

Award in Company Law Fundamentals

Lecture Title: Commercial Partnerships

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Date: 25 October 2021



Diploma in Law (Malta)



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Introduction

A contract of a commercial partnership

- An agreement between two or more persons
- Creating a legal relationship between the parties
- Regulated by the Memorandum and Articles of Association or by the deed of partnership



Different forms of commercial partnerships



Partnership *en nom collectif*



Partnership *en nom collectif*



Limited liability company

Partnership *en nom collectif*

“.....may be formed by two or more partners and operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners”

(Article 7, Companies Act)



Partnership *en nom collectif*

Each and every partner is liable for the debts and obligations of the partnership with all his property, present and future and **not merely up to the amount contributed by him to the partnership.**

As between the partners, however, each partner is liable for the debts and obligations of the partnership in the proportion fixed in the deed of partnership and, in default, by law.



Partnership *en nom collectif*

Joint and several liability connotes the idea of the ability of the creditor to turn to one of the co-debtors and claim the full amount of the debt owed to him.

But, the Companies Act says that “no action shall lie against the individual partners unless the property of the partnership has first been discussed.”



Partnership *en commandite*

A partnership which operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution of one or more partners, called limited partners.

(Article 7, Companies Act)



Limited liability company

“a limited liability company is formed by means of a capital divided into shares held by its members. The members’ liability is limited to the amount, if any, unpaid on the shares respectively held by each of them.”



Limited liability company

A limited liability company is the most common form of business entity in Malta. It may be:



**PUBLIC COMPANY
(P.L.C.)**

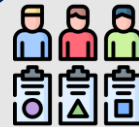


**PRIVATE COMPANY
(LTD)**

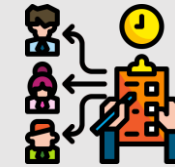
Key features of the limited liability company



The LLC is a separate legal entity



Partners are members/shareholders of the company



Management is vested in the board of directors, and shareholders vote at meetings

Key features of the limited liability company



Shares may be transferred, which may be considered an asset in the hands of shareholders

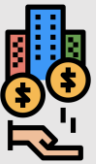


Must be registered with the MBR, with formation documents signed by at least 2 members



Members' liability is limited

Key features of the limited liability company



The shareholders/owners may benefit from a distribution of dividend



Name of the company must end in 'p.l.c.' or 'ltd.'



The company must file annual statutory filings

Private company



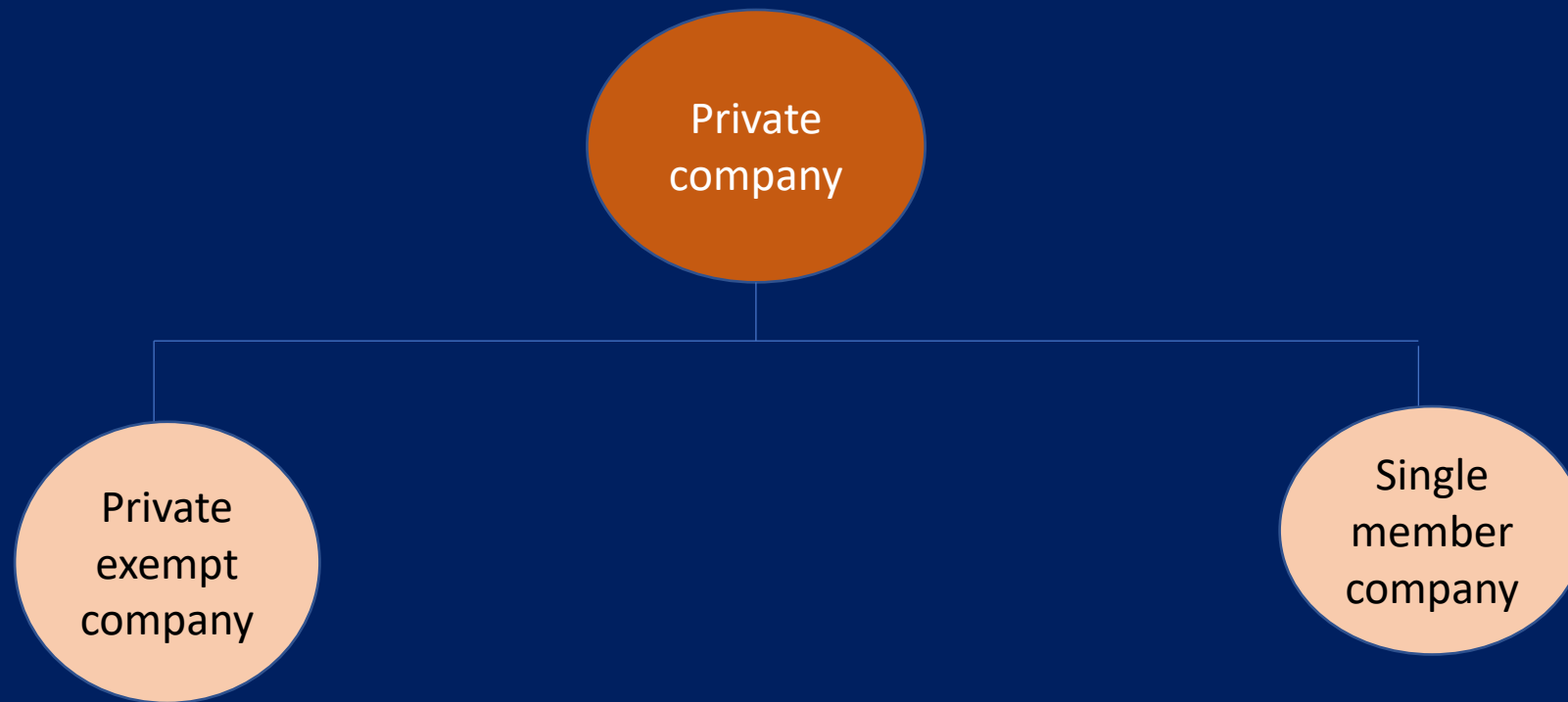
A private company:

- Restricts the right to transfer its shares;
- Limits the number of its members to 50;
- Prohibits any invitation to the public to subscribe for any of its shares or debentures.

The CA also provides that a private company shall not offer to the public, whether for cash or otherwise, any shares in or debentures of the company or allot or agree to allot, whether for cash or otherwise, any shares in or debentures of the company, with a view to all or any of those shares or debentures being offered to the public.

The equity securities of private companies may also not be admitted to listing or trading.

Private company



Private Exempt company

- The additional conditions apply to private exempt companies:
 - The number of persons holding debentures of the company must not be more than 50
 - No body corporate is a director of the company and neither the company nor any of the directors is party to an arrangement whereby the policy of the company is capable of being determined by persons other than the directors, members or debenture holders thereof.
- The **advantage** of a private exempt company is that it is not required to comply with certain legal requirements applicable in the case of all other private companies.



Single Member Exempt company

A **Single Member Exempt Company** is a private exempt company formed and registered or operating, with one member.

- The memorandum and articles of association must specify the principal activity of the company



Public company

A public company is defined as a company which is not a private company



SICAVs

- These are investment companies with variable share capital
- They are typically used for collective investment schemes or fund structures



The main differences between a PLC and a LTD company

FEATURES	LTD	PLC
Minimum number of directors	1	2
Minimum number of members	2	2
Authorised share capital	euro 1,164.69	euro 46,587.47
Nominal value paid up upon subscription	>20%	>25%
Transferability of shares	Limited	Free
Advertise shares/debentures to public	No	Yes
Time to hold accounting records	10 years	10 years
Annual general meeting	Compulsory	Compulsory

Process for the incorporation of a company

In the case of businesses operating in **highly specialized sectors**, the need for expert professional advice is essential.

Some **highly specialized sectors** are further subject to tight and detailed regulation, and a license to operate in these sectors will not be granted unless certain conditions are satisfied.

The Registry will also **require KYC documents**



The Role of the Registrar of Companies

All the documentation required for the purposes of the registration of a company must be delivered to the Registrar.

The Registrar plays a crucial role in ensuring that the applicable legal requirements are complied with.

In the simplest of cases, the following documentation must be delivered to the Registrar:

1. The memorandum and articles of association;
2. A deposit slip (or other evidence) in respect of the paid up share capital;
3. Payment of the registration fee;
4. KYC information; and
5. Bo Form (unless the shareholders are natural persons)



Evidence of paid-up share capital

A. CASH

- For the purposes of giving evidence that the share capital has been paid-up, if in cash, the share capital of the proposed company is often deposited in the “**company/client in formation account**” of the practitioner or firm handling the incorporation of the company.
- A statement by a foreign bank that the amount has been deposited into an account in the name of the proposed company with such foreign bank is also acceptable.



Evidence of paid-up share capital

B. IN KIND

- Expert's report describing the assets comprising the consideration as well as the methods of valuation which have been used.
- The expert's report must further state whether the values arrived at by the application of these methods correspond at least to the number and nominal value on the shares to be issued for them
- The report must be delivered to the Registrar for registration before the company is registered



Registration fees

- Fees are usually paid to the MBR – with the delivery of the Memorandum and Articles of Association.
- The amount of fees depends on the amount of the authorised share capital



FDI Screening

- Relevant if the company is being set up by non-EU companies and individuals
- The sectors which are subject to screening include the following:
 - (a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
 - (b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
 - (c) supply of critical inputs, including energy or raw materials, as well as food security;
 - (d) access to sensitive information, including personal data, or the ability to control such information; and
 - (e) the freedom and pluralism of the media.



Beneficial ownership

Every company shall obtain and at all times hold adequate, accurate and up-to-date information in respect of its beneficial owners.

A **beneficial owner** is any natural person or persons who ultimately own or control the commercial partnership/company, or the natural person or persons on whose behalf a transaction or activity is being conducted (this could also be a body corporate or a body of persons) through direct or indirect ownership of more than 25% of the shares or more than 25% of the voting rights or ownership interests in that body corporate or body of persons, including through bearer share holdings, or through control via other means, other than a company that is listed on a regulated market which is subject to disclosure requirements consistent with EU law or equivalent international standards which ensure adequate transparency of ownership information.

After having exhausted all possible means and provided there are no grounds of suspicion, no beneficial owner has been identified, subject persons shall consider the natural person or persons who hold the position of senior managing official or officials to be the beneficial owners, and shall keep a record of the actions taken to identify the beneficial owner.



Beneficial ownership

Name of form	Timeframe
B01	To be submitted with company incorporation
B02	To be submitted within 14 days from the change being reflected in the internal register of the company - in practice, with the filings of other corporate forms e.g. with the Form T (for share transfers)
BO – Annual Confirmation	Filed every year together with the annual return
BO – Change in SMO	Within 14 days after the date on which the change is recorded in the company
BO – Change in details of BO/SMO	In the eventuality of such changes occurring

Reservation of the company name

It is highly recommended that a practitioner, when entrusted with the formation of a company, reserves the proposed name.

However, the Registrar, in certain instance, will **not** reserve the name.



Effects of registration

Registration is official once the Registrar issues a **Certificate of Registration**. At this point, the company comes into existence and is authorized to commence business.

Once registration is affected, the company will have a legal personality **distinct** from that of its member or members. This will subsist until the name of the company is struck off the register.





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Memorandum and articles of association

A company shall not be validly constituted in terms of Maltese company law (the Maltese Companies Act, Chapter 386 of the laws of Malta) unless a **Memorandum of Association** is entered into and subscribed (signed) by at least two persons (unless the company being incorporated qualifies as a single member company).

Memorandum of Association: outward looking document which provides key information on the company, such as the objects, capital, directors, subscribers, etc.

Articles of Association: inward looking document which sets out the internal regulations of the company.



The Articles of Association may be registered together with the Memorandum of Association.



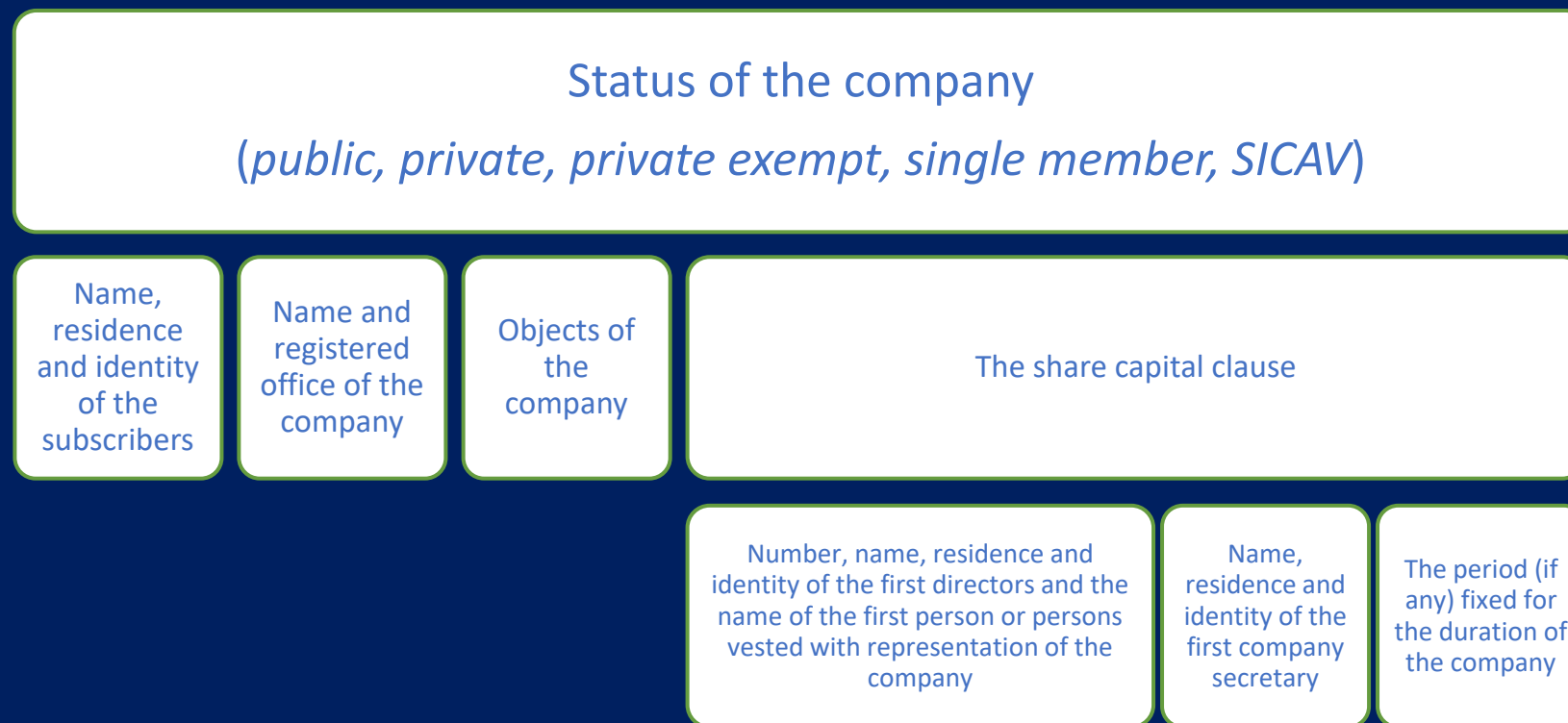
Memorandum of association

The provisions of the memorandum of association are mandatory. If any one of the matters is not included, the Registrar of Companies will refuse to register it.



Memorandum of Association

The contents shall vary from company to company, depending on the type of company.



Status Clause

Private
company



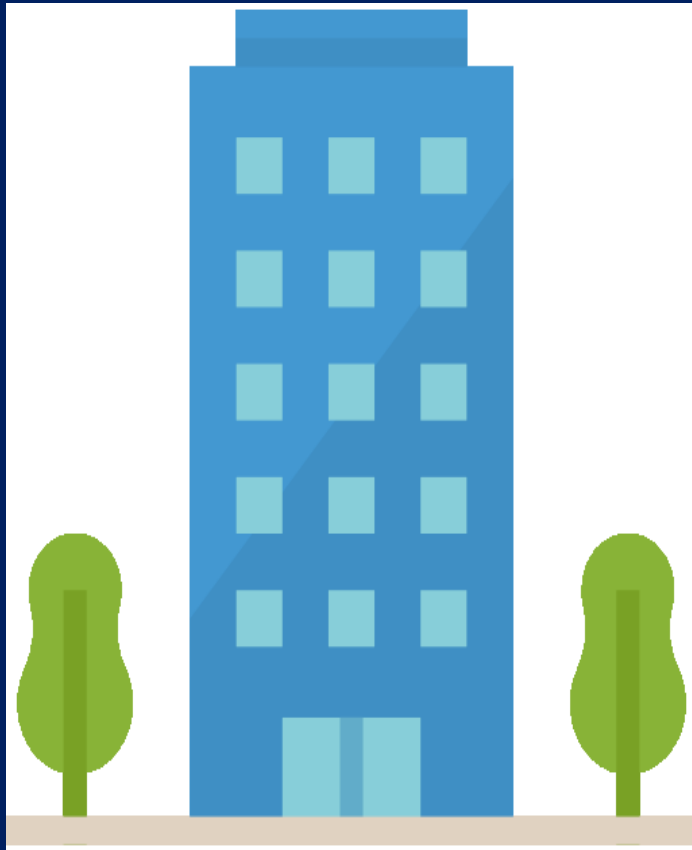
The name must end with the words "private limited company" ("limited"/"ltd")

Public
company



The name must end with the words "**public limited company**" ("p.l.c.")

Registered Office Clause



Since a company has a legal but not physical existence, a company must be allocated a place where the company can be found.

Communications and notices shall be sent to the registered office.

The registered office does not need to be the principal place of business.

The registered office of a Maltese company must be in **Malta**.

Consent letter for use of property if owned by third parties.

OBJECTS CLAUSE



MEMORANDUM OF ASSOCIATION
OF
BUHAGIAR LIMITED

1. Name

The name of the company is Buhagiar Limited ("the Company").

2. Registered Address

The registered address of the Company shall be at Level 3, Valletta Buildings, South Street, Valletta, Malta.

3. Objects and Powers

The objects for which the Company is established are as follows:-

- (a) to subscribe for, purchase or otherwise acquire, take, hold, dispose of or otherwise deal in all kinds of securities including shares, stocks, debentures, debentures stock, bonds, notes, options, and interests in all kinds of companies, corporations, entities, partnerships or other body of persons as the Board of Directors may determine, and to manage and administer any of the afore-mentioned property or any other property permitted by law;
- (b) to receive from the assets mentioned in paragraph (a) above dividends, capital gains, interest, and any other income derived from investments including income or gains on their disposal, rents, royalties and similar income whether arising in or outside Malta, and profits or gains attributable to a permanent establishment (including a branch) whether situated in or outside Malta;
- (c) to acquire and dispose of, by any title valid at law, movable or immovable property, whether for commercial or other purposes and to hold the property so acquired, and the consideration for any acquisition or disposal can be in credit or in cash or in kind, including the allotment of shares or debentures of the company, credited as paid up in full or in part as need be;
- (d) to administer, invest, lease, hire, grant by way of emphyteutical concession or in any other manner employ, improve, manage, administer or develop any of its assets, or any other property, as may from time to time be determined;



Management clause

- The number of directors can be stated either as a fixed number or as a range or as a maximum
- It is not advisable to fix an amount as if there is a vacancy the board may be unable to act



Subscribers' clause

The subscribers' clause generally incorporates, in tabular form, not just the name, addresses and identification details of the subscribers but also the number, nominal value and class, if any, of the shares respectively taken up by them



Share capital clause

The memorandum must state:

- i. The amount of share capital with which the company proposes to be registered
- ii. The division thereof into shares of a fixed amount
- iii. The number of shares taken up by each of the subscribers
- iv. The amount paid in respect of each share
- v. Where the share capital is divided into different classes of shares, the rights attaching to the shares of each class.



Share capital Clause

5. Share Capital

The authorised and issued share capital of the Company is twenty thousand Euro (€20,000) divided into twenty thousand (20,000) Ordinary Shares of one Euro (€1) each, which have all been subscribed, allotted, taken up and fully paid up, as follows:

Michael Buhagiar I.D. number: 123483 M Address: No.2, <u>Triq Santa Margerita</u> , Tarxien	10,000 Ordinary Shares of €1.00 each (fully paid up)
<u>Nicola</u> Buhagiar I.D. number: 123483 M Address: No.5, Old Bakery Street, <u>Mdina</u>	10,000 Ordinary Share of €1.00 each (fully paid up)

Representation clause

- A company cannot act in its own person since its person is a fiction of law with legal but no physical existence
- Typically representation of the company is vested in “*any one director*” or “*in any two directors*” or “*in any two directors and the Chairman jointly*” or “*in such other person or persons duly authorised by the board of directors*”



Representation clause

8. Legal and Judicial Representation

The legal and judicial representation of the Company shall be vested in any one (1) of the directors who may act severally or, without prejudice to the aforesaid, in any person or persons authorised by the Board of Directors from time to time.



Articles of Association

- Inward looking document: it regulates the relationship between the company and its members and between each of the members *inter se*.
- The Articles of association may be registered. If they are not registered, the model articles contained in the First Schedule to the Companies Act will apply.
- Even if the company does register the articles of association, insofar as these do not exclude or modify the provisions of the First Schedule, the provisions of the First Schedule will continue to apply
- The articles of association must be signed by the subscribers



FIRST SCHEDULE

(Article 75)

MODEL REGULATIONS FOR A LIMITED LIABILITY COMPANY

PART I REGULATIONS FOR THE MANAGEMENT OF A LIMITED LIABILITY COMPANY

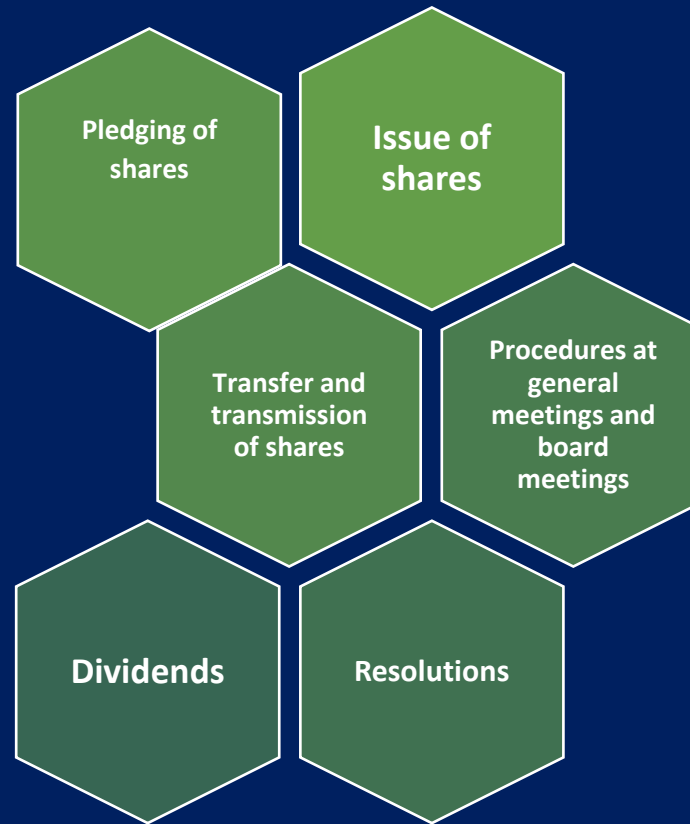
Share capital and variation of rights

1. Without prejudice to any special rights previously conferred on the holders of any existing shares or class of shares, any share in the company may be issued with such preferred, deferred or other special rights or such restrictions, whether in regard to dividend, voting, return of capital or otherwise as the company may from time to time by ordinary resolution determine.

2. Subject to the provisions of article 115 of the Companies Act, (hereinafter referred to as "the Act"), any preference shares may, with the sanction of an ordinary resolution, be issued on the terms that they are, or at the option of the company are, liable to be redeemed on such terms and in such manner as the company before the issue of the shares may by extraordinary resolution determine.

3. If at any time the share capital is divided into different classes of shares, the change of any shares from one class into another or the variation of the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class which is to be changed or the rights attached to which are to be varied, according to the case) may, whether or not the company is being wound up, be made with the consent in writing of the holders of three-fourths of the issued shares of that

Articles of Association





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