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Critical Journey of Changing the Memorandum of Association of a Company in the Modern Corporate Era: Legal Provisions in Bangladesh

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ABSTRACT: This paper is an analysis regarding the changing procedure of the Memorandum of Association of a company in Bangladesh. A Company stands on the basis of a Memorandum. It acts as the constitution of a company. A Memorandum is comprised of different clauses such as name clause, address clause, object clause, capital clause, liability clause, consent clause etc. Sometimes it becomes necessary to change these clauses because business is a continuous process and it has to fulfill the market demand. Each of these clauses requires different procedure to change. Sometime only a general resolution is required, sometime a special resolution is required and somewhere special resolution, court's permission and register's authorisation is required. In some cases a notice should be given informing the concerned people about the change in the Memorandum.

KEY WORDS: Memorandum, Company, Object Clause, Address Clause, Capital Clause, Register etc.

I. INTRODUCTION

Present world is a world of Business. Everywhere around us business is happening. In most of the cases these businesses are initiated and run by different companies. As per the Company Law 1994 of Bangladesh, to be recognised as a company it must be registered at first. For submitting the application of registration to the company registrar, with other relevant documents a Memorandum of Association must be submitted. The promoters are responsible for preparing it. Memorandum is treated as the identity of a company. It also indicates the limit of the power of a company. As it incorporates the basic principles of a company, some experts mention it as the constitution of the company. Like the constitution, a complex and lengthy process is required to change the Memorandum of Association under the Company Law of Bangladesh. There are some specific components of Memorandum of Association such as the name clause, address clause, object clause, capital clause, liability clause and consent clause. Each of these clauses has separate feature and importance for a company. There are separate rules and systems under the Company Law of 1994 for changing these components of memorandum. Without following those legal procedures memorandum cannot be changed. If all the shareholders of a company decide together, pass resolution and change the memorandum, it will be null and void. If any director or Board of Directors violates the Memorandum, he or they will be personally liable for it and company can sue against them. To critically explain the changing procedure of the Memorandum it's necessary to know what are to be changed. It means the subject matter of the Memorandum should be described at first. They are as follows:

II. SUBJECT MATTERS OF THE MEMORANDUM

a) Name Clause:

The name clause contains the official name of a company. Name is the primary identity of a company. It's not possible to fix name of a company by the shareholders or directors though they are the owner and policy makers of a company. They may set a name for their company but it should be finally certified by the company registrar officially. As per the Company Law of Bangladesh, some rules and procedures should be followed for fixing the name of a company. Firstly, such name should be chosen for a company which is not given to any company so far. It means the name should be unique and exclusive. Secondly, the name should not be confusing and too much similar. People will be able to identify the name and the company and differ it from other companies very easily. Thirdly, the name will be such that it will not hurt and defame any people, group, nation or religion. Fourthly, if any registered company applies to the registrar for winding up their company, shareholders or owners who wants to establish a new company can chose the name of that company as the name of their new company with the prior permission of the registrar. Fifthly, if a company authority

wants to name their company in the name of any worldwide recognised company or association, they must have a written recognition from the chief of that association. This is how a company can be named.

b) Address Clause:

This clause helps the government or any other concerned authority to find out such address of a company where they will communicate if necessary. That means it includes the address of the Head Office of a company. A company may have several branch or sub-offices around the country or the globe. But as a branch or sub-office, it may not be possible to provide such decision or support to the government, court or any other concerned authority when they seek for it. Moreover it's not possible to communicate with so many branches and sub-offices at a time. So, it is evident to set one contacting address for solving different issues. The address of the Head office works as the permanent address of the company. In the address clause, it is necessary to include that which countries the company will spread its business. Not only the name of the country but also the name of the areas of those countries should also be included in the Address Clause.

c) Object Clause:

The most important part of the Memorandum of Association is its Object Clause. The success of a company depends on the successful implications of the objects of Object Clause. It directly relates the business and existence of a company. It actually expresses the limit of the power of a company. The Object Clause stipulates that in which sectors and industries a company will invest and conduct business in the present time and future. No company is authorised to take any initiative beyond the Memorandum of Association. If any such activity is happened it will be treated as ultra vires. It will be null and void though its decision was taken and executed by the all the shareholders or directors. So, the rules of the Memorandum of Association should be framed very carefully.

d) Capital Clause:

This clause relates with the capital related issues of a company. It confirms about the amount of capital of a company. No company can collect capital in excess to that amount. The capital of the company is also treated as Authorised Capital or Registered Capital. The capital works as fuel for a business organisation. Without capital it's not possible to start and run a business. The starting amount of capital may increase or decrease in future. The capital is divided in to share we know. Capital clause also stipulates that in how many shares the capital will be transformed in to and what will be their values. Moreover, the nature or classifications of share is also described in the Capital clause.

e) Liability Clause:

Liability means duties which must be performed whether they are legal, ethical or something other. Various types of peoples and parties are attached with a company having various interests. Such as shareholders, directors, suppliers etc. All of them have specific duties and responsibilities. If they fail or does not perform their duties liability is created on their behalf. In Bangladesh, nature of the liability of the shareholders depends on the nature of the company. If a company is limited by its share, the liability of the shareholders will be either limited by share or limited by guarantee. It means, if such a company faces loss, shareholders will pay or meet up the loss as per their amount of share or an amount which is two or three times than his own share value. But if the company is an unlimited company, the shareholder have to pay till the fulfillment of the loss or until he becomes insolvent.

f) Consent Clause

This is the last ingredient of the Memorandum of Association. In it the signatures and some promises of the primary shareholders are included. The primary shareholders promise that they will buy a fixed number of shares and they will establish the company as per the direction of the Memorandum. For all types of company in Bangladesh it is mandatory that each shareholder must buy at least one share and each shareholder must mention just in the side of his name that how many shares he will buy. While providing his signature, the shareholder will provide his full address and identity in the presence of two witnesses. The signature given in this way is actually conclusive evidence that the shareholder has bought shares voluntarily. He was not forced or pressurized.

III. ALTERATION OF MEMORANDUM

a) Alteration of Name Clause:

During its life time, a company can change its name at any time. In this case it has to follow the same rules it followed during its naming period. Those clauses are, the name must be a unique and exclusive one. It should not match with

other company's name. It will not be a one which is barred by the state law or so confusing that people mistake it as other company's name. For changing the name of a company, the Board of Directors must hold a Special Meeting and pass a Special Resolution. Then submit the application to the company register for changing the name of that company. If the register finds all the issues are correct then he will remove the old name form the register and include the new name. He will give a certificate to the company authority mentioning the new name of the company. This is how; the existing name of a company can be changed in Bangladesh.

b) Alteration of Object Clause:

Changing the Object Clause of a Memorandum is a very complicated task. Too much legal procedure is required to change it. Three different steps have to maintain for changing it. They are as follows:

i) Adopting a Special Resolution:

As per the Company Law of Bangladesh, at the very beginning a Special Resolution should be passed by the Board of Directors for changing the Object Clause. But the Board of Directors has to follow some purposes or grounds for passing such resolution. Except these grounds, the Object Clause cannot be changed for any other purpose. The Object Clause can be changed for, firstly, for the purpose of decreasing the cost and increasing the efficiency in maintaining the business. Secondly, for satisfying the main object of the company by new and more efficient way. Thirdly, for extending the local business area of the company. Fourthly, for starting any such new business which will be merged with the present business of the company as a profitable one. Fifthly, for leaving or narrow down any object of the Memorandum. Sixthly, for selling or transferring the present business wholly or partly, or selling a single business when the company has several businesses. Seventhly, to merge the company with any other person or business. When the special resolution is passed, the company authority will go the competent civil court for its approval.

ii) Permission of the Court:

It's mandatory to the take the consent of the court after passing the special resolution for changing the Memorandum of Association. The change in the Memorandum will not be effected until the resolution is authorised by the competent court. Before permitting the special resolution, the needs to be satisfied that some conditions are fulfilled. Those are, firstly, each people who holds debenture and whose interest in the company will be hampered due to the change in the Memorandum are properly noticed. Secondly, the court should be satisfied that the creditors who are competent to claim about the change in the Memorandum has got the proper opportunity to claim as per the system of the court or consent has been taken form that creditor or the debt has been fulfilled on behalf of the creditor or security has been provided to him for fulfilling the claim. If all these conditions are properly fulfilled, the court will authorise the resolution for changing the Memorandum.

iii) Submission of Documents to the Registrar:

After receiving the competent court's consent, the directors will submit one printed copy of the changed Memorandum and the certified copy of the authorisation of the court to the register. The submission to the registrar should be within ninety days from the date of the authorisation of the court. After receiving the petition from the directors, the register will examine the submitted papers properly and if he finds all the procedure and papers are properly done and submitted he will accept them and authorise the change in the Object Clause of the Memorandum. He will provide a certificate of this change to the company and this certificate will be treated as the evidence of such change and the changed Memorandum will be treated as the new Memorandum of Association of the Company.

c) Alteration of Address Clause:

As said earlier that Address Clause ensures the location of Head Office of a company. It is a necessity because the Head Office may be required for contacting by the government or any other concerned authority for solving different issues. If any company needs to change its Address Clause, it has to follow the same procedure of changing the Object Clause. At first a special resolution will be passed and then a petition should be filed to the competent civil court for getting permission for changing the Address Clause. If the court permits the change of the Address Clause, a notice should be served to the company register and all the concerned party to the company informing the change of the Address Clause. The grounds and purposes which are relevant for changing the Object Clause can also be applicable for turning the Address Clause. If the changed address is set within the same city or same local area then a notice can be served within 28 days to the company register.

d) Alteration of Capital Clause

The Capital Clause of a company is changed mainly for two reasons - either for increasing the capital or decreasing it. The capital clause of a company can be changed only when such permission is available in the Articles of Association of a company. If a company wants to increase its capital it needs to pass a General Resolution, But if wants to decrease its capital, it has to pass a Special Resolution in a General Meeting and take permission from a competent court. Within 15 days of such permission, a declaration should be the given about the change in the Capital Clause and that declaration should be submitted to the company register. The methods of changing the Capital Clause may be firstly-issuing new shares, secondly-increasing the value of the present shares, thirdly-divide the shares in new numbers and change the share value and fourthly-transforming the paid capital into stock and the stock into paid capital. This is how the Capital Clause of the Memorandum of Association of a registered company can be changed.

IV. CONCLUSION

A Memorandum of Association is not a very common or well-known document to mass people. It's a legal document mandatory for a company in Bangladesh and applicable in the business world. As discussed above, preparing a Memorandum is comparatively easy but it's changing is too lengthy and complex. Each of its component demands different initiatives to change them. It's so tough that most of the time expert's advice or help is necessary to change a Memorandum of Association. Companies sometime feel discomfited to change its Memorandum due to the lengthy and difficult process. It's very common in Bangladesh That a good number of companies change their Memorandum without following the legal procedure even they do not inform the register authority.

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