit, modify or add to the "Rules" of the Provident Fund.

- 15. The Trustees shall maintain an account of provident fund for each member of the fund and it shall include the particulars prescribed in sub-rule (2) of Rule 74 of the Income-tax Rules, 1962, and such other particulars as the Trustees hereof may, from time to time, deem necessary and expedient.

The Trustees shall furnish a statement of Provident Fund account to each member at such interval, not exceeding 12 months, in such form as the Trustees may prescribe. It shall be the duty of every member to verify the correctness of the statement as and when it is furnished to him and to bring the discrepancy, if any, to the notice of the Trustees. Such a statement shall be signed by the Trustees or by any other person specially authorised by the Trustees in this behalf.

- 16. The accounts of the Provident Fund Trust shall be made for each year and shall be duly audited by the auditors appointed by the Trustees with the approval of the Board of directors of the company. There shall be an annual meeting of the trustees after the close of the year and at such annual meeting of the trustees the audited accounts of the previous year of the Fund shall be presented and passed.
- 17. All matters of procedures and other ancillary matters not herein specifically provided for and requiring the framing of rules shall be regulated by such rules as the trustees may, in consultation with the Board of directors of the company, from time to time, make in that behalf.

Without prejudice to the general powers conferred or implied in the last preceding sub-clause, the Trustees may, in consultation with the Board of directors of the company make rules:

- (i) regarding the advance of loans to the members,
- (ii) regarding the mode of election of the Trustees, and
- (iii) regarding the conduct of the meetings of the Trustees.

- 18. The Trustees shall respectively be indemnified for and against all liabilities incurred by them in *bona fide* execution of the Trust hereof

IN WITNESS WHEREOF the parties hereto have duly executed this Trust on the date, month and year first above written.

The Common Seal of the above named company was, pursuant to the resolution of the Board of Directors of the Company passed in this behalf on....., affixed hereunto in the presence of the authorised director of the company, who has hereunto set his hands in the presence of:

WITNESS:

for COMPANY (DIRECTOR)

SIGNATURE OF TRUSTEES

- 1.
- 2.
- 3.

**ANNEXURE II**

**DRAFT TRUST DEED**

**(Pension Fund)**

DECLARATION OF TRUST is made this..... day of..... 2017, between....., having its registered office at..... (hereinafter called 'the Company') of the One Part and (1) Shri....., (2) Shri....., and (3) Shri..... (hereinafter called 'the Trustees') of the Other Part.

WHEREAS THE COMPANY intends to creating a Pension Fund for the benefit of the employees; AND

WHEREAS it is necessary to execute a Declaration of Trust in respect of the contribution of the Company.

THIS DEED WITNESSES AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES THERETO AS FOLLOWS:

1. That the above named persons, namely (1) ....., (2) ..... and (3) ..... are hereby appointed as the first trustees for administering the Pension Fund of the Company and the income thereof as provided in the rules in force for the time being.
2. That the Trustees shall stand possessed of the existing Fund, Investments, as also all contributions made in future, from time to time, with all accumulations to the said Fund upon trust for the benefit of the employees of the Company.
3. In these presents, unless there is anything repugnant to the subject or context:
  - (a) "The Fund" means the Pension Fund constituted by these presents.
  - (b) "Member" means an employee of the Company who has been admitted to the benefits of the membership of the Fund. Provided however that a director of the company may be admitted to the benefits of membership of the fund only if he is a whole-time *bona fide* employee of the Company and does not beneficially own shares in the company carrying more than 5% of the total voting power.
  - (c) "Salary" includes dearness allowance if the terms of employment so provide but excludes all other allowances and perquisites.
  - (d) "Service" means the period of paid employment with the company which has been specifically declared by the company as having been satisfactory. Leave sanctioned without pay except on grounds of sickness or study will not count towards the total service, but the period of such leave will not be treated as an interruption in the continuity of service.<sup>212</sup> PP-DA&P
  - (e) "Wife" means a woman to whom the member of the fund was married on the date of his becoming eligible to a pension and in whose favour a nomination has been lodged with the Trust.
  - (f) "Completed Years of Service" - 'N' is the integral quotient obtained by dividing by 12 the total service as an employee in terms of months, leave without pay other than on grounds of sickness or study for total service, if any, not counting.
  - (g) "Terminal Leave" means leave as defined in Rule (.....) of the "Company Leave Rules 19.....".
  - (h) "Year" means the period of 12 calendar months from 1st July to 30th June or such other period of 12 months as the company may, from time to time, adopt for making up its own accounts.
4. This Trust shall not be revocable except with the consent of the members of the fund.
5. That the money for the time being constituting the fund shall be invested by the trustees in such manner as may be specified, from time to time, by the Income-tax Rules, 1962.
6. The Employee permitted to retire at any age after attaining the age of 55 (fifty five) years shall be eligible for pension provided he has rendered not less than 120 calendar months of continuous service with the company as an employee. The Pension to the employee shall commence from the date immediately following the expiry of the period of any *terminal leave* where it is granted to him on full pay or from the date immediately following his retirement where it been granted cash compensation for the said leave.
7. The amount of pension payable to an employee shall be a monthly pension of N/60 of the average monthly salary drawn by him during the 36 complete calendar months preceding the date of retirement,

'N' as defined in para 3(f) above being limited to 30. The amount of pension shall not exceed the monthly ceiling of Rs.....

8. The pension granted by the company shall be for life. However, where an employee, who has been granted a pension dies before the expiry of 20 years from the date of the commencement of pension, the pension from the date of his death for the balance of 20 years shall be paid firstly to his wife provided she does not re-marry, and, secondly, if she re-marries or dies, to his children at the rate at which the deceased employee was entitled.
9. An employee who having served the company for not less than 10 completed years of service as an employee becomes mentally or physically incapacitated and is medically declared unfit for further service with the company, may be granted by the company an invalid pension calculated on the same basis as provided under clause 7 hereof and subject to the same monthly ceiling as provided in the said clause, even though the employee has not attained the age of 55 years. Such an invalid pension will be subject to review every year and may be reduced or stopped at the sole discretion of the Board of directors of the Company.
10. If an employee dies while in service but after 10 years of completed service as an employee or dies while in receipt of invalid pension then his wife or minor children may at the sole discretion of the Board of Directors be sanctioned by the company a family pension of an amount not exceeding the pension which the employee would have been eligible to have had he retired after attaining the age of 55 years and having rendered the same number of completed years of service as provided under clause 7 hereof and subject to the same monthly ceiling as provided in the said clause. Such a pension shall be subject to review every year and may be reduced/ stopped at the sole discretion of the Board of directors of the company.
11. The trustees may allow commutation of pension granted under clauses 6 and 7 hereof in the following manner:
  - (a) in a case where the employee receives any gratuity, the commuted value of one-fourth pension which he is normally entitled to receive, and
  - (b) in any other case, the commuted value of one-third of such pension;such commuted value being determined having regard to the age of the recipient, state of his health, the rate of interest, and officially recognised tables of mortality.
12. (i) The number of trustees at all times shall be three.
  - (ii) One of the Trustees shall be nominated by the Board of directors of the Company, who may be either a director or an officer of the company. The other two trustees shall be elected from amongst the members of the Pension Fund.
  - (iii) The nominee of the Board of directors of the company shall be the Chairman of the Trust.

The trustees other than the nominee of the Board of directors shall be elected by ballot by members hereof and shall hold office as trustees for 3 years, unless their seat becomes vacant earlier under Clause 13 hereafter.
  - (iv) The nominee of the Board of directors of the company shall hold office until a new representative is appointed by the Board of directors to take his charge.
13. The place of trustee shall become vacant if a trustee (a) dies, or (b) resigns his office, or (c) is adjudged an insolvent, or (d) becomes of unsound mind, or (e) is convicted of an offence involving moral turpitude, or (f) in the case of a nominee of the Board of directors of the company ceases to be a director or an officer of the company and in the case of a elected trustee ceases to be a member of the fund, or (g)



fails to attend three consecutive meetings of the trustees for any reason which the trustees do not consider to be satisfactory.

14. (i) Any casual vacancy under clause 13 above shall also be filled by holding a fresh election, in case the vacancy occurs in a seat held by an elected trustee.  
  
(ii) If a seat of an elected trustee remains vacant for more than one month, the Board of directors of the company may fill the casual vacancy by appointing a trustee from among the members for such period as the election does not take place.  
  
(iii) The person elected or nominated to a casual vacancy shall be a trustee for the residue of the term for which the person whose place he fills would have been a trustee.
15. (i) The trustees may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit. The Chairman and an elected trustee shall form a quorum. Questions arising at any meeting shall be decided by a majority of votes and in case of equality of votes the Chairman of the Trust shall have a casting vote.  
  
(ii) A resolution in writing signed by all the trustees for the time being shall be as valid and effectual as if it had been passed at a meeting of the Board of Trustees duly called and constituted.
16. (i) The Board of Trustees shall be authorised to delegate any of their powers to such one or more of themselves as they may think fit, from time to time, and they may vary, alter or rescind such powers or any of them as they from time to time think fit.  
  
(ii) No act or proceedings of the trustees shall be invalidated merely by reason of the existence of a vacancy among the trustees.  
  
(iii) The trustees shall cause proper minutes to be kept and entered, in a book provided for the purpose, of all their resolutions and proceedings and any such minutes of any meeting of the trustees, if purporting to be signed by the Chairman of the trustees shall be receivable as *prime facie* evidence of the matters stated in such minutes.
17. The Fund shall be exclusively managed and administered by the trustees in accordance with these rules, and the decision of the trustees upon any question relating to the fund or any rights or benefits in connection therewith or generally upon the interpretation of any provision of these rules shall be absolutely final and binding on all members, their executors, administrators, representatives, widows or relatives and the employers.  
  
The costs, charges and expenses of administering the fund and of the determination of any question arising under these rules or otherwise, including expenses incurred by the trustees in the discharge of their duties shall be charged to the fund and may be properly paid therefrom, from time to time.
18. The trustees shall have power to employ any person or persons (including any one or more of their numbers) to do any secretarial, legal, accountancy or other work which they may consider necessary or expedient in connection with the management of the fund and to pay therefore in addition to all other proper disbursements, all ordinary or reasonable charges out of the fund.
19. The trust property shall consist of such yearly and other contribution as the company may make to the trust or such other sums as the company shall from time to time, determine provided that the annual contribution by the company to the fund in respect of any particular employee shall not exceed 25% of his salary for each year as reduced by the company's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year.

Interest, dividend or other accretions from investments and deposits of the Fund hereby established; and Any Securities or other investments of the Trust money.

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- 20. Subject to the previous approval by the Commissioner of Income-tax, the trustees shall, with the approval of the Board of directors, be competent to vary, alter, omit, modify or add to the rules of the Pension Fund.
- 21. The accounts of the Pension Fund shall be made for each year and shall be duly audited by the auditors appointed by the Trustees with the approval of the Board of directors of the company. There shall be an annual meeting of the trustees after the close of the year and at such annual meeting of the trustees the audited accounts of the previous year of the Fund shall be presented and passed.
- 22. All matters of procedures and other ancillary matters not herein specifically provided for and requiring the framing of rules including for the election of trustees and for conduct of their meetings shall be regulated by such rules as the trustees may, in consultation with the Board of directors of the company, from time to time, make in that behalf.
- 23. The Trustees shall respectively be indemnified for and against all liabilities incurred by them in *bona fide* execution of the Trust hereof.

IN WITNESS WHEREOF the parties hereto have duly executed this Trust on the date, month and year first above written.

The Common Seal of the above named Company was, pursuant to the resolution of the Board of Directors of the Company passed in this behalf on....., affixed hereunto in the presence of the authorised director of the company, who has hereunto set his hands in the presence of:

WITNESS:

for COMPANY

- 1.
- 2.
- 3.
- 4.

(DIRECTOR)

SIGNATURE OF TRUSTEES

- 1.
- 2.
- 3.

**ANNEXURE III**

**DRAFT TRUST DEED  
(Superannuation Fund)**

The Superannuation Fund Trust Deed should also be drafted on the same lines as Pension Fund Trust Deed except for the following changes.

Clauses relating to the benefit accruing to the members of the fund, namely, Clauses 6 to 10, must be replaced as below:

- 6. On a member being permitted to retire from the service of the Company, at or after the age of 55 years, of being permitted to retire before the age of 55 years upon his being incapacitated, the Trustees shall, by payment of the amount lying at his credit in the Fund made up to the date of retirement, purchase from the Life Insurance Corporation of India an annuity for him for his life in the event of there being no nominee, or for a duration of not less than ten years certain, on either or survivors basis, jointly with the nominee(s) named in the declaration of nominations.

7. Nothing contained in this Trust Deed shall be deemed to restrict in any way the rights of the Company to terminate the employment of a member at any time nor shall his being a member be used by him as a ground for increasing damages in any action brought by him against the company in respect of termination of his employment and no expression of intention on the part of the Company herein contained shall create for the benefit of the member any legal obligation or impose any legal liability on the company.
8. Should a member die while in employment, the Trustees shall, by payment of the amount lying at his credit in the Fund made-up to the date of death, purchase from the Life Insurance Corporation of India an annuity for the first named nominee in the declaration of nominations for a duration of not less than ten years certain, on either or survivors basis, jointly with other nominees, if any.
9. If a member dies while in service without making a nomination or resigns with or without due notice from the employment of the Company or is discharged for reasons of fraud, dishonesty, criminal charges, or other misconduct inconsistent with due and faithful discharge of duty, the gross annual contribution to be made by the Company to the Fund under the provisions of clause 15(ii) above for the relevant year shall be reduced by the amount lying at the credit of such member in the Fund and the Trustees shall thereupon by cancellation of the individual account of such member utilise the credit alongwith the annual contribution by the Company, so reduced, for making up the individual accounts of the members.
10. No member shall assign, or create a charge upon his beneficial interest in or under the Fund, and if such assignment or charge is made or created, such assignment or charge shall be invalid.

In addition the Superannuation Fund Trust Deed should have the following clause:

“The Trustees shall maintain individual accounts for each member and credit thereto the contributions received, from time to time, from the Company in respect of that member. The yield from investment of funds or capital gains shall be credited to the individual members’ accounts at the end of each year pro-rata to the amount and the duration in the year of the credits in such accounts.”

#### ANNEXURE IV

#### DRAFT DEBENTURE TRUST DEED

THIS TRUST DEED is made this..... day of..... 2018, between..... incorporated under the Companies Act, 2013 with its registered office at..... (hereinafter called “the Company”) of the One Part, and Mr..... and Mr..... (hereinafter called “the Trustees”) of the Other Part.

WHEREAS by Sub-Clause..... of Clause..... of its Memorandum of Association, the company is authorised to borrow or raise and secure the payment of money by the issue of debentures charged upon any of the company’s property.

AND WHEREAS the Directors of the company being duly empowered in that behalf by Article No. .... of the Articles of Association of the company have decided by a resolution passed in pursuance to Section 179 of the Companies Act, 2013 by the Board of directors in the meeting of the Board held on..... to raise a sum of Rs..... by issue of..... First Mortgage Debentures of Rs..... each, bearing interest at..... per cent per annum framed in accordance with the forms set for in the *First Schedule* hereto and to secure the same by mortgaging with the trustees the properties described in the *Second Schedule* hereto.

AND WHEREAS the trustees above mentioned have consented to act as trustees for the debenture holders.

NOW THIS DEED WITNESSETH AND IT IS HEREBY MUTUALLY AGREED TO AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. That in these presents unless there be something in the subject or context consistent therewith the expression following shall have the meaning hereafter mentioned, that is to say:
  - (a) "Company" means..... Ltd.
  - (b) "Trustees" means Mr..... or any other trustees hereof for the time being.
  - (c) "Debentures" means the debenture of the company in the form set out in the First Schedule hereto for the time being outstanding and entitled to the benefit of these presents.
  - (d) "Debenture holders" means the holder for the time being of the debenture issued and entered in the register of debenture holders, mentioned on the conditions endorsed on the debentures on the holder of the debentures.
  - (e) "Mortgaged premises" means the property belonging to the company described in the Second Schedule hereto and comprised in the security of the debenture holders. Words denoting the singular include the plural and *vice versa* unless the contrary appears from the context.
  - (f) Act means the Companies Act, 2013 and any modification or re-enactments thereof.
2. The debentures entitled to the benefit of these presents shall consist of a series of number of debentures of Rs..... each, aggregating to Rs..... in all to rank *pari passu* without any preference or priority by reason of the date of issue or otherwise and secured by the mortgage hereby created on the mortgaged premises.
3. The company hereby covenants with the trustees that the company will on the..... day of..... or such earlier day as the principal moneys shall become payable under clause 7 hereof pay the debenture holders the amounts secured by their debentures respectively, and in the meantime will pay interest to the debenture holders on the day of..... 20... in each year, the first payment of interest to be made on the day of..... 20...
4. All payments due by the company in respect of the Debentures issued hereunder whether of interest, principal or premium shall be made by cheque or warrant drawn by the company on its bankers and the company shall make at its own expenses all arrangements, with its Bankers as shall be necessary to ensure that such cheques or warrants shall be encashable for the amount for which they are expressed without any deduction whatsoever at the office of its bankers in Delhi or such other places in the Union of India as the Trustees may require.
5. In consideration of the debentures hereby authorised aggregating to Rs..... the company, as the beneficial owner, hereby mortgages unto the trustees all the fixed plant and machinery and fixture at present existing at the company's factory and described in part A of the Second Schedule hereto and which may be acquired by the company hereafter or fixed or erected hereafter at its factory for the benefit of the debentureholders and the property described in Part B of the Second Schedule as security for the due payment of principal moneys amounting to Rs..... in aggregate with interest and all other charges, expenses and other dues, the payment of which has been secured by a charge on the mortgaged premises under these presents. The charge hereby created on the property mentioned in Part A of the Second Schedule shall be the specified charge, while that on the property included in Part B of the Second Schedule shall rank as floating charges.
 

The trustees may, at any time, by notice in writing to the company, convert the said floating charge into a specific charge as regards any assets included in the Second Schedule and specified in the notice in case it is, in the opinion of the trustees in danger of being seized or sold under any sort of distress or execution levied or threatened or in any other case.
6. The company shall hold and enjoy all the mortgaged premises and carry on therein and therewith the business or any of the business mentioned in the Memorandum of Association of the company until the

security hereby constituted shall become enforceable under the terms of these presents, in which case the trustees may, in their discretion, without any such request as next hereinafter mentioned and shall upon the request in writing of the holder or holders of..... at least of the debentures, enter upon or take possession of the mortgaged premises, or any of them and may in the like discretion and shall upon the like request sell, call in, collect and convert into money the same or any part thereof with full power to sell any of the same premises either together or in parcels, and either by public auction or private contract, and either for a lumpsum or for a sum payable by instalments or for a sum on account and a mortgage or charge for the balance and with full power upon every such sale to make any special or other stipulations as to title or evidence, or commencement of the title or otherwise which the trustees shall deem proper and with full power to modify or rescind or vary any contract for sale of the said premises or any part thereof and to re-sell the same without being responsible for any loss which may be occasioned thereby and with full power to compromise and effect compositions and for the purposes aforesaid or any of them to execute and do all such assurance and things as they shall think fit.

7. The principal moneys due to the debenture-holders under this Indenture shall become immediately payable and the security hereby constituted shall become enforceable within the meaning of these presents in each and any of the following events:
  - (a) If the company makes default in the payment of any interest which ought to be paid in accordance with these presents.
  - (b) If the company without the consent of debenture holders ceases to carry on its business or gives notice of its intention to do so.
  - (c) If an order has been made by the Court of competent jurisdiction or a special resolution has been passed by the members of the company for winding up the company.
  - (d) If the company acts in contravention of clause..... of its Articles of Association.
  - (e) If it is certified by a Chartered Accountant capable of being appointed as auditor under the Act, that the liabilities of the company exceed its assets.
  - (f) If the company creates or attempts to create any charge on the mortgaged premises or any part thereof without the prior approval of the trustees/debenture holders.
  - (g) If in the opinion of the trustees the security of debenture holders is in jeopardy.

Provided that on the happening of the events specified in sub-clause (a), the permission given by clause 6 to hold and enjoy the mortgaged premises shall not be determined unless and until the trustees shall have first served on the..... company a preliminary notice requiring the company to pay the interest in arrears and the company shall have neglected for the period of 30 days to comply with such notice.

8. As soon as the principal money shall become payable and the security enforceable under the last preceding clause 7 (and unless the time for payment and the security to be enforced has been expressly extended by the debenture holders), the trustees shall enter upon and take possession of the mortgaged premises and shall forthwith take steps to consult the debenture holders for the purpose of determining whether the business of the company may be allowed to be carried on or whether the mortgaged premises shall be realised by sale or otherwise.
9. Until the happening of some one of the events mentioned in clause no. 7 of this Indenture, the trustees shall not be in any manner bound to interfere with the management of affairs of the said business except to the extent they may consider necessary for the preservation of the mortgaged premises or any part thereof.

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10. If the debenture-holders resolve not to allow the business of the company to be carried on as mentioned in clause 9 above but to realise the security, the trustees shall after giving a notice of 30 days in writing to the company, proceed to realise the mortgaged premises by sale or otherwise and, in doing so, shall conform to discretion, if any, given by debenture-holders.
11. The trustees shall apply the proceeds of such sale or other mode of realisation in the following manner, that is to say, that the trustees shall pay:
  - (a) In the first place all costs, charges and expenses incurred in or about such sale or the performance or execution of trust or otherwise in relation to these presents or otherwise in respect of the security, including the remuneration of the trustees.
  - (b) Secondly, the interest for the time being due and owing on the debentures. (c) Thirdly, the principal money then due and owing to debenture-holders.
  - (d) And lastly, the surplus, if any, to the company or its assignee.

Provided that if the said money shall be insufficient to pay all such interest or principal money in full, then the said moneys shall be paid rateably and without preference or priority among all debenture-holders of this series according to the amount of the face value of the debentures held by them, but all interest shall be paid before any principal money.

12. When all the principal moneys and secured by these presents shall have been paid and satisfied, the trustees shall forthwith, upon the request and at the cost of the company and on being paid all the costs, charges and expenses properly incurred by the trustees in relation to the security, reconvey, reassign, release and surrender the mortgaged premises or so much or the same as shall not have been sold or disposed of, unto the company or its assigns.
13. If the company shall, at any time during the continuance of the security, be desirous of selling, demising or otherwise disposing of or dealing with any part of the mortgaged premises otherwise than in respect of the floating charge the ordinary course of the company's business, the trustees may, if satisfied that the debenture-holders' security shall not be thereby prejudiced, assent to or concur in such sale, demise, disposal or other dealing, and may, if necessary, release the property in question from the trust under this deed on such terms as the trustees may determine.
14. The company hereby covenants with the trustees:
  - (i) That the moneys secured by this deed shall be the first mortgage and charge on the mortgaged premises and shall take precedence over all other moneys which may hereinafter be borrowed by the company against the security of the premises.
  - (ii) that the company shall maintain the mortgaged premises and any and every part thereof in a fit and efficient condition of repair and shall keep the said property duly insured against risk of fire, riot, civil and war risks with such insurers and in such manner as the trustees may determine from time to time and, in default, the trustees shall carry out repair and keep insured the mortgaged premises in the interest of the debenture-holders, and shall be entitled to the immediate payment of such expenditure in full.
15. (a) The company shall in each and every year during the continuance of this security pay to the Trustees for the time being of these presents as and by way of remuneration for their services as Trustees the sum of Rs..... (Rupees..... only) per annum in addition to all legal, travelling and other costs, charges and expenses incurred by the Trustees on their officers, employees or agents in connection with the execution of the trust hereof (including all the costs, charges and expenses of and incidental to the approval and execution of these presents) and all other documents effecting the security herein and the first of such payments to be made proportionately for the period and the said

remuneration shall continue to be payable until the trust hereof shall be finally discharged. The trustees acknowledge having received from the company a sum of Rs..... (Rupees..... only) as their fee for agreeing and accepting the trusteeship of these presents.

(b) The company shall pay to the trustees all legal travelling and other costs, charges and expenses incurred by them or their agents in connection with execution of trusts of these presents including costs, charges and expenses of and incidental to the approval and execution of these presents and all other documents affecting the security herein and will indemnify them against all actions, proceedings, costs, charges, expenses, claims and demands whatsoever which may arise or be brought or made against or incurred by them in respect of any matter or thing done or permitted to be done without their wilful default in respect of or in relation to the mortgaged premises.

16. The trustees hereof being a corporate body may, in the execution and exercise of all or any of the trusts powers, authorities and discretions vested in them by these presents act by responsible officers or a responsible officer for the time being of the trustees and the trustees may also whenever they think it expedient in the interests of the debenture-holders delegate by power of attorney or otherwise to any such officer or officers all or any of the trusts power, authorities, and discretions vested in them by these presents and any such delegations may be made upon such terms and conditions and subject to such regulations including power to sub-delegate as the trustees may, in the interest of the debentureholders, think fit and the trustees shall not be bound to supervise the proceedings of or be in any way responsible for any loss incurred by reason of any misconduct or default or any mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such delegate.

**Note:** *This clause is suitable where the trustees is a bank. In case of individual this be modified suitably.*

17. The debenture holders may, by an ordinary resolution, remove the trustee or trustees, or the trustee or trustees may, with the consent of the directors of the company and of the majority of the debenture holders in writing resign or retire from trusteeship.
18. In the event of death, bankruptcy, disability or resignation of any trustee or trustees, another trustee or trustees shall be appointed who shall thereafter have and exercise all powers of the trustee or trustees under these presents. The power of appointing a new trustee or trustees shall be vested in the directors, but no such trustee or trustees shall be appointed by the company until his appointment has been approved by an ordinary resolution of the debenture holders.
19. The trustees may by agreement with the directors of the company modify the terms of the deed in any manner that may be necessary to meet any requirement or contingency, provided that the trustees are satisfied that such modifications are in the interests of the debenture holders.
20. If any debenture is proved to the satisfaction of the company to have been lost, the company shall issue a fresh debenture on payment of a fee of Rs..... for each such debenture and on such indemnity as the directors may think fit.
21. The company hereby covenants with trustees that company will at all times during the continuance of the security (except as may be otherwise previously agreed in writing by the trustees).
- (a) carry on and conduct its business in proper and efficient manner with due diligence and efficiency with sound financial standing and pay all rents, cesses on mortgage premises, and insured these properties against fire and natural calamities;
  - (b) to keep proper books of account as required under the Act and let them be open to inspection of trustees during business hours;
  - (c) to give trustees such information as he or they may require relating to business, mortgage property and the affairs of the company;





1. The Company will during the continuance of this security pay to such registered holder(s) interest thereon at the rate of 15% per annum on the paid-up value of the debentures, (subject to deduction of Income-tax at the rate of the time being prescribed under the Income Tax Act, 1961, or any statutory modification or re-enactment thereof for the time being in force) by half-yearly payments on the..... and..... every year in respect of the half-year period ending on that date.
2. The company shall pay the face value of the non-convertible debentures at the expiry of the..... year from the date of allotment at a premium of.....% of the face value of the debentures, together with the interest due as above stated.
3. During the continuance of the security under the Trust Deed, the Company shall be entitled to make further issue of Debentures and/or raised further term loans and/or avail of further Deferred Payment/ Guarantee facilities and/or other form of borrowings from time to time from any Financial Institution/ Bank/Body corporate or other person whomsoever by creation of such prior or *pari passu* security on the mortgaged premises or any part thereof without requiring any sanction from the holders of the Debentures but subject to the consent of the Trustees.
4. The Debenture is issued subject to the provisions of the Trust Deed whereby all remedies for the recovery of the principal moneys and interest secured by the Debentures are vested into Trustees on behalf of the debenture-holders and shall operate only according to the tenure thereof.
5. The notices may be served on the Debenture-holders either by the Company or by the Trustees in accordance with the provisions of the Companies Act, 2013.

Given under the Com m on Seal of the Com pany this the..... day of..... Two thousand.....

Director

Director

Authorised Signatory.

PART A

PART B

## LESSON ROUNDUP

- An assignment is a form of transfer of property and it is commonly used to refer the transfer of an actionable claim or a debt or any beneficial interest in moveable property. A transfer of an actionable claim is usually called an assignment thereof.
- A debt is property. It is an actionable claim and is heritable and assignable and it is treated as property under the Transfer of Property Act, 1882 and is known as “actionable claim”.
- A debtor cannot claim or take advantage of non-payment of consideration for assignment.
- The Companies Act, 2013 while defining the nature of property in the shares of a company provides that “the shares or other interest of any member in a company shall be moveable property, transferable in the manner provided in the articles of the company.”
- Provisions have been envisaged under Patents Act, Copyright Act, and Trade Marks Act pertaining to the assignment of patents trademarks and copyrights.
- Goodwill is an intangible asset. It represents the value to a business attaching to all the factors, internal and external, which enable it to earn a differential return of profit on the capital employed.

- Partnership is an association of two or more like minded persons formed with a common objective to establish a lawful business house of their choice with the idea of earning profits.
- The partnership is based on contract. This contract may be made either orally or in writing or even may be inferred from the course of dealing between the partners. In order to avoid all disputes relating to terms of partnership, it is suggested that a written document containing terms and conditions of partnership be executed between the partners. The deed is executed by all the partners and is drafted as an agreement to carry on certain business in partnership on certain terms and conditions.
- While drafting partnership deed we should incorporate all terms and conditions that govern a particular partnership business.
- An instrument of trust is drafted either as a deed poll or as a regular deed between the author of trust and the trustee. Where trustees are strangers and a transfer of property is involved, it is better to draft the deed as a deed between the author of trust and the trustees. Where the author is to be the trustee himself and the deed requires a mere declaration of trust, it is drafted as a deed poll.
- While drafting a trust deed, it should be seen that every clause in the deed is clear in its meaning. If there is any reference to any article, documents, rules, statutory Acts etc., the same are properly applied out.
- The most important and vital part of a trust is the expression of an intention to create a trust which should be expressed in the deed in unequivocal language and with reasonable certainty. No particular or technical words are necessary but the words used must be definite and unequivocal.

**SELF TEST QUESTIONS**

1. Draft a specimen Deed of Assignment of policy of life assurance.
2. Define 'patent'. Discuss in brief legal provisions governing assignment of patents. Draft a specimen Deed of Assignment of a patent.
3. What is a 'trade mark'? Discuss in brief legal provisions governing assignment of trade marks. Draft a specimen Deed of Assignment of a registered trade mark.
4. How 'copyright' has been defined? Discuss in brief legal provisions governing assignment of copyrights. Draft a specimen Deed of Assignment of the copyright of a novel.
5. Draft a specimen Deed of Agreement on admission into firm of a new partner. What extra care should be taken while drafting such a deed?
6. What important points you will keep in view while drafting a Trust-Deed?

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# Lesson 8

## Drafting of Agreements under the Companies Act

### LESSON OUTLINE

- Promoters' Contract-Pre- Incorporating Contracts
- Memorandum of Association
- Drafting of Memorandum
- Articles of Association
- Drafting of Articles
- Underwriting and Brokerage Agreements
- Underwriting Contract
- Shareholders Agreement
- Contract of Appointment with Managing Director
- Contract of Appointment with Manager
- Contract of Appointment with Secretary
- Deeds of Amalgamation of Companies:  
Transfer of Undertakings
- Compromise, Arrangements and Settlements
- Slump Sale Agreement
- LESSON ROUND UP
- SELF TEST QUESTIONS

### LEARNING OBJECTIVES

The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre incorporation contracts. Memorandum of Association of the company is the fundamental formation document. It is the constitution and charter of the company. Articles are rules and regulations for management of internal affairs of the company.

Corporate professionals like Company Secretaries have to advise the companies in drafting various documents as well as to undertake legal documentation pertaining to a range of other functions.

The objective of this lesson is to make the students appreciate the skills involved and the important requirements to be borne in mind in the drafting of memorandum of association, articles of association, company's agreements in particular shareholders agreements, agreements for the appointment of managing director & manager etc.

## PROMOTER

As per Section 2(69) of the Companies Act, 2013, Promoter” means a person –

- (a) Who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity;

Generally Promoter of a company is a person who does the necessary preliminary work in connection with the formation and the establishing of the company. It is Promoters only who conceives an idea, develops it, formulates a scheme or project and takes all the necessary steps for the formation of a company to implement the project or the scheme.

Before the company is registered by the Registrar promoters continue to be known as promoters. They gather funds for meeting the expenses in connection with the formation of the company and spend them, which are known and designated as “*preliminary expenses*” and a provision is made in the articles of association of the company authorising the company and its directors to reimburse promoters the preliminary expenses incurred by them, and also a provision for the formalisation of the contracts which the promoters of the company had entered into with third parties prior to the company coming into existence. Promoters usually enter into contracts with the prospective directors, solicitors, bankers, brokers, underwriters, auditors, secretary, manager and with those who offer to sell land, plant, machinery equipment etc. for implementing the proposed project. Such contracts are known as “*promoters’ contracts*” which are not binding on the company because the company had not come into existence when they were entered into with third parties by the company’s promoters. However, as a matter of practice, the company, on its incorporation enters into fresh contracts with the third parties on the lines of the promoters’ contracts, which then become binding on the company.

## PROMOTERS’ CONTRACT – PRE-INCORPORATION CONTRACTS

Companies Act, 2013 does not contain any provisions about Promoter’s Contract. The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called *preliminary or pre-incorporation contracts*. The promoters generally enter into such contracts as agents for the company about to be formed. The legal position is that since presence of two consenting parties is necessary for a contract, and the company before incorporation is a non-entity, the promoters cannot act as agents for the company, which has yet to come into existence. As such, the company is not liable for the acts of the promoters done before its incorporation.

When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters’ contract.

Similarly, the company, after incorporation, cannot enforce any contract made before its incorporation, which means the company cannot sue the other party to the contract if the other party fails to carry out the contract. Promoters remain personally liable on the contract.

A company also cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit of the contract purporting to have been made on its behalf before it came into existence, as ratification by the company when formed is legally impossible.

The doctrine of ratification applies only if an agent contracts for a principal who is in existence and who is competent to contract at the time of the contract by the agent. Where a contract is made on behalf of principal known to both parties to be non-existent, the contract is deemed to have been entered into personally by the actual maker, i.e. the agent. A company may, if it desires, enter into a new contract, after its incorporation, with the other party which is known as *novation of promoter's contracts*; and if it makes a fresh contract in terms of the preliminary contract, the liability of the promoters comes to an end and if it does not make a fresh contract within a limited, period of time, either of the parties may rescind the contract.

The essential feature of novation is that the right under the original contract is relinquished and a new right referable to a new contract is created. The substituted contract must, in order to effect a novation, be enforceable one.

The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.

**A Specimen of Promoters' Contract for the Purchase of an Industrial Plot for setting up Industrial Unit of the Proposed Company ABC Ltd.**

THIS AGREEMENT is made on ..... day of ..... between Mr. A, son of Mr..... resident of....., Mr. B, son of Mr..... resident of..... and Mr. C, son of Mr....., resident of.....' (hereinafter referred to as "promoters") of the one part which expression shall, unless repugnant to the context include their heirs, legal representatives and assigns and Mr. "V" son of Mr..... resident..... (hereinafter referred as "Vendor") of the other part, which expression shall, unless repugnant to the context, include his heirs, legal representatives and assigns.

WHEREAS the promoters have been engaged for quite sometime in the past in promoting and forming a company to be known as ABC Ltd., which name has been made available to the promoters by the Registrar of Companies....., consequent upon which they have filed with the Registrar memorandum of association and articles of association for registration of the company;

AND WHEREAS the memorandum and articles of association of the proposed ABC Ltd., empower the company and its directors to enter into agreements on its incorporation on the lines of the agreement entered into by the promoters for the purchase of land, plant, machinery, equipment and for hiring the services of persons required for and in connection with the formation and incorporation of the company;

AND WHEREAS the Vendor is the absolute owner of industrial plot of land measuring..... and situated at..... and is desirous of selling the same;

AND WHEREAS the promoters are desirous to buy the said plot of land for the proposed company ABC Ltd. to set up an industrial unit on its incorporation.

NOW IT IS AGREED AND DECLARED BETWEEN AND BY THE PARTIES AS FOLLOWS:

1. That the said vendor shall sell and the promoters shall purchase the industrial Plot No..... situated in the..... Industrial Area, ..... bounded on North by....., on South by....., on East by....., and on West by..... in consideration of the payment, by the promoters on the date of this agreement, of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the promoters before the Sub- Registrar..... at the time of registration of the deed of sale to this agreement.
2. The vendor shall satisfy the promoters or ABC Ltd., if incorporated by then, about the title of the vendor to the aforesaid piece of land within one month of the execution of this agreement and the promoters or their attorney shall be entitled to ask for such information as may be necessary to ascertain the title of the vendor and the vendor shall be bound to allow inspection of the title deeds relating to the plot of

land at his place within two months of the date of this agreement. On the satisfaction of the promoters as to the title of the vendor in respect of the said plot of land, the parties shall complete the transaction of the sale within six months of the date of this agreement.

3. The parties shall bear the expenses of sale equally. The purchaser shall pay to the vendor the expenses for purchase of stamp, a fortnight before the expiry of the period fixed for this agreement for completion of the sale and the promoters shall also at the same time deliver to the vendor a draft of the deed of sale which the vendor shall, if in proper form, execute at his expense in favour of the purchasers and present the same for registration on or before the date fixed for the completion of the sale transaction.
4. The vendor shall deliver actual possession of the plot of land to the promoters or the company on the date of payment of the balance of the price aforementioned and shall do all other acts that may be necessary or requisite to effectually put the promoters or ABC Ltd., as the case may be, in such possession.
5. In case there found to be any error or misdescription in area or the boundaries or the other specifications of the plot of land agreed to be conveyed to the promoters of ABC Ltd. or ABC Ltd., as the case may be, corresponding decrease or increase in price relating to the area and rectification of misdescription of the specification relating to boundaries etc. shall be permissible, and shall not form any ground for avoiding this agreement for sale of the plot of land.

IN WITNESS WHEREOF the parties aforementioned have signed this deed of acceptance of the terms thereof.

- |            |  |
|------------|--|
| 1. Witness | Vendor   |
| 2. Witness | Purchasers/Promoters of the Company<br>ABC Limited, under incorporation. |
| 3. Witness | A  |
| 4. Witness | B<br>C<br>(Schedule of Land)   |

**A Specimen of Agreement entered into by and between ABC Ltd. on its Incorporation and Mr. .... Vendor of Industrial Plot No..... Situated..... who had earlier entered into an Agreement dated..... for the Sale of the said Plot of land to the Promoters of the Company.**

THIS AGREEMENT made and entered into the..... day of..... between Mr. 'V' son of Mr....., resident of..... (hereinafter called "the vendor") which expression shall, unless, repugnant to the context, include his heirs, legal representatives and assigns of the one part and ABC Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter known as "the company") which expression shall, unless repugnant to the context, include its legal representatives, of the other part.

WHEREAS the company was incorporated on..... under the Companies Act, 2013 as a public limited company with a nominal share capital of Rs..... divided into..... equity share of Rs..... each;

AND WHEREAS Mr. A, Mr. B and Mr. C have been engaged for quite sometime in the past in promoting and forming this company;

AND WHEREAS the said promoters of the company, Mr. A, Mr. B and Mr. C had entered into agreement

with the vendor on the....., for the purchase of industrial plot of land No..... situate at....., a copy of the plan whereof is annexed hereto as Annexure-I;

AND WHEREAS the memorandum and articles of association of the company empower the company and its directors to enter into agreements with third parties on the terms and conditions of the agreements entered into by and between the promoters and the third parties for the purchase of land, plant, machinery, equipment etc. for the company;

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES OF ONE PART AND PARTY OF THE OTHER PART:

1. That the said vendor shall sell and the company shall purchase the industrial plot No..... situate in the..... Industrial Area, .....more precisely described in the Schedule hereto in consideration of payment by the company on the date of this agreement of the sum of Rs..... and the balance of Rs..... on the date of the appearance of the vendor and the company before the Sub-Register, .....at the time of registration of the deed of sale pursuant to this agreement.
2. The company has already satisfied itself with regard to absolute title of the vendor in the said plot of land and has already given to the vendor a draft of the deed of conveyance and the vendor hereby agrees and undertakes to execute the same in favour of the company within a period of a fortnight of the date of execution hereof and present the same for registration within the said period of fortnight.
3. The vendor shall deliver actual possession of the plot of land to the company on the date of payment of price aforementioned and shall do all other acts that may be necessary or requisite to effectually put the company in such possession.

Signed and delivered by within named vendor in presence of:

Witness - 1.....

Witness - 2.....

Signature of Vendor Signed, sealed and delivered by within named company (purchaser)

(Name of the Company)

Through its Director

Shri.....

Signature..... In presence of:

Witness - 1.....

Witness - 2.....

*(Annexure or Schedule of Land)*

### **Agreement by Company Adopting Contract made on its behalf before its Incorporation**

This Agreement made at New Delhi on this..... day of..... 2018 between Shri A of the 1st part, Shri B of the Second part and AB & Co. Ltd. (hereinafter referred to as ‘the company’) of the third part.

Whereas after the execution of the contract on 10th July, 2018 (hereinafter referred to as “the said contract”) between Shri A, the vendor, and Shri B, on behalf of the company, the said company AB & Co. Ltd. has been incorporated under the Companies Act, 2013.

Now it is hereby agreed by and between the parties hereto as under:

1. The said contract dated 10th July, 2018 is hereby adopted by the company and shall be binding on the said Shri A and on the company in the same manner and shall take effect in all respects as if the company had been in existence at the date of the agreement.

2. Shri B who actually signed on behalf of the proposed company shall be discharged from all liability under the said contract as the company had adopted and ratified the said contracts.

In witness whereof the parties hereunto have put their hands and signatures and the company has caused its common seal affixed in the presence of Shri..... and Shri..... two directors who have set their respective hands and signatures the day and year first herein above written in terms of the Resolution passed in its Board of Directors in their meeting held on.....

*Common Seal*

Witnesses: ..... (Signature)

1..... Director

2..... (Signature) Director

Signatures of A .....

B.....

**MEMORANDUM OF ASSOCIATION**

Memorandum of association of the company is the fundamental formation document. It is the constitution and charter of the company. It contains the basic conditions on the strength of which the company is incorporated. Thus, it defines and confines the area of operation of the company. It lays down the area, beyond which the action of the company cannot go. Sections 4 of the Companies Act, 2013 and Table A, B, C, D and E in Schedule I as may be applicable to such company deal with contents, form and printing and signature of memorandum of association. Students are advised to be conversant with the above sections, as they are very relevant to drafting.

**Drafting of Memorandum**

It is pertinent to note that memorandum is the main edifice upon which the whole structure of the company is erected. It is the basic document fundamental to its existence. Further, it is also to be noted that as it is the charter of the company defining scope of its activity and extent of power it could exercise, so that its shareholders, creditors, bankers and other third parties who deal with the company could know the range of the company’s enterprise. Based on the provisions of Section 4 of the Companies Act, 2013, the main drafting requirements of contents of a Memorandum are summarized below:

**1. Name of the company**

As per Section 4(1) (a) of the Companies Act, 2013, in the case of a public limited company the name of the company should last with the word “Limited”, or in the case of a private limited company, the name of the company should last with the words “Private Limited. In case of Companies Registered under Section 8 of the Companies Act, 2013 these provisions does not apply.

As per Section 4(2) of the Companies Act, 2013, the name stated in the memorandum shall not—

- (a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or
- (b) be such that its use by the company –
  - (i) will constitute an offence under any law for the time being in force; or
  - (ii) is undesirable in the opinion of the Central Government.

**2. Registered Office of the Company**



As per Section 4(1) (b) the memorandum of the company should mention the State in which the registered office of the company is to be situated;

### 3. Objects of the Company

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013 (hereinafter referred to as 'Act'). This is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is a public company; two or more persons, where the company to be formed is a private company; or one person, where the company to be formed is a One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1)(c) of the Act, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities.

The memorandum of the company should state the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;

An act beyond the objects mentioned in the memorandum is *ultra vires* and void and cannot be ratified even by all members of the company. There is no restriction on objects except it should be legal and lawful. While drafting the objects, care should be taken to see that:

- (i) The objects are stated in a precise and clear manner so that there is no ambiguity in their inter-presentation;
- (ii) Each object is stated independently;
- (iii) There is no inconsistency or contradiction between the objects;
- (iv) The same objects are not repeated in other clauses of objects in different words and phraseology;
- (v) No object is illegal, immoral or against public policy;
- (vi) Objects are properly arranged and divided and set in short sentences.

### 4. The Liability of Members

This clause of memorandum should state the liability of members of the company, whether limited or unlimited, and also state, –

- (i) In the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and
- (ii) In the case of a company limited by guarantee, the amount up to which each member undertakes to

contribute –

- (A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and
- (B) To the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

## 5. Capital Clause

This clause of memorandum of association of company should include in the case of a company having a share capital, –

- (i) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount and the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and
- (ii) The number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

## 6. Name of one person Company's Subscriber

In the case of One Person Company, the memorandum of association of a company should contain the name of the person who, in the event of death of the subscriber, shall become the member of the company.

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

Any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

## ARTICLE OF ASSOCIATION

According to Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

In terms of section 5(1), the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company *inter se*. They are subordinate to and are controlled by the memorandum of association.

An article of Association is another equally important document for incorporation of a limited company. Articles are rules and regulations for management of internal affairs of the company. It constitutes a contract between the company and its members and members *inter se*. It is framed with the object of carrying out aims and objects of the company as contained in Memorandum and if necessary it may clarify anything contained in Memorandum. The article of a company contains the regulations for management of the company and other such matters, as may be prescribed:

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a

special resolution, are met or complied with. However the provisions for entrenchment referred above shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

## ENTRENCHMENT PROVISIONS

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The Companies Act 2013, recognizes an interesting concept of entrenchment. Essentially, the entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions greater than those prescribed under the Act (such as obtaining 100% consent). This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment referred to in section 5(3) shall be made either (a) on formation of a company, or (b) by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed. [Section 5 (5)]

## Contents of Articles

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Share Capital, variation of rights, Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.
10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. Share certificates.
14. Dematerialisation.

15. Conversion of shares into stock.
16. Voting rights and proxies.
17. Meetings and rules regarding committees of the Board.
18. Directors, their appointment and delegations of powers.
19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.
22. Managing director, Whole-time director, Manager, Secretary, Chief Executive Officer and Chief Financial Officer.
23. Additional directors.
24. Seal.
25. Remuneration of directors.
26. General meetings, proceedings at general meetings, adjournment of meeting.
27. Board of Directors, Proceedings of the Board meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalisation of profits, reserves.
34. Secrecy

### Drafting of Articles

Utmost care is required to be taken to draft the Articles. It should contain strictly only relevant and necessary matters. In its draft, efforts must be made to incorporate comprehensive provisions so as to cover all statutory requirements and all possible contingencies. Any alteration requires cumbersome procedure to be followed which is expensive and time consuming.

Articles, as a public document of the company, have evidentiary value in matters which involve dealing of the company with its own members or third parties. Any person outsider has constructive notice of the contents of Articles and expected to inspect before entering into any transaction with the company. Articles must be signed by the subscribers of the Memorandum and be registered along with the Memorandum. In case of drafting the articles for a company limited by shares, the draftsman can follow the following alternatives:

- (i) Adopt Table F of Schedule 1 in Companies Act, 2013 in full; or
- (ii) Exclude Table A wholly and register own Articles suiting its requirements; or
- (iii) Register own articles and in addition thereto allows Table A to apply so far as it is not modified or excluded by the articles.

Articles shall be divided into paragraphs numbered consecutively. This will help the company to alter the articles conveniently.

Some important points which a draftsman should bear in mind while drafting the Articles are as follows:

1. Share capital, its kinds rights attached to different kinds of shares or any special privileges attached thereto should be considered and incorporated in Articles.
2. Directors – appointment of directors, their noting rights, resignations, termination etc. should be given due consideration and their rights, powers and privileges should be incorporated in Articles Proportional representations may also be looked into.
3. In Government Companies, Joint Sector Companies, Joint Ventures with foreign companies, joint venture with Government Companies, the main terms of their partnership in Share Capital as well as the management of the affairs of the company with power and authority delegation be relevantly discussed in the Articles with scope and limitations thereto to avoid any misinterpretation.
4. As far as possible, regulation given in Table F may be borrowed, even if it is not made applicable so that Article may conform to the intent and spirit of law.
5. Efforts should be made to make each article self explanatory and self interpretative to avoid misleading conclusions. Coherence and sequence of the contents should be maintained at any costs.
6. Any items which are already mentioned in Memorandum and is to be mentioned in Articles, it is better that it is put in words such as “as mentioned in Memorandum of Association” which will skip the requirement of altering Articles when Memorandum is altered.
7. No provision which a company cannot do either as per Memorandum or Companies Act or any other law, should find a place in articles: e.g. expulsion of members. This is opposed to Company Jurisprudence and is *ultra vires* of the Act.
8. Where the company would require assistance from financial Institutions, provisions be made for appointment of nominee directors, conversion of loans from financial institutions into equity etc.

After drafting a proper balancing should be done with Memorandum’s contents, as to coverage, inconsistencies with it, contradictions occurred etc. to enable proper modification in time. It is better to have an Article of an existing company in the same field of activity, either to modify it or at least to know the relevant matters which can be included in the Draft. Before printing it is better be shown to ROC and seek his informal approval.

## UNDERWRITING AND BROKERAGE AGREEMENTS

Underwriting is an insurance against risk. When shares or debentures of a company are issued, they are, by and large, underwritten to ensure that all the shares or debentures issued are taken up and thus the required capital is raised. Before entering into an underwriting arrangement with a member of any recognised stock exchange, it is the duty of the directors of the concerned company to ensure that the underwriter has sufficient financial resources to meet any obligation which may devolve upon him in the event of the issue not being fully subscribed by public.

### Power of a Company to Pay Brokerage/Underwriting Commission

Section 40 of the Companies Act, 2013 permits a company to pay certain commissions and prohibits the payment of all other commissions, discounts etc.

- (i) The company may exercise the powers of paying commissions conferred by sub-section (6) of section 40, provided that the rate per cent. or the amount of the commission paid or agreed to be paid shall be disclosed in the manner required by that section and rules made thereunder.
- (ii) The rate or amount of the commission shall not exceed the rate or amount prescribed in rules made under sub- section (6) of section 40.

- (iii) The commission may be satisfied by the payment of cash or the allotment of fully or partly paid shares or partly in the one way and partly in the other.

As per Rule 13 of the Company (Prospectus and Allotment of Securities) Rules, 2014 a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the following conditions, namely:-

- (a) The payment of such commission shall be authorized in the company's articles of association;
- (b) The commission may be paid out of proceeds of the issue or the profit of the company or both;
- (c) The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;
- (d) the prospectus of the company shall disclose –
  - (i) the name of the underwriters;
  - (ii) the rate and amount of the commission payable to the underwriter; and
  - (iii) the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.
- (e) there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;
- (f) a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

### **Specimen Agreement for Acting as Broker to an Issue**

Name and address of the firm of brokers who agree to act as brokers.

Ref. No.....

Date..... The Board of Directors

(Name and address of the company for whose public issue the firm agrees to act as broker)

Dear Sir(s),

Re: Proposed public issue of..... (type of security) Shares/ Debentures of Rs..... each for cash at par of.....Ltd.

We, the undersigned, hereby testify and consent to act as Brokers to the Issue of..... Shares/Debentures of Rs..... each for cash at par as captioned above by..... Ltd. and to our name being inserted as Brokers in the prospectus which the company intends to issue in respect of the proposed issue of capital and we hereby authorise the said company to deliver this consent to the Registrar of Companies..... pursuant to Section 40(6) of the Companies Act, 2013.

As required under Rule 13 of the Company (Prospectors and Allotment of Secreteries) Rules, 2014, we are agreeable to accept one and a half per cent on the issue price as brokerage on allotment made in respect of applications bearing our rubber stamp as brokers.

Thanking you,

Yours faithfully,

For.....

**Specimen Underwriting Agreement**

Name and address of the firm of brokers  
who agree to act as underwriters.

(Letter form)

Ref. No.....

Date..... The Board of Directors

(Name and address of the company for  
whose public issue the firm agrees  
to act as underwriter)

Dear Sir(s),

Re: Proposed Public Issue of Equity Shares

We, hereby record the term son which we (hereinafter referred as “underwriters”) have agreed to underwrite..... Equity Shares of the aggregate nominal value of Rs..... out of the total issue of..... Equity Shares to be offered to the public at Rs...../- each for cash at par.

1. The prospectus as approved by the underwriters will be delivered to the Registrar of Companies ..... on or before..... for registration in accordance with the provisions of Rule 13 of the Company (Prospectors and Allotment of Secreteries) Rules, 2014. Sufficient number of copies of the prospectus and application forms shall be printed and made available to the underwriters, brokers and members of the public who intend to apply for the Equity Shares as soon as possible thereafter.
2. Underwriters shall be entitled to arrange sub-underwriting with respect to their respective commitments for their own account on terms to be arranged at their discretion with their sub-underwriters.
3. If by the closing date of the subscription list or such earlier date as may be agreed to by the underwriters, the Equity Shares offered to the public are not subscribed in full by the public and the application money payable in respect thereto is not received by you, you will within 14 days or such extended time as may be agreed to by the underwriters, notify the underwriters in writing as to the amount/number of Equity Shares which have not been so subscribed. The underwriters shall within 21 days after the receipt of such intimation apply for and subscribe such unsubscribed amount/number of Equity Shares and pay or procure to be paid the money payable on application in respect of such Equity Shares in proportion that the amount underwritten by each of them bears to the total amount of the issue.
4. In determining the amount/number of Equity Shares to be taken up by the underwriters the following factors shall be taken into consideration:
  - (a) In no circumstances will the underwriters be liable to take up Equity Shares more than the amount underwritten by them.
  - (b) All applications made before the closing of the subscription list by the underwriters, or on forms of application bearing the stamp of the underwriters, and not withdrawn in the meantime shall be taken into account in *pro tanto* reduction of the liability of the underwriters under this underwriting agreement.
  - (c) After scrutiny of the applications received, the total shortfall shall first be allocated among all

persons who have underwritten the issue and who have not fulfilled their quota, in proportion to the amount underwritten by each of them.

- (d) Credit shall be given to each underwriter who has not fulfilled his quota in relation to applications made by members of the public independently proportionately to the amount underwritten by each under writer, any amount or such credit being in excess of the commitment of any underwriter being similarly shared proportionately by the others.
- 5. Subject to the terms of the prospectus, you will allot Equity Shares for which applications have been received as soon as possible and despatch Equity Share Certificates within six months of such allotment.
- 6. In consideration of the underwriting you will, within 14 days from the date on which we shall have fulfilled our obligation, pay the underwriters a commission at the rate of two and a half per cent on the issue of the amount/ number of Equity Shares underwritten by the underwriters.
- 7. Notwithstanding anything stated above the underwriters shall have the option to be exercised by them at any time prior to the date fixed finally for publication of the "Announcement" of terminating underwriting arrangement in the event of a complete breakdown or dislocation of business in the financial markets of the cities of Calcutta, Bombay, Madras and Delhi due to war, insurrection, civil commotion or any other serious or sustained or political or industrial disturbances or if the whole present basis of Stock Exchange prices in any such city should undergo substantial change through the occurrences of such catastrophe or similar event at present not foreseen. In the event of underwriters exercising such option they shall be released from all obligations arising out of the underwriting agreement.
- 8. Our offer is valid subject to your subscription list opening on or before.....

Please acknowledge receipt of this letter and intimate to us your acceptance of the terms and conditions mentioned above.

Thanking you,  
 Yours faithfully,  
 For.....

**Underwriting Contract**

This AGREEMENT is made on the..... day of..... 20..... between..... of..... (hereinafter called the underwriters) of the one part, and .....Ltd. whose registered office is situate at..... (hereinafter called the 'the company') of the other part:

Whereas the company is about to offer for public subscription as issue of..... shares of..... each in accordance with the terms of the draft prospectus a copy of which is annexed hereto, or with such modifications therein as may be mutually agreed upon between the company and the underwriters:

Now it is hereby agreed as follows:

- 1. If the said..... shares shall on or before the..... day of..... 20..... (or such latter date as shall be mutually agreed upon by the parties hereto not after than the..... day of..... 20.....) be offered by the company for subscription by the public at par on the terms of such prospectus as aforesaid, the underwriters shall on or before the closing of the subscription list apply at par for the said..... shares.

The said prospectus shall be issued in the form already approved by the underwriters or with such modification, if any, as shall mutually agreed between the company and the underwriters.

- 2. If on the closing of the lists under the said prospectus the said..... shares shall be allotted in



respect of applications from the public the responsibility of the underwriters is to cease and no allotment is to be made under this agreement but if the said..... shares shall not be allotted to the public but any smaller number of such shares is so allotted, the undertaking of the underwriters is to stand for the difference between the said..... shares and the number of the shares allotted to the public.

3. The company shall pay to the underwriters in cash within..... days from the allotment of the said..... shares a commission at the rate of p.c. on the nominal value of the shares.
4. This agreement is to be irrevocable on the part of the underwriters and is to be sufficient in itself to authorise the company in the event of the underwriters not applying for the said..... shares to cause application to be made for such shares or any part thereof in the name and on behalf of the underwriters in accordance with the terms of the said prospectus and authorise the directors of the company to allot the said..... shares of the company or any part thereof to the underwriters (but subject to the provisions of this agreement) and in the event of the company causing an application to be made for such shares in the name of the underwriters, the underwriters shall hold the company and the said applicants harmless and indemnified in respect of such application.

### Shareholders' agreements

Shareholders' agreements (SHA) are quite common in business. In India shareholder's agreement have gained popularity and currency only lately with bloom in newer forms of businesses. There are numerous situations where such agreements are entered into – family companies, JV companies, venture capital investments, private equity investments, strategic alliances, and so on. Shareholders' agreement is a contractual arrangement between the shareholders of a company describing how the company should be operated and the defining inter-se shareholders' rights and obligations. shareholders' agreement. SHAs are the result of mutual understanding among the shareholders of a company to which, the company generally becomes a consenting party. Such agreements are specifically drafted to provide specific rights, impose definite restrictions over and above those provided by the Companies Act. A SHA creates personal obligation between the members signing such agreement however, such agreements do not become a regulation of the company in the way the provisions of Articles are.

### Enforceability of the Shareholder's Agreement

Though the international view is split but to a large extent courts are inclined towards favouring SHA as long as they are not found to be detrimental to the minority stakeholder's rights. In the leading case of *Russell v. Northern Bank Development Corporation Ltd* [1992] BCC 578; [1992] 1 WLR 588, the House of Lords found that though a company cannot deprive itself of its power to alter its constitution, the members of the company could agree in a shareholders' agreement as to how they will exercise their voting rights on a resolution to alter the articles/constitution. The US Courts have largely accepted shareholder agreements. [*Blount v. Taft* [246 S.E.2d 763 at 769 (1978)]

While shareholders' agreements are enforceable in England regardless of whether they have been incorporated in the articles of association of the company, in India courts have either refused to recognize clauses in shareholders agreements or, even when consistent with company legislation, enforced such clauses only if they have been incorporated in the articles of association of the company. There is a series of rulings where the courts have upheld that in case of any conflict between the Articles and the SHA, the former will always prevail. Some of these are:

- V.B. Rangaraj v. V.B. Gopalakrishnan (AIR 1992 SC 453)
- Shanti Prasad Jain v. Kalinga Tubes Ltd., (35 Com. Cas. 351 SC)
- Mafatlal Industries Ltd., v. Gujarat Gas Co. Ltd (97 Comp Cas 301 Guj),

- Pushpa Katoch v. Manu Maharani Hotels Limited ([2006] 131 Comp Cas 42 (Delhi))

The Supreme Court in *V.B. Rangaraj v. V.B. Gopalakrishnan*, AIR 1992 SC 453 held that a restriction which is not specified in the articles of association is not binding either on the company or on the shareholders. This decision was reiterated by the Bombay High Court in *IL & FS Trust Co. Ltd. v. Birla Perucchini Ltd* [2004] 121 Comp Cas 335 (Bom).

However, the Supreme Court in 2003 in its decision in *M.S. Madhusoodhanan v. Kerala Kaumudi Pvt. Ltd.* (2003 117 CompCas 19 SC ) not disagreeing with the decision in *V.B Rangaraj* case mentioned above, but distinguishing itself from the facts in that judgment, held that a restriction in relation to identified members on identified shares of a private company did not amount to restriction of transferability of shares per se.

In *Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd* [(2010) 154 Company Cases 593 (Bom)], it was held that such clauses are to hamper the free transferability of shares and in violation of the Companies Act, and hence, are not enforceable. Subsequently in the case of *Messer Holdings Limited v. Shyam Madanmohan Ruia and Ors* [(2010) 98 CLA 325] the Division Bench of Bombay High Court overruled its judgement in *Western Maharashtra Development Corporation Ltd* and provided a more liberal interpretation and recognised the rights inter se among shareholders in case of restrictions on transfer of shares.

In Indian context, while the landmark decision of the Supreme Court in *V.B. Rangaraj* case mentioned above is often cited in the context of shareholders' agreements, most other decisions have been rendered by the High Courts in various states especially the Bombay High Court. The decisions on shareholders' agreements are not uniformly inclined in a direction. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value. It is difficult to come to clear and crisp answers as to enforceability of shareholders' agreements

### **Specimen Shareholders Agreement**

THIS AGREEMENT made on the ..... day of ....., 2018 BETWEEN MR. A residing at (hereinafter referred to as "A") (which expression shall, unless repugnant to the context or meaning hereof, mean and include his heirs, executors, administrators and assigns) of the First Part.

And

MR. B residing at (hereinafter referred to as "B") (which expression shall, unless repugnant to the context or meaning hereof, mean and include his heirs executors, administrators and assigns) of the Second Part.

And

.....(P) LTD., a Company incorporated under the Companies Act, 2013 and having its registered office at herein represented by its (hereinafter referred to as "XYZ") which expression shall, unless repugnant to the context or meaning hereof, include its successors and assigns) of the Third Part;

WHEREAS:

- (A) A and B hereto have agreed to jointly manage a company in India named "XYZ Pvt Ltd.";
- (B) A and B have agreed to become Equity Partners by investing in the shares of the Company subject to the condition that they shall enter into a Shareholders Agreement in terms of these presents;
- (C) The Company "XYZ PVT. LTD. " has been requested to, and has agreed to, join in the execution of these presents and to take this Agreement on record so that it is aware of the rights and obligations of A AND B, the parties hereto and ensure that they comply with the same;
- (D) The parties hereto are desirous of recording the terms and conditions of their Agreement in writing;

NOW IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:-

1. (a) A and B shall jointly invest in the Company which is an existing company limited by shares under the Companies Act, 2013 and known as “XYZ PVT LTD”.

(b) The registered office of the Company shall be situate at , or at such other places as may be mutually agreed upon between the parties in writing.

(c) The Company shall carry on the business of running and managing restaurants and (Description of the business and complete address), either by itself or through other agencies or company industries and may carry on any other business as may be decided by B hereto and shall ensure that no other business activity is undertaken by the Company at any time without the consent of A hereto.

2. The authorised share capital of the Company is Rs./- (Rupees only) consisting of (.) equity shares of Rs.10/- (Rupees ten) each.

3. The subscription by A hereto to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/- (Rupees ten only) and the subscription by B to the aforesaid authorised share capital of the Company shall be 1,00,000 (One lakh) equity shares of Rs.10/-(Rupees ten only).

4. There shall be no further issue of capital without the consent of both the parties hereto, and unless otherwise agreed upon in writing further investment shall be as mutually decided by both parties.

5.(a) The Board of Directors of the Company shall consist of A and B

(b) A shall have the right to nominate two (2) Additional Directors onto the Board and B shall have the right to nominate three or more Additional Directors on the Board. Both parties shall be entitled at any time to remove any of the representatives on the Board by written notice to the other party and to appoint another or other/s in their place.

(c) The day to day management of the Company shall be looked after by a Managing Director to be appointed with the consent of B hereto. Any major acquisition of property, substantial expansion of business activities or diversification or matters of policy shall be with the prior consent of B.

(d) It is agreed as between the parties hereto that the position of Chairperson of the Company shall be held by B or a nominee of B. The Chairman of the Board shall also be the Chairman of all general meetings of the Company.

6. A and B hereto jointly and severally shall vote and act as members of the Company and with respect to the shares of the Company held by them, so as to ensure that Directors of the Company are at all times appointed and maintained in office in conformity with the provisions of this Agreement. If at any time the provisions of this Agreement are not fully complied with, A and B jointly and severally agree to promptly take all necessary steps to ensure that the provisions of this Agreement hereof are fully implemented in letter and spirit.

7. (a) The Auditors of the Company shall be M/s.\_.

(b) The Auditors of the Company shall not be changed without the prior written consent of both A and B.

8. Any sale or transfer of shares in the Company by either party shall be as provided in Clause 9. If at any time during the continuance of this Agreement either A or B, desire to sell or transfer all or any of their respective shares held by them in the Company, they shall do so strictly in accordance with the provisions hereinafter written.

9. If either A or B desires at any time to sell the whole or part of their shares in the Company, he shall first offer such shares in writing to the other. If the other does not accept in writing the offer within 15 days of receipt of the offer, the first party shall then be at liberty within 30 days thereafter to sell the shares so offered to any other persons of its choice at the same price and on the same terms and conditions as contained in its written offer to the other party hereto in the first instance, failing which the procedure contained in this sub-clause will have to be repeated by a party desiring to sell his shares.

10. B will bring in further working capital to run an F & B Unit(s) at (Address of registered office). \_ Bank had advanced loans of about Rs. 1,10,00,000/-(Rupees One Crore Ten Lakhs Only) to XYZ which loans have to be repaid by them. B will be bringing further moneys upto Rs.\_(Rupees\_Only) to repay the loan. The Balance Rs. /- has been secured with the collateral security provided B. XYZ have entered into a Management and Royalty Agreement with \_\_\_\_\_ (P) Ltd., for the operation and management of the F & B unit(s) of XYZ and are entitled to receive their share of profit. A and B are equally entitled to this share of profit being equal shareholders of XYZ. It is hereby agreed that A shall not be entitled to a percentage of the profit which shall not exceed Rs. \_\_\_\_\_/-(Rupees Only) per month from XYZ out of his share of profit subject to the terms contained herein and/or in any other document executed by him on behalf of XYZ. The balance money attributable to A shall be utilized to repay the loans and interest outstanding to Bank, and the amount of Rs. /- brought in by B and interest thereon, and towards the working capital brought in by B and interest thereon and any other loans of the XYZ. This arrangement will continue till the entire sums (liabilities) together with the interest thereon have been repaid. However B will be entitled to withdraw the profit attributable to his share.

11. B will be entitled to interest at the rate of 12% per annum on the sums brought in by him or his Associates / concerns / businesses.

12. A and B agree and undertake not to disclose or divulge directly or indirectly to any third party any trade or business secret or other secret or confidential information pertaining to the business, affairs or transactions of each other or of the Company or of their clients or customers, that may have been disclosed, imparted to or acquired by either of them from the other or from the Company.

13. A and B jointly and severally undertake:-

- (a) that they shall ensure that they, their representatives, proxies and agents representing them at general meetings of the shareholders of the Company shall at all times exercise their votes in such manner so as to comply with, and to fully and effectually implement, the provisions of this Agreement.
- (b) that if any resolution is proposed contrary to the terms of this Agreement, the parties, their representatives, proxies and agents representing them shall vote against it. If for any reason such a resolution is passed, the parties will, if necessary, join together and convene an extraordinary, general meeting of the Company in pursuance of section 100 of the Companies Act, 2013 for implementing the terms of this Agreement.

14. A and B shall jointly and severally procure and/or ensure that the Director or Directors of its choice on the board of the Company shall at all times fully and effectually implement and comply with (including by exercise of voting rights at meetings of the Board or resolutions by circulation and on resolutions passed at a meeting of any Committee of the Directors) the provisions of this Agreement.

15. If either A or B shall commit a breach of any of the terms or provisions of this Agreement and shall fail to rectify such breach within Sixty (60) days from the receipt of written notice from the party complaining of the breach, then the latter shall be entitled, without prejudice to its other rights and remedies under this Agreement or at law, to terminate the Agreement recorded herein by written notice.

16. No modification or alteration of this Agreement or any of its terms or provisions shall be valid or binding on A and/or B unless made in writing duly signed by both.

17. This Agreement is personal to A and B and shall not be transferred or assigned in whole or in part by either party without the prior written consent of the other.

18. If any dispute or difference shall at any time arise between A and B as to any terms, provisions or matters contained herein on as to their respective rights, claims, duties or liabilities hereunder or otherwise, howsoever in relation to or arising out of or concerning this Agreement, such dispute or difference shall be referred to the arbitration. The venue of such arbitration shall be in Bangalore unless otherwise agreed in writing. Such

arbitration shall be held under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

19. This Agreement represents the entire agreement between the parties hereto on the subject matter hereof and cancels and supersedes all prior agreements, arrangements or understandings, if any, whether oral or in writing, between the parties hereto on the subject matter hereof.

IN WITNESS WHEREOF the parties hereto have executed these presents the day and year first hereinabove written.

SIGNED AND DELIVERD by MR. A

in the presence of

.....

SIGNED AND DELIVERD by MR.B

in the presence of

.....

SIGNED AND DELIVERD for and on behalf of XYZ

By its SHAREHOLDERS AND AUTHORISED DIRECTORS

MR. A

MR. B

in the presence of

.....

### Contract of Appointment with Managing Director

According to Section 2(54) of the Companies Act, 2013, “managing director” means “a director who, by virtue of the article of a company 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 a managing director, by whatever name called.”

While drafting a contract of appointment, the following points have to be taken care of:

The person who is being appointed as managing director must be a director of the company; and

He must be entrusted with substantial powers of management.

Usually the articles of association of companies empower the Board of directors to appoint one or more of the directors as managing director(s) and fix their remuneration subject to the provisions of Sections 196, 197, 198, 199, 200 and other applicable provisions of the Act and Rules make thereunder. The Board of directors while appointing a director as managing director, critically examines the draft agreement prepared by the secretary for the appointment of the managing director and after having approved the same with or without any modification, authorises one of its directors to sign and execute for and on behalf of the company, the agreement for the appointment of the managing director. It should, therefore, be made sure that the person executing the agreement on behalf of the company is duly authorised by the Board of directors in this regard.

Being an agreement, such a contract must have all the other essential ingredients of a contract under the Indian Contract Act, 1872, namely,

- (i) free consent of parties;

- (ii) competence to contract;
- (iii) for a lawful consideration;
- (iv) with a lawful object; and
- (v) are not expressly declared to be void in the Act (Section 10).

Section 11 of the Contract Act lays down that “every person is competent to contract who is of the age of majority, according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”

Section 12 of the said Act provides that a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

According to Section 14 of the Contract Act, consent is said to be free when it is not caused by –

- coercion;
- undue influence;
- fraud;
- misrepresentation; or
- mistake.

### **Specimen Agreement of Service as a Managing Director of a Company**

THIS AGREEMENT is made on the..... day of..... 2018 between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter called “Company” of the one part and Mr..... son of Mr..... resident of..... (hereinafter called “the Managing Director” of the other part).

It is hereby agreed as follows:

1. The company hereby appoints subject to the approval of the Government of India under Section 203 of the Companies Act, 2013, Mr..... as Managing Director of the company for period of five years with effect from..... and the Managing Director hereby agrees to serve the company in such capacity for a period of five years with effect from.....
2. The Managing Director shall exercise and perform such powers and duties as the Board of directors of the company (hereinafter called “the Board”) shall, from time to time, determine, and subject to any directions and restrictions, from time to time, given and imposed by the Board and subject to the restrictions contained hereinafter, he shall have the general control, management and superintendence of the business of the company with power to appoint and dismiss employees (other than officers of the company drawing a basic pay of Rs. 3,000 and above per month) and to enter into contracts on behalf of the company in the ordinary course of business and to do and perform all other acts and things, which in the ordinary course of business he may consider necessary or proper or in the interest of the company.
3. Without prejudice to the generality of the powers vested in the Managing Director under the preceding clause hereof, the Managing Director shall be entitled to exercise the following powers –
  - (a) With Board’s approval singly or together with other authorised officer(s) of the company, to open and operate on any banking or other account and to draw, make, accept, execute, endorse,

discount, negotiate, retire, pay, satisfy and assign cheques, drafts, bills of exchange, promissory notes, hundis, interest and dividend warrants and other negotiable or transferable instruments or securities;

- (b) Together with other authorised officer(s) of the company to borrow moneys with or without security, but not exceeding Rs. five lakhs at a time from one party;
  - (c) To incur capital expenditure up to a sum of Rs. five lakhs during any financial year;
  - (d) Together with other authorised officer(s) of the company, to invest funds of the company in approved securities (other than in shares of other companies) and on fixed deposit with the company's bankers provided that such investments in any one financial year shall not exceed Rs. twenty lakhs;
  - (e) To engage employees and other servants for the company at a basic salary not exceeding Rs. 3000/- per month within the budget sanctioned by the Board;
  - (f) To increase the salary or the remuneration of any employee or servant of the company whose basic salary does not exceed Rs. 2,000/- per month. General increments must be with the Board's approval;
  - (g) Together with other authorised officer(s) of the company, to enter into contracts for the purchase of goods and hiring of services for the company which contracts do not extend over a period of one year or exceed in value the sum of Rs. ten lakhs;
  - (h) To institute, prosecute, defend, oppose, appear or appeal, to compromise, refer to arbitration, abandon subject to judgment, proceed to judgment and execution or become non-suited in any legal proceedings relating to customs or excise duties, tax on income, profits and capital and taxation generally or otherwise.
4. The Managing Director shall, throughout the said term, devote the whole of his time, attention and abilities to the business of the company, and shall obey the orders, from time to time, of the Board and in all respects conform to and comply with the directions and regulations made by the Board, and shall faithfully serve the company and use his utmost endeavour to promote the interest thereof.
5. The company shall pay to the Managing Director during the continuance of this agreement in consideration of the performance of his duties –
- (a) a salary at the rate of Rs..... per month;
  - (b) the actual travelling expenses incurred by the Managing Director in or about the business of the company;
  - (c) the actual entertainment expenses and approved club membership fees reasonably incurred by the Managing Director in or about the business of the company;
  - (d) the actual hospital and medical expenses which have been incurred by the Managing Director for himself, his wife, dependent parents and his minor children, provided that such expenses during the three consecutive financial years shall not exceed Rs.....
  - (e) The Managing Director shall be entitled to use the company's car, all the expenses for maintenance and running of the same including salary of the driver to be borne by the company;
  - (f) The company shall provide the Managing Director with rent free furnished accommodation and will pay electricity and water charges;
  - (g) He shall also be entitled to use the company's telephone at his residence, the charges whereof shall be borne by the company;

- (h) The Managing Director shall be entitled to participate in any provident fund and gratuity fund or scheme for the employees which the company may establish;
  - (i) The Managing Director shall be entitled to such increments from time to time as the Board may in the discretion determine;
  - (j) The Managing Director shall be entitled to privilege annual leave on full salary for a period of one month, such leave to be taken at such time to be previously approved by the Board; Provided that the Board shall be entitled, at its sole and uncontrolled discretion, to permit the Managing Director to accumulate such leave for not more than three months; provided further that any leave not availed of by the Managing Director shall be encashable.
6. The Managing Director shall not during the period of his employment, and without the previous consent in writing of the Board, engage or interest himself either directly or indirectly in the business or affairs of any other person, firm, company, body corporate or concern or in any undertaking or business of a nature similar to or competing with the company's business and further shall not, in any manner, whether directly or indirectly, use, apply or utilise his knowledge or experience for or in the interest of any such person, firm, company, body corporate or concern as aforesaid or any such competing undertaking or business as aforesaid.
7. The Managing Director shall not, during the continuance of his employment or any time thereafter, divulge or disclose to any person, firm, company, body corporate or concern, whatsoever or make any use whatever for his own or for whatever purpose of any confidential information or knowledge obtained by him during his employment of the business or affairs of the company or of any trade secrets or secret processes of the company and the Managing Director shall, during the continuance of his employment hereunder, also use his best endeavours to prevent any other person, firm, company, body corporate or concern from doing so.
8. Any property of the company or relating to the business of the company, including memoranda, notes, records, reports, plates, sketches, plans, or other documents which may be in the possession or under the control of the Managing Director or to which the Managing Director has at any time access, shall at the time of the termination of his employment be delivered by the Managing Director to the company or as it shall direct and the Managing Director shall not be entitled to the copyright in any such document which he hereby acknowledge to be vested in the company or its. assigns and binds himself not to retain copies of any of them.

The Managing Director shall, from time to time, during his employment hereunder, fully disclose to the company the progress of his investigation and any discoveries he may make himself or in conjunction with others and if at any time hereafter he shall make himself or in conjunction with others any improvement, invention or discovery arising out of or in connection with the said employment he shall forthwith disclose to the Company or any patent agent appointed by it a full and complete description of the nature of the said improvement, invention or discovery and the mode of performing the same.

9. The whole interest of the Managing Director in the said improvement, invention or discovery and in all future improvements thereon at any time discovered or invented by the Managing Director alone or in conjunction as aforesaid, shall be the sole and absolute property of the Company and the Managing Director, if and whenever required by the Company during the period of employment or after the termination thereof shall at the expense of the Company, join with the Company in applying for letters patent, design registration or other forms of protection in India and in such other countries as the Company may direct for the said improvement, invention or discovery or any such improvement thereon and shall, on the request by, and at the expense of the Company, execute, sign and do all applications, assignments, instruments and things necessary to vest the whole of his interest in the said improvements, invention or discovery or improvement thereon and any letters patent or other protection



that may be obtained in respect thereof, in the Company or person or persons appointed by it.

10. If the Managing Director shall at any time be prevented by ill-health or accident from performing his duties hereunder, he shall inform the Company and if he shall be unable by reason of ill-health or accident for a period of sixty days in any period of twelve consecutive calendar months to perform his duties hereunder, the Company may terminate his employment.
11. The Company shall be entitled to terminate this agreement in the event of the Managing Director being guilty of misconduct or such inattention to or negligence in the discharge of his duties or in the conduct of the Company's business or of any other act of omission or commission inconsistent with his duties as the Managing Director or any breach of his agreement.
12. If before the expiration of this agreement the tenure of office of the Managing Director shall be determined by reason of a reconstruction or amalgamation whether by the winding up of the Company or otherwise, the Managing Director shall have no claim against the Company for damages.
13. The Company shall be at liberty from time to time to appoint a person or persons to be Managing Director(s) jointly with the Managing Director.

The Managing Director hereby agrees that he will not, at any time, after the termination of this agreement, represent himself as being in any way connected with or interested in the business of the company.

IN WITNESS WHEREOF the parties hereto have set their hands the day, month and the year first above written.

Witnesses:

*for and on behalf of the company*

1.

2.

*Managing Director*

### Contract of Appointment with Manager

Section 2(53) of the Companies Act, 2013 defines "Manager" means an individual who, subject to the superintendence, control and direction of the Board of directors, has the management of the whole, or substantially the whole, of the affairs of the company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not.

The above definition highlights the following points, which must be borne in mind by the secretary while drafting an agreement for the appointment of a manager:

- (1) a manager has to be an individual only;
- (2) a manager has the management of the whole, or substantially the whole, of the affairs of the company;
- (3) a manager functions subject to the superintendence, control and direction of the Board of directors of the company;
- (4) a manager may be under a contract or not.

If, for the appointment of a manager, an agreement is not drawn and executed, then the secretary must draft a detailed Board resolution approving the appointment of a manager, making it very clear that the manager shall have the management of the whole or substantially the whole of the affairs of the company, and shall function under the superintendence, control and direction of the Board of directors, which means that he shall act under the directions of the Board, his actions shall be subject to the scrutiny and supervision of the Board and finally the Board shall direct the manager in his day-to-day management of the affairs of the company. As against a managing director, who is entrusted by the Board of directors with substantial powers of management, a manager by virtue of his appointment, has the power of management. A managing director after the powers of management have been entrusted to him performs his day-to-day functions independently according to the

mandate of the Board, whereas a manager acts under the superintendence, control and direction of the Board. Keeping the above subtleties between the two managerial personnel in view, the secretary shall proceed to draft an agreement for the appointment of a manager.

### **Specimen Agreement for the Appointment of a Manager in a Company**

This AGREEMENT is made on this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at....., (hereinafter referred to as the Company, which expression shall, unless repugnant to the context or contrary to the meaning thereof include its legal representatives) of the one part and Mr....., son of Mr....., resident of..... (hereinafter called the manager) of the other part.

WHEREAS the company intends to appoint a Manager and Mr....., has been considered as a suitable and competent person for the said post;

AND WHEREAS the said Mr..... has agreed to accept his appointment as the Manager of the Company.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. The said Mr..... is hereby appointed on the terms and conditions hereinafter provided, as the Manager of the Company for a term of five years commencing..... on a monthly remuneration of Rs. ... subject to the approval of his appointment by the Central Government under Section 203 of the Companies Act, 2013 and also subject to the approval of his remuneration by the Central Government pursuant to the provisions of Sections 196, 197, 198, 199 and 200 and other applicable provisions of the Act.
2. The Manager shall be entitled to other pecuniary benefits which are enjoyable by other employees of the company.
3. The Manager shall be paid travelling allowance for the tours he makes in connection with the, business of the company to perform his duties or to carry out the directions of the Board of Directors of the company.
4. The Manager shall be entitled to bonus in accordance with the provisions of the law.
5. The Manager shall be entitled to annual increment of his remuneration at the rate of Rs..... per annum.
6. The Manager shall be on probation for a period of six months. If his work is found satisfactory, his appointment shall continue for a full term of five years including the period of probation.
7. Either the company or the Manager shall be entitled to terminate this agreement by, giving the other, notice in writing of sixty days but the company may terminate this agreement by paying two months' remuneration to the Manager in lieu of the notice.
8. If the Manager dies during his continuance of service, his salary, remuneration, bonuses, allowances etc. for the current financial year shall be paid to his heirs, legal representatives, executors, administrators in a rateable proportion of what he would have received if he had lived and had continued in the service of the company for the whole of that year.
9. The Manager shall not be entitled to make any claim for damages against the company other than liquidated damages, if his services are determined on account of a reconstruction or amalgamation whether by the winding up of the company or otherwise before the expiration of this agreement.
10. The Manager shall devote the whole of his time and attention to the business of the company during the term of his service with the company and shall work with due diligence and using his abilities to his best.

He shall comply with the directions issued by the Board of Directors of the company from time to time. He shall obey the orders issued by the Board of Directors. He shall do his best to promote the interest of the company and shall faithfully serve the company.

11. The Manager shall perform the duties towards the company and exercise the powers assigned to or vested in him by the Articles of Association of the company or by the Board of Directors of the company.
12. The Manager shall not disclose during the term of his service any information obtained by him in relation to the business of the company while attending to his duties and discharging his functions or exercising his powers as the Manager even to such employees of the company as have no concern with the information or to any person not connected with the company.
13. The Manager shall not divulge any secret relating to any working process, improvement in the working process used by the company, invention leading to improvement in the working process or introduction of a new working process usable in the business of the company, invention relating to any of the articles connected with the business of the company, business matters, administrative affairs of the company, to any person not connected with such process, invention, matter and affairs either during the period of his employment in the company or any time after he has left the company.
14. The Manager shall be entitled neither to make use of any of the inventions in relation to the business of the company made by him during the employment in the company, nor to derive any benefit of all the patents whether obtainable in respect thereof in India or abroad, as such inventions and patents shall belong to the company. The Manager shall do at the expense of the company all that is necessary to give full benefit of such invention and patents whenever he is required to do so.
15. The Manager shall be bound not to do himself or participate or associate in any capacity with others in doing the business in which the company is engaged during the period of his employment with the company and for a period of six years after he has left the services of the company.
16. The Manager shall never make use of the working process used by the company even after he has left the services of the company and he shall not employ any invention relating to the business of the company either made by him during the period of his employment in the company or invention relating to the business of the company made by other employees of the company at any time.

IN WITNESS WHEREOF the parties hereto have set their hands on the day, month and year above written.

Witnesses:

For..... Ltd.

1.

2.

Manager

### Contract of Appointment with Secretary

The position of Secretary in a company is a very important one. He is the person who acts as liaison between the Board of Directors and the shareholders on the one hand, with the Departmental Division heads and with the world at large on the other hand. Every information from various departments, divisions, branches, executives, departmental heads, shareholders, creditors, debtors, bankers, financial institutions, Government departments and others concerned with the company converges in his office. He gathers all the information, arranges it in a useful manner, furnishes it with explanations etc. on the company's long-term policies and short-term plans as formulated by the Board of directors to the concerned persons. He collects, arranges and presents the desired/required information to the Board on the progress in the implementation of the various decisions of the Board so that whenever and wherever some corrective or preventive actions are to be taken, the same be taken in time by the Board.

The Company Secretary is expected to be expert in all the aspects of corporate management viz., Company

Law and Practice Income-tax Law and Practice, Excise, Sales tax, Import and Export and Industrial Licensing Law and Practice, various types of insurance-covers, Patents, Trade Marks, Design and Copyright Law and procedure, Industrial Law, Shops and Commercial Establishments Law and Essential Commodities Act and the Orders issued thereunder, drafting of various corporate documents, reports etc. and, accounts, audit, banking and finance.

The appointment of a Company Secretary is done by the Board of Directors and he functions at the pleasure of the Board. He acts under the Board’s instructions but at the same time he is adviser to the Board in all corporate matters. Therefore, the relationship between the Board and the Company Secretary has to be very cordial and there must be perfect understanding between the two, particularly with the Chairman/Managing director, executive director and other Chief Executive Officers.

Usually the appointment of a Company Secretary is made by an appointment letter signed and issued by the Chief Executive Officer, who may be the managing director, executive director, whole-time director etc. under specific authority of the Board.

This letter is an offer by the company to the prospective Company Secretary and when he accepts the same it become a binding contract between him and the company and their relationship is governed by the terms and conditions thereof. “company secretary”, according to Section 2(24) of the Companies Act, 2013 means a company secretary as defined in clause (1) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 who is appointed to perform the functions of company secretary under this Act.

The Government of India has formulated the Companies (Appointment and Qualifications of Secretary) Rules, 1988.

As per Section 205(1) of the Companies Act, 2013, the functions of the company secretary shall include,–

- (a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;
- (b) to ensure that the company complies with the applicable secretarial standards;
- (c) to discharge such other duties as may be prescribed.

Therefore, even if the letter of appointment of a Company Secretary or an agreement between the company and the Company Secretary is silent on those statutory duties and functions, a Company Secretary is bound by law to perform them strictly. Therefore, the letter of appointment or the agreement need not detail all those duties. Usually it contains the fact of offer by the company, the date on or before which he is required to join the service of the company, his salary and ‘perks’, his answerability to the Board of Directors and/or other senior executives of the company, his relationship with other departmental heads, his leave eligibility and other benefits, commitment on his part not to divulge the secrets of the company, so on and so forth.

**A Specimen of the Letter of Offer to the Prospective Company Secretary**

Name and Address of the company.

Ref. No.....

Date: Mr.....

..... Dear

Sir,

I have been directed to advise you that the Board of Directors of the company have decided to appoint you as Secretary of the company and the said assignment is hereby offered to you. You are requested to join the service of the company on or before..... and contact the undersigned so that you may be introduced to the concerned persons before you start functioning.

You will be considered to have been appointed with effect from the day you actually join duty.

2. The company shall pay to you a monthly basic salary of Rs. .... in the time scale of pay of Rs. .... with other allowances as are applicable to other employees of the company in the same time scale of pay.
3. You will enjoy other benefits like the medical expenses reimbursement, leave travel allowance, bonus etc. as may be permissible under the company's service rules.
4. You shall be allowed casual leave/sick leave/festival holidays, weekly off days and earned leave as per rules of the company.
5. You will be on probation for a period of six months and on your services during the said probation period being found satisfactory the Board of Directors may consider you for confirmation in the said post.
6. During the period of your probation, your services may be terminated by the company without any notice and you may also leave the service of the company at twenty-four hours' notice. On confirmation, however, the contract of employment may be terminated by either party by giving the other, thirty days' written notice or paying thirty days' salary in lieu thereof.
7. The company may terminate your services even after confirmation without giving you any notice if you are found by the Board of Directors of the company not performing your assigned duties and your statutory duties properly and to the satisfaction of the Board.
8. As Company Secretary you shall be exclusively responsible:
  - (a) for complying with all the provisions of the Companies Act and the various Rules framed thereunder and other laws applicable to the company;
  - (b) maintaining all the statutory and non-statutory essential registers, books, files, records, papers etc.;
  - (c) preparing and filing with the Registrar of Companies and other concerned authorities the required reports, returns, documents, papers etc. complete in all respects and within the prescribed periods of time; and
  - (d) for carrying out the instructions, directions and advice of the Board of Directors of the company given to you from time to time.
  - (e) ensuring the adherences of applicable secretarial standards.
9. You shall devote your whole time and attention to the work of the company during your tenure as Company Secretary and shall work with due diligence and using your abilities to your best. You shall obey the orders of the Board of Directors of the company. You shall do your best to promote the interest of the company and shall faithfully serve the company.
10. You shall not disclose to any unauthorised person during your employment as Secretary of the company an information obtained by you in relation to the business and corporate policies of the company with special reference to the company's policy regarding the issue of rights shares, bonus shares, time and quantum of payment and/or declaration and payment of dividends from time to time.

Please convey your acceptance of the offer and the terms and conditions attached thereto by signing the carbon copy of this letter and returning the same to the company within a period of seven days from the receipt hereof.

Thanking you.

Yours truly

For.....Ltd.

(.....)

Managing Director

I accept the above offer of the post of Company Secretary with all the terms and conditions attached thereto and shall join on.....

(.....)

Company Secretary

**DEEDS OF AMALGAMATION OF COMPANIES: TRANSFER OF UNDERTAKINGS**

An amalgamation may be defined as an arrangement whereby the assets of two companies become vested in, or under the control of one company, which may or may not be one of the original two companies. Such a company has as its shareholders all, or substantially all, the shareholders of the two companies. An amalgamation is effected by the shareholders of one or both of the amalgamation companies exchanging their shares either voluntarily or as a result of operation of law, for shares in the other or a third company. The arrangement is frequently effected by means of a take-over offer by one of the companies for the shares of the other, or of a take-over offer by a third company for the shares of both.

**Specimen Agreement between two Companies to Amalgamate by Sale of one to the other**

This AGREEMENT is made on this..... day of..... between..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter referred to as the “Vendor”, which expression shall, unless repugnant to the context or contrary to the meaning thereof, include its successors and assigns) to the one part and..... Ltd., a company incorporated under the Companies Act, 2013 and having its Registered Office at..... (hereinafter referred to as “the company”, which term shall, unless repugnant to the context or contrary to the meaning thereof, include its successors or assigns) of the other part.

WHEREAS the vendor was incorporated in the year..... with an authorised share capital of Rs. ten lakhs divided into one lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company shall have the power to sell, transfer or otherwise dispose of the whole or any part of the business and undertaking of the vendor company and to accept in consideration, cash or shares or debentures or debenture stock or other securities of any other company and to distribute among the members in specie or otherwise any surplus assets remaining in the winding-up of the vendor company.

AND WHEREAS the company was incorporated under the Companies Act, 2013 in the year..... with an authorised share capital of Rs. fifty lakhs divided into five lakh Equity Shares of Rs. ten each and its Memorandum of Association contains a provision that the company may acquire by purchase or otherwise the business and undertaking, in part or whole of any other company or companies having any of the purposes or objects same or similar to those of the company.

AND WHEREAS the Articles of Association of the company also provide that the company is empowered to increase its share capital.

IT IS HEREBY AGREED AS FOLLOWS:

1. The vendor shall sell and the company shall purchase the whole of the business undertaking, assets and property of the vendor, benefits of all securities which shall include cheques and bills given to the vendor from time to time in consideration or payment thereof, benefits of subsisting contracts, and debts due to the vendor relating to the business of the vendor as a running concern from the day of..... The said purchase shall not include the uncalled capital of the vendor. Up to the aforesaid date for the aforesaid purchase the vendor shall continue to carry on the business for the benefit of the company.
2. From the aforesaid date of the aforesaid purchase the company shall be liable for all the debts and liabilities of the vendor and shall be liable to perform all its engagements. The vendor shall be indemnified

by the company against all claims and demands. The company shall defend all actions and proceedings against the vendor who shall also be indemnified in respect of such actions and proceedings.

3. The company shall pay to the vendor Rs. seven lakhs as consideration for the aforesaid purchase and out of the aforesaid consideration Rs. five lakhs shall be paid in cash and the balance of Rs. two lakhs shall be paid to the vendor by allotment of twenty thousand Equity Shares of Rs. ten each in the capital of the company credited as fully paid-up shares. For the allotment of the aforesaid shares, the vendor has conveyed its acceptance, vide its letter No..... dated.....
4. The company shall create and issue five lakh Equity Share of Rs. ten each to increase its shares capital as aforesaid and for the same purpose the company shall pass a resolution in accordance with the Articles of Association of the company and in accordance with the provisions of the Companies Act, 2013.
5. For the purpose of Stamp Duty, the value of the immoveable properties of the vendor shall be fixed for Rs..... and the goodwill benefits of contracts and securities, debts, stock, fittings and fixture and all other properties of the vendor shall be valued at Rs.....
6. The title deeds to all the immoveable and other properties of the vendor and an abstract of all the properties of the vendor, the sale of which is hereby agreed shall be handed over to the company within thirty days from this day..... of..... The company shall accept the same titles sufficient in all respects.
7. On the..... day of....., the vendor shall be paid Rs. five lakhs in cash and shall be delivered the certificates showing that the company shall have allotted twenty thousand Equity Shares of Rs. 10 each fully paid- up of the share capital of the company.
8. Thereupon, the purchase shall be deemed to have been completed and the vendor shall execute necessary documents and do all things and give assurance as may be necessary and reasonable for the vesting of all the properties, the subject matter of the aforesaid purchase by the company.

IN WITNESS WHEREOF the parties hereto have set their hands and seals. Signatures and seals of the parties.

## COMPROMISE AND ARRANGEMENTS

During its life time a company may find it necessary to reorganise itself. Such a re-organisation may be for many reasons. When a company is financially weak, it wishes to reach a compromise with its members and/or creditors. It may wish to take over the business of another running but endangered .company. It may wish to restructure its share capital.

Sections 230 to 240 of the Companies Act, 2013 provide various methods of company re-organisation or reconstruction. The various terms used for reorganisation are arrangement, reconstruction, amalgamation, merger, take-over, etc. They are distinct terms but they have many common features and to a great extent they overlap. The expression “arrangement” is of wider import and include reconstruction and amalgamation. “Arrangement” has been defined in explanation to section 230(1) of Companies Act, 2013 as including a reorganisation of the company’s share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods.

“Arrangement” has a wider interpretation and includes reconstructions and amalgamations.

“Reconstruction” has not been defined in the Act. A reconstruction normally entails the transfer of an undertaking to another company, consisting substantially of the same shareholders with a view to its being continued by the transferee company, and usually resorted to for achieving one or more of the following objects:

- (a) For the purpose of raising fresh capital by issuing partly paid shares in the new company in exchange for fully shares in the old company, and calling up the balance on new shares as and when required;

- (b) For extending the company's objects;
- (c) For reorganising or rearranging the capital structure and the rights of members as between themselves; and
- (d) For effecting a compromise with creditors, or the allotment to them of shares or debentures in settlement of their claims.

A reconstruction may, however take place, without the promotion and incorporation of new company, by compromise with members involving alterations of various rights between each class, usually also involving the writing down of the amount of share capital (as in a reduction of capital, which is a special form of reconstruction) and by a compromise with creditors (including debenture holders).

Amalgamation usually covers a situation where two or more companies join forces either under the name of one of them or in a new company formed for the purpose. This is a blending of two or more existing undertakings into one, the shareholders of each company becoming substantially the shareholders in the company which is to carry on the blended undertakings.

Amalgamation will usually require the consent of the directors of both the companies and may also be described as "Merger". On the other hand, the word "take-over" is usually used to describe the acquisition by one company of sufficient number of shares in another company so as to give the purchaser company control over that company.

Amalgamations and take-overs are resorted to for any one or more of the following purposes:

- (a) For saving overheads and working expenses and for improving efficiency in the management, production and marketing by reason of unified control;
- (b) For reduction or elimination of competition, and some times for securing the advantages of vertical combination by an amalgamation of companies to secure a linking of different stages or processes of production back to raw materials and forward to the finished product; and
- (c) For obtaining greater facilities possessed by one large company, as compared with a number of smaller companies, for raising additional capital, for buying raw materials, etc. and for securing better credit facilities on the most favourable terms, and, what is, of increasing importance now a days, for carrying out research work on a large and co-ordinated scale and basis.

The memorandum of association of almost every company permits it to amalgamate with another company. In case there is no such provision, it will be necessary to alter the memorandum before any scheme of amalgamation is drawn up.

### Arrangement

Section 230 of the Companies Act, 2013 provides that when a compromise or arrangement (the word compromise implies the existence of some dispute, but the word arrangement is of wider application) is proposed between a company and

- (a) its creditors or any class of them; or
- (b) its members or any class of them,

then the Tribunal may, on the application of the company, or any creditor or member, or, if the company is being wound up, the liquidator, order a meeting to be called of the creditors or class of creditors, or of the members or class, of members, as the case may be.

The compromise or scheme of arrangement will then be binding upon:

- (a) all the creditors or class of creditors;



- (b) the members or class of members;
- (c) the company; and
- (d) in the case of a company being wound up, upon the liquidator and contributories. Provided that:
  - (1) it is approved by a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members as the case may be, present and voting in person or by proxy; and
  - (2) it is sanctioned by the court.

## SLUMP SALE AGREEMENT

Slump sale is one of the widely used ways of business acquisitions. In simple words, 'slump sale' is nothing but transfer of a whole or part of business concern as a going concern; lock, stock and barrel. The concept of 'slump sale' was incorporated in the Income Tax Act, 1961 ("IT Act") by the Finance Act, 1999 with the inclusion of section 2(42C). The term 'slump sale' is defined as transfer of one or more undertakings as a result of the sale for a lump-sum consideration without values being assigned to the individual assets and liabilities in such sales.

For looking at the meaning of word 'undertaking' resort has to be made to Explanation 1 to section 2(19AA). Section 2(19AA) defines "demerger" in relation to companies. Explanation 1 to Section 2(19AA) defines "undertaking" to be any part of an undertaking or a unit or division of an undertaking or a business activity taken as a whole but does not include individual assets or liabilities. As per definition of 'undertaking' even any part/division of an undertaking or business activity as a whole can be considered.

Explanation 2 to S. 2(42C) clarifies that the determination of value of an asset or liability for the payment of stamp duty, registration fees, similar taxes, etc. shall not be regarded as assignment of values to individual assets and liabilities. Thus, if value is assigned to land for stamp duty purposes, the transaction will not cease to be a slump sale.

The basic condition to be satisfied to qualify as a slump sale is that the transaction relating to transfer of business should be a transfer of undertaking and not transfer of individual assets and liabilities consisting of the business activity. This has been expressly provided in the Explanation 1 to Section 2(19AA) stated above. In case of transfer of individual assets and liabilities consisting of the business activity, the same would not imply transfer of undertaking [*Duchem Laboratories Ltd. v. ACIT*, ITA No. 3332/Mum/2004 June 12, 2009].

Given the high figures involved in such transactions, taxation is one of the key elements of consideration for both the buyer as well as the seller. With increase in slump sale deals, several rulings and judicial precedents have emerged over the years. The following is an illustrative list of cases *where sale of an undertaking was held to be a slump sale* :

- (a) Land development business – *CIT v. Mugneeram Bangur & Co.*, [57 ITR 299 (SC)]
- (b) Sale of cement unit, which was transferred as a functional productive unit – *Coromandel Fertilisers v. DCIT*, [90 ITD 344 (Hyd.)]
- (c) Sale of branch – *CIT v. Narkeshari Prakashan Ltd.*, [196 ITR 438 (Bom.)] Slump sale is carried out through following steps:

**1. Find Buyer:** The seller has to find the potential buyers.

Before opting for slump sale there are various issues that needs to be analyzed especially the impact of capital gain tax to the seller and stamp duty to the buyer in the light of business strategies.

**Short listing of buyer:** The buyer or transferee companies needs to be shortlisted by refining the business and tax objectives.

*Primary Valuation:* This valuation enables the seller to get a better idea about value of the business to be sold.

*Analyse and Finalise buyer:* Analysis of shortlisted buyer should consider objective of the deal, cost and time required for execution and structure of the deal. This helps to get a better idea about the deal before finalisation.

**2. Sign MoU/Term sheet:** Once the buyer company is selected, there is need to sign MoU [Memorandum of Understanding] which helps the buyer company to get access to seller entities information for making due diligence, valuation etc.

**3. Make Valuation:** Valuation is a process of determining the value of assets and liabilities of business. It is one of the most important aspects of slump sale process, as seller wants maximum valuation for its business whereas buyer wants it at lowest end. Valuation of business is mandatory for listed company.

**4. Deal Structuring:** A deal should be structured considering agreement between buyer and seller. It should be time, cost and compliance effective. While structuring a deal following factors must be taken into consideration:

*Objective of the deal:* This includes the core objective set for deal of slump sale. While structuring the deal it must be taken into consideration that objective is getting achieved fully. As post deal factors such as ownership and control, financial impact depends on structuring of the deal.

*Transaction cost:* Transaction cost under slump sale majorly involve capital gain tax to the seller, stamp duty tax to the buyer and withdrawal of exemption deduction, and allowances, and apart from these professional fees to the consultants. Transaction costs involved in slump sale can go upto 5-10% of deal size.

*Discharge of consideration:* Lump sum consideration may be discharged by payment in cash or by way of issue of debentures and or both. Consideration being imperative aspect of slump sale should be discharged by taking in to consideration future financial, legal and strategic impact on transacting companies.

**5. Slump sale agreement:** Deal needs to be executed through agreement, capturing all slump sale clauses, effecting objectives predetermined and executed by both parties. The executed agreement needs to be registered as per applicable Stamp Act.

## LESSON ROUND UP

- The promoter of a company is a person who does the necessary preliminary work in connection with and incidental to the formation and the establishing of the company.
- The promoters of a company usually enter into contracts to acquire some property or right for the company which is yet to be incorporated, such contracts are called preliminary or pre-incorporation contracts. The promoters generally enter into such contracts as agents for the company about to be formed.
- When the company comes into existence, it is not bound by the pre-incorporation contracts even when it takes the benefit of the work done on its behalf. However, specific performance of a contract between a third party and the promoters may be successfully claimed by the third party against the company, when the company enters into possession of the property on the faith of the promoters' contract.
- The pre-incorporation agreements entered into by the promoters acting on behalf of the intended company with third party cannot always be avoided for various reasons. These agreements affect the operations of the incorporated company.
- Memorandum of Association of the company is the fundamental formation document. It is the constitution and charter of the company. Draftsmen should know that Memorandum is the main edifice upon which the whole structure of the company is erected. Based on the provisions of Section 4, the main drafting requirements of contents of a Memorandum should be kept in mind.
- Articles are rules and regulations for management of internal affairs of the company. It constitutes a