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Memorandum and Articles of Association: An Analysis of their role in Corporate Governance as Foundation of a Company

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ABSTRACT

Corporate Governance refers to the regulations and guidelines that a company receive in order to ensure their efficient and effective company administration. We know, company incorporates itself with the key foundational documents called the Memorandum of Association and Articles of Association. These documents lay the basic framework for a company's governance throughout its existence. But, it is to be known that the concept of Memorandum and Articles is not only present in Indian Jurisdiction, but other foreign jurisdictions also have mandated to get their constitutional documents of a company to be framed at Incorporation of a Company. The paper addresses the key differences between Indian and Foreign Jurisdictions. Arbitration is the upcoming field of dispute resolution amid the judicial settlement via courts and has been gaining popularity in the Corporate Law field as well. The paper discusses the debate that have been ensued in the Courts regarding the inclusion of arbitration clauses in the Articles of a Company. Lastly, the conflicting standpoint with regard to the Shareholder's Agreement and the Articles of Association of a Company has witnessed ambiguity in the Indian Judiciary. The paper has researched on which document has to prevail or what must be done to reduce the conflicting standpoints.

Keywords: *Memorandum, Articles, Arbitration, Shareholders, Jurisdiction.*

I. INTRODUCTION

A business idea is turned into a company by filing an application to the Registrar of Companies. A company can commence its operations after it receives the Certificate of Incorporation. There are different procedures to be followed and many documents to be filed to incorporate. For Incorporation, key documents that derive the foundation of the company are a Memorandum of Association ('**MOA**') and Articles of Association ('AOA').

Memorandum means two things i.e. 'originally framed' and 'altered from time to time'[2]. MOA

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[2] The Companies Act, 2013, §.2(56), No. 18, Acts of Parliament, 2013 (India)

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is a public document and can be allowed to alteration as per circumstances. Any document registered with the Registrar can be inspected by any individual and by that get to know about a particular company[3]. MOA are registered to determine the subscribers and promoters, provide information to shareholders before investing or to any other stakeholder involving with the company. MOA is compulsory for all forms of companies. There are different formats for different companies under Schedule 1 in Table A-Table E [4].

Name clause is the name of the company is selected as per the Act[5]. 'Limited' or 'Private Limited' will be part of the name. It is not applicable for Section 8 companies. The Name must be unique and unidentical. Name can be reserved for 20 days[6]. Registered Office Clause is added to determine nationality and jurisdiction of court for the company[7]. Object clause determines the scope of the company[8]. There are main objects as well as ancillary objects of a company. The company must operate, enter into contracts, associate with stakeholders, ensure public interest as per the object clause or else 'Ultra Vires' will be imposed. Liability of the company can be either limited by shares or guarantee so as to protect the members from personal liabilities. Capital clause mentions the authorized capital at the commencement of business and also shows the nominal share value which can be equity or preference shares. Subscription clause mentions the subscribers of the company having atleast 1 share subscribed and has to sign MOA before 2 witnesses. Finally, for OPC Companies[9], Nomination clause is mentioned as to who will be the survivor if the sole member dies.

AOA refers to a document having regulations, bye-laws about management and administration of the company. AOA defines the duties of members, shareholders, directors, various officials, mentions their rights and liabilities, guidelines on internal conflicts, about audit and accounts, dissolution and insolvency, dividend policy, on different kinds of meetings. AOA helps in structuring and organizing the operations of a company; preliminary contracts, total amount of shares and its nominal value; issuing, calling and allotting of shares; transfer of shares, alteration of capital amount, buyback of shares, salary for directors and other employees, about debentures etc[10].

By a special resolution in a formal meeting, the clauses of MOA can be altered along with

[3] The Companies Act, 2013, §.399, No. 18, Acts of Parliament, 2013 (India)
[4] The Companies Act, 2013, §.4(5), No. 18, Acts of Parliament, 2013 (India)
[5] The Companies Act, 2013, §.4(1)(a), No. 18, Acts of Parliament, 2013 (India)
[6] The Companies Act, 2013, §.4(5)(1), No. 18, Acts of Parliament, 2013 (India)
[7] The Companies Act, 2013, §.12, No. 18, Acts of Parliament, 2013 (India)
[8] The Companies Act, 2013, §.4(c), No. 18, Acts of Parliament, 2013 (India)
[9] OPC here means "One Person Company"
[10] The Companies Act, 2013, §.5, No. 18, Acts of Parliament, 2013 (India)

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approval from Central Government[11]. To alter capital clause, ordinary resolution can be done. AOA can be altered by the company[12]. Amendment to AOA can be done by a special resolution to amend the clauses[13]. If in order to alter a company from private company to public company, it must be approved from the Central Government.

Research Problem

1. The distinct characteristics of various jurisdictions about MOA and AOA with that of India.
2. The inclusion of arbitration clause in AOA will be practical or not.
3. The solution to the conflicts between SHA and AOA.

Objectives

1. To study different jurisdictions and analyze the key differences with India.
2. To analyze the applicability and need of arbitration clause under AOA.
3. To provide solution for conflicts arising between SHA and AOA.

Hypothesis

1. The arbitration clause can be included under Articles so as to ensure speedy justice.
2. The SHA provisions must be incorporated under Articles of Association to avoid conflicts.

Literature Review

1. Prasanth V.G. *Arbitration Clause in the Articles of Association of a Company: Scope and Ambit* (2012)[14]: The author speaks on applicability of arbitration clause under Articles and whether is it an alternative to litigation process. The author also analyzes the enforcement of arbitration clause on the members of the company and also with outsiders. The paper also studies on if important contracts of the company don't have an arbitration clause.

2. Sidharrth Shankar, Vidur Prabhakar. *Articles of Association v. Shareholder's Agreement – The Conundrum* (2020)[15]: The author analyzes the long-standing conflicts between SHA and

[11] The Companies Act, 2013, §.13, No. 18, Acts of Parliament, 2013 (India)
[12] The Companies Act, 2013, §.14, No. 18, Acts of Parliament, 2013 (India)
[13] The Companies Act, 2013, §.14, No. 18, Acts of Parliament, 2013 (India)
[14] Prasanth V. G., *Arbitration Clause in the Articles of Association of a Company: Scope and Ambit*, 1 INDIAN J. ARB. L. 75 (2012).
[15] Sidharrth Shankar, Vidur Prabhakar. *Articles of Association v. Shareholder's Agreement – The Conundrum.* Mondaq (2020)

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AOA and how the harmony can be brought down along. The author analyzed the differences in the judgements given by the Court and how to resolve such differences.

3. Laxmi Joshi, Aditi Rani. *AOA over SHA: Overriding Powers!* (2017)[16]: The author studied the judicial trends on the overriding powers of AOA over SHA and upheld that the Courts have rightly pointed out so as AOA is the foundation of a company.

4. Prateek Gupta. *Shareholder's Agreement and Articles of Association: A Power Struggle* (2021)[17]: The author studies the contents and importance of AOA and SHA. The author analyzes the supremacy of Companies Act over SHA and AOA and how AOA has been held superior to AOA and the indecisiveness of conflict affecting the companies questioning the enforcement of SHA.

5. Karan Gandhi, Syed Ahmed. *Effect of Arbitration Agreements on the Company when entered in Articles of Association of the Company* (2013)[18]: The author analyzes how arbitration clause can be included under articles with impact of the same and what is the importance and applicability of arbitration clause in India along with case analysis.

II. ANALYSIS OF JURISDICTIONS CONCERNING MEMORANDUM AND ARTICLES OF ASSOCIATION

UK companies need to file MOA and AOA during incorporation of a company. If the company was formed before the Companies Act of 2006, then it must follow a different guideline for MOA as compared to company formed prior to the 2006 Act. Pre-2006 companies have to include subscribers of the company, objects, liability, share capital. But after the amendment in 2006, older companies have the old format but the newly incorporated companies only have subscriber clause in MOA[19]. Nowadays, the MOA is like a snapshot taken of the company at incorporation, being transformed to much simpler version. Companies incorporated prior 2006 don't have to incorporate objects, liability and capital clause in MOA, but in AOA of the company. AOA after the Act of 2006 and as per The Companies (Model Articles) Regulations 2008[20], for a limited company; liability, directors, objects, shares, decisions of shareholders, administrative arrangements. The model articles are not compulsory and it can be suited to the requirements of the company. With respect to alteration, MOA cannot be altered but AOA is

[16] Laxmi Joshi, Aditi Rani. *AOA over SHA: Overriding Powers!* Mondaq (2017)
[17] Prateek Gupta. *Shareholder's Agreement and Articles of Association: A Power Struggle*, 4 INT'l J.L. MGMT. & HUMAN. 1239 (2021).
[18] Karan Gandhi, Syed Ahmed. *Effect of Arbitration Agreements on the Company when entered in Articles of Association of the Company* Mondaq (2013)
[19] Companies Act, 2006. C. 46 of 2006. (Eng.)
[20] The Companies (Model Articles) Regulations, 2008. No. 3229 of 2008. (Eng.)

flexible, which can be amended with a special resolution.

Memorandum and articles in UK is much more liberal with content to be entered in the documents than India. In UK, Articles have more weightage and foundational part as compared to the MOA, whereas in India, MOA is superior to AOA. The model articles under the Companies (Model Articles) Regulations of 2008[21] is not inclusive of every company's objectives, situations, administration depending upon the features of a company. The model articles involves "one fit for all companies" whose features can vary posing a problem if incorporators don't have knowledge with respect to AOA and they can run into problems as they will have to choose the standardized format of the model articles. The model articles has to be made inclusive of different provisions in case of problem arises for a company.

In US, Companies only have to file Articles of Incorporation. The requirements for AOA differs from the state to state, but mostly they include name and address of the corporation, registered capital and total number of shares, name and address of the agent who is registered in-state, incorporator's names and addresses. Sometimes, certain states require the information relating to objects of the company, about initial directors and their addresses, duration in case of a short-timed company. In US, AOA need only minimum information to be stated, but if companies wants, it can include about the administration, rights and liabilities of shareholders, directors etc, but with consistence to the state laws. Sometimes, states also have some default rules that can be used by the companies of which some rules can also be opted out[22].

US's AOA is much simpler, basic compared to MOA and AOA of India. Most states of US don't require much information and it can be tailored as per needs of the company if needed. In India, all states have same compliances to be followed under Companies Act 2013[23] whereas in US states, it varies. In case of US, if companies don't include important provisions with respect to shareholders and directors, meetings, detailed objects of the company, it can get itself into legal problems if they are not well versed with legal compliances and don't have capital for appointing legal counsels.

In Nigeria, for incorporation, AOA and MOA is essential and is governed under the Companies and Allied Matters Act 2020[24]. The memorandum clauses under Section 27 is similar as that of India and AOA under Section 33 includes the same administration details as that of India. In Nigeria, as well, MOA is superior to AOA. MOA of Nigerian Companies under Section

[21] Ibid
[22] Will Kenton. Articles of Incorporation. Investopedia (Aug. 30th, 2022, 6:54 pm)
[23] The Companies Act, 2013. No. 18, Acts of Parliament, 2013 (India)
[24] Companies and Allied Matters Act (2020). No. 3 of 2020 (Nigeria).

27(2)(A) it is mandated to have a minimum issued share capital of 100,000N[25] for private companies; 2,000,000N for public companies for it to be registered[26]. Under CAMA 2020, the entire concept of 'authorised share capital' has been removed and companies have to make sure that entire share capital is fully issued and should not have any balance shares. Whenever the company wants to increase its share capital, resolution between the members of the company has to made and notice has to filed to the CAC[27] and mention all the particulars about increase in shares.

This new amendment in Nigeria is not advantageous since the company would not have buffer shares in case of immediate liability or expense requirement and would have to conduct Board meetings, resolutions and go to CAC and deal with the entire process every time they will need additional share capital. This will prove costly and time consuming for the companies. The companies have been restricted in their autonomy to decide share capital for their business.

In Italy, it is necessary for a public company to have Deed of Incorporation and AOA (Bye-laws) as per Article 2328 of Italian Civil Code[28]. It is important that the Deed of Incorporation is being notarized and has to filed in a public form as a notarial act by a Notary. If this process is skipped, then Deed will be held invalid and the company will be null. The Deed includes about name and address of shareholders, registered office, objects, subscribed and paid-up capital, about profit-sharing, about powers of directors, about statutory auditors, incorporation expenses, time limit of the company, about founding members. The AOA is even though a separate set of laws, but a major part of the deed and company cannot exist without both. The AOA contains about shares, capital increase, about company meetings, dissolution methods, about dividends, shareholders and their loans, need for majority in meetings, management techniques, income of directors etc and other corporate statute. Under Article 17 of Law No. 218 of 1995, notary process applies to foreign companies also as notary process is important even for a foreign company due to the fact that Italian law prevails over them[29].

Italy's laws on Deed of incorporation is much wider and complicated than MOA in India. Deed contains more information than MOA and has extra procedure of attesting via notarial act. Notarial act is not mentioned for MOA and it can be difficult process. The notary may reject the deed and can involve expenses for the incorporating company. The company has to bring forth all future/first shareholders or a company as a shareholder has to represented by power of

[25] N stands for Nigerian Currency i.e. Nigerian Naira
[26]Companies and Allied Matters Act (2020). No. 3 of 2020, § 27(2)(A) (Nigeria).
[27] CAC refers to Corporate Affairs Commission
[28] Italian Civil Code (1942), Article 2328 No. 262 of 1942 (Italy)
[29] L.n. 218/1995 (Italy)

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attorney. This process can be time consuming for the company and delay the incorporation process. If a foreign company is incorporating there, then it has to bear the extra costs of translating the documents.

III. INCLUSION OF ARBITRATION CLAUSE IN ARTICLES OF ASSOCIATION

Arbitration has been existing since many years and it has gained prominence in recent years. Arbitration is a contractual relationship which helps in faster, easier and less costly mode of settlement of disputes outside the court-room. With globalization, arbitration has become a part of international commercial transactions and has been widely by corporates, employees, customers, etc[30].

MOA and AOA binds the companies and the members who signed those documents and they have to follow all the covenants and provisions of the memorandum and articles[31]. This indicates that MOA and AOA is contract between the company and the members of the company. Section 7(2) of Arbitration and Conciliation Act states there must be a clause in a contract or a separate agreement to be treated as an arbitration agreement[32]. Taking into note these provisions, arbitration clause under articles will be valid.

Relevancy of arbitration clauses under AOA has been discussed by judiciary. Bombay HC[33] held a wider view that the arbitration clause should cover disputes of members with the company as well the private transactions that are not in the purview of articles[34]. The Calcutta HC held a restrictive viewpoint that the arbitration clause in articles would be applicable only to disputes of commercial nature between the members and the companies; and would not extend with private transactions as it will be unjustifiable[35]. The Bombay HC also held in a case that in matters of private transactions of commercial nature, may have company as an interested party, then the arbitration clause can be invoked[36].

About applicability of arbitration clauses in articles, outsiders to the company are not bound to articles[37] and subsequently cannot take advantage of the arbitration clause inside articles. But in a scenario, a company while entering into a contract with a third party, adds to that contract that the party would be subject to the rights and liabilities in MOA and AOA; a doubt can arise

[30] Prathima R. Appaji. Arbitral Immunity: Justification and Scope in Arbitration Institutions. 1.INDIAN J. ARB.L. 63 (2012)
[31] The Companies Act, 2013, §.10, No. 18, Acts of Parliament, 2013 (India)
[32] The Arbitration and Conciliation Act, 1996 , § 7(2), No. 26, Acts of Parliament, 1996 (India)
[33] HC refers to High Court.
[34] Mohanlal Chhaganlal v. Bissessarial Chirawalla 1945 SCC OnLine BOM 125
[35] Khushiram v. Honutmal 53 CWN 505 (H); Case decided by Calcutta High Court
[36] Shiv Omkar v. Bansidhar Jagannath 1955 SCC OnLine Bom 115
[37] The Companies Act, 2013, §.10, No. 18, Acts of Parliament, 2013 (India)

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whether the party will be subject to arbitration clause now or not in case of dispute arising from the contract [38]. Also, there is also need to look whether such third party will be wanting to go into arbitration proceedings or not. Sometimes, the Andhra Pradesh HC has held that parties bring third person who have no connection to the suit to escape arbitration and such suits will be stayed[39].

IV. JUDICIAL VIEW ON CONFLICTS BETWEEN SHAREHOLDER'S AGREEMENTS AND ARTICLES OF ASSOCIATION

Shareholder's Agreement (**SHA**) is an agreement between the shareholders and the company providing framework on the rights and liabilities towards each other. SHA is a private document unlike MOA and AOA. SHA regulates the rights of Shareholders in transfer of shares, fraction of shares that shareholders are going to have, pre-emption rights, powers of board of directors, rights of minority shareholders, etc[40]. It is to be noted that the Companies Act overrides the provisions of SHA as Calcutta High Court held in a case that SHA will be invalid as it restricted the right to change the name of the company which cannot be just via an agreement[41].

Two different viewpoints has been given by judiciary on SHA and AOA. Firstly, AOA contains about management of a company and SHA cannot be a separate agreement until it's provisions are added to AOA. Secondly, SHA is a contract that can be enforced on the parties irrespective of whether added in AOA or not.

The Supreme Court in a landmark case held that SHA provisions having restrictions that contradicts the AOA will not be binding on shareholders or the company[42]. In another landmark case, the Court held that the Rangaraj Judgement will be applicable to public companies as well[43]. In another landmark case where SHA provided favourable rights to the shareholders about voting rights which was not mentioned in AOA and Delhi HC held that such provision would not be binding on shareholders/company[44]. The Bombay HC also held the same view SHA provisions about internal management cannot be enforced until SHA is included in AOA[45]. In another case in 2013, the Delhi HC held that since the provisions on shareholding

[38] Prasanth V. G., *Arbitration Clause in the Articles of Association of a Company: Scope and Ambit*, 1 INDIAN J. ARB. L. 75 (2012).
[39] M/s. Srivenkateswara Constructions and others v. The Union of India 2001 (3) ALT 59
[40] Surabhi Pandey. *Enforcing Shareholder's Agreement in India: A Legal Laggard*. MONDAQ (2021)
[41] Feroz Bhasania v. United Breweries 1971 ILR 1 (Cal.) 367 (India).
[42] V.B. Rangaraj v. V.B. Gopalakrishnan and others (1992) 1 SCC 160
[43] Mafatlal Industries Ltd. v. Gujarat Gas 1999 2 GLR 1436
[44] World Phone India Pvt. Ltd. and Ors. Vs. WPI Group Inc., USA 2013 SCC OnLine Del 1098
[45] IL&FS Trust Co. Ltd. v. Birla Perucchini Ltd. 2002 SCC OnLine Bom 2004

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was included in articles, claim about breach of articles will not be accepted[46].

On the other hand, Supreme Court held an opposite viewpoint[47] to the VB Rangaraj Judgement that SHA containing the rights of shareholders and restrictions on transferability of shares comes under the purview of freedom of contract to not include SHA into AOA until it does not violate Indian Contract Act[48]. The Court emphasized that SHA should not be in contradiction to AOA but it will not be necessary to incorporate the same in articles[49]. In another case, the Delhi HC had held the view that company being a party to 'Subscription and Shareholder's Agreement' will be binding upon the company despite the agreement was not included under AOA[50].

The Vodafone Judgement has partly overruled the VB Rangaraj Judgement but whether it will be enforceable or not is a question since it was the Obicter Dicta of the Judgment. World Phone India Case came later and did not take into consideration of the Vodafone Judgement and upheld the Rangaraj Judgement. This shows the ambiguity in the judicial justification on incorporation of SHA in articles.

V. FINDINGS & CONCLUSION

Findings: It has been found that other jurisdictions have variations in laws about forming of MOA and AOA for incorporation. There are certain distinct characteristics in various jurisdictions on incorporation documents. It is found that the arbitration clause in articles has been subject to judicial review, and the question arises of how to apply it. Also, SHA and AOA have a long-time conflict, and judicial review on the same is ambiguous, posing problems for companies.

Conclusion: There are important characteristics that can be seen in foreign jurisdictions about MOA and AOA, and different processes take place. There are many similarities in the incorporation documents between jurisdictions. Judiciary has tried to analyze the application and enforcement of arbitration clauses in certain landmark judgements. It is of utmost necessity that arbitration is recognized for companies so that justice can be delivered in time. Similarly, the long-time conflict between SHA and AOA has been oscillated by the Indian Courts without determining a certain action causing ambiguity.

Suggestions: The problem in all jurisdictions is they have "only type fits all" under model

[46] HTA Employees Union (Regd.) vs Hindustan Thompson Associates 2013 SCC OnLine Del 3000
[47] Vodafone International Holdings B. V. v. Union of India 2012 SCC OnLine SC 77
[48] The Indian Contract Act, 1872 §.23, No.9, Acts of Parliament, 1872 (India).
[49] Supra Note 31.
[50] Premier Hockey Development Ltd. v. Indian Hockey Federation 2011 SCC OnLine Del 2621

articles, it is necessary that all jurisdictions include further suggestions under model articles on different kinds of clauses that incorporators can add if they have no knowledge of the same as the companies can benefit from more than generic model articles due to changes in the ways companies operate.

With huge backlog of cases in High Courts, Supreme Court and NCLT[51], it is important that courts passes on certain appropriate Company Law disputes to Arbitration to get speedy trial, time efficiency and cost-effectiveness. On the applicability of same, it must be applied to parties to AOA and for only those private transactions where the members are involved in a fraudulent activity affecting the company's interest. In such cases, Courts must not prevent arbitration for private transactions expressly without taking into account the company's interest, as it will help maintain the confidentiality of the company. It is necessary that via the Companies Act, the introduction to arbitration under AOA for specific company law disputes which are not serious in nature is implemented. Awareness via law-making bodies as well as the judiciary must be required so that companies include the Arbitration clause under AOA. Not necessarily Arbitration, Companies can try to adopt other ADR[52] mechanisms via AOA to solve disputes.

It is necessary to resolve the decade-long SHA and AOA battle of ambiguity and struggle over control. As seen under judicial analysis, it will be expedient for companies to include SHA provisions in AOA to avoid overriding. To give complete clarity to the conflict, it is better that the Companies Act addresses the issue in an explicit manner via an amendment. It is also necessary for judiciary ambiguity to be solved by the judiciary taking a firm stand on the issue.

In my opinion, it is important that SHA provisions are included under AOA as MOA and AOA are the foundation of a company. Since both documents want to achieve efficient management, including provisions in AOA will not be badly consequential. It is to be noted that the ultimate goal should be the benefit of the company. For balancing the interests of shareholders and other members of the company under Corporate Governance, it can be beneficial to include important provisions in AOA. Not including such provisions can also cause internal conflicts between the Board of Directors and Shareholders and cause litigation costs and invite unnecessary public attention to internal issues. Until the judiciary or MCA[53] takes a stand, companies can try to solve these issues via arbitration or ADR mechanisms to prevent costs or time consumption.

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[51] NCLT refers to National Company Law Tribunal
[52] ADR refers to Alternate Dispute Resolution
[53] MCA refers to Ministry of Corporate Affairs

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