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Abstract

The development and incorporation of an organization are especially like the introduction of a human like it additionally goes through different phases of development of its body parts during the womb stage. Different basis is completed to bring an organization into reality. The course of a thought changing over into an organization incorporates different stages, these critical phases of the pre-fuse and development stages are examined exhaustively as under. This article makes sense of the capabilities, obligations and liabilities of an advertiser alongside giving experiences into cases in regards to pre-incorporation contract. This article abides into the coordinated course of company registration.

The development of an organization goes through various advances, beginning from thought age to initiating of the business. This entire cycle can be separated into 4 significant stages or steps, which we will talk about in the lines underneath.

The significant stages in line of an organization are as per the following:

- Promotion stage
- Registration stage
- Incorporation stage
- Commencement of Business stage

Contemporary business needs a substantial sum of money. The technical environment is changing and becoming more competitive every day. As a result, an increasing number of business firms favour the corporation form of organisation. Stages in the formation of a company are the procedures that must be followed from the time a business idea is conceived

until a firm is legally capable of starting operations. Promoters are those who are promoting a firm by taking these actions and the ensuing dangers.

Over the past few years India has witnessed an exponential growth in the number of companies, of various scales and across various industries. The Government policies and the corporate stand-still during the pandemic have fuelled the fire of the booming entrepreneurial spirit. All in all, India is now a veritable hub of nascent companies rising through the global rankings.

Incorporation for the company.

In order to be able to incorporate the business, the promoter attempts to increase investor faith in the idea and builds upon the investment. According to Section 2(69) of the 2013 Companies Act, "promoter" is a term. A promoter is, technically speaking, a person who is thus identified in the company's prospectus. In the annual return submitted pursuant to Section 96 of the Companies Act of 2013, the Company shall also identify its promoter.

An advertiser is to a business what parents are to a child. Along with persuading investors to support the business concept, the promoter assembles the physical capital of labour, raw materials, managerial talent, machinery, etc.

While having a strong commitment to the company's ideas, the promoter must consider SWOT analyse the idea with respect to the future prospects and feasibility with respect to the societal dynamics.

The pre-incorporation contracts are the contracts entered upon by the promoter before the company is incorporated and these are essential for the successful running of the company in the future. The nature of these pre-incorporation contracts is however different to that of an ordinary contract. These contracts are Bipartite and effects of it are tripartite. The Promoter enters into a contract with the service providers or the interested persons and the consequential effect of these contracts help the prospective company which is still lingering in its nonincorporated stage. The instrument of Contract is essentially used for the *quid-proquo* transactions between two parties, but here it is remarkably used for the benefit of the nonparty to contract as legally the company is non-existent.

The Company is essentially the beneficiary of the pre-incorporation contracts as inferred from the above said para. Now it might stir up doubt as to why a company is not liable towards the pre-incorporation contracts, the answer to the question to be simply put is that one cannot make

someone liable if they are non-existent and hence not a party to the aforesaid pre-incorporation contract.

The non-liability of the company with respect to the pre-incorporation contracts was the same as the common law court in India until the passing of the Specific Relief Act, 1963. The Specific Relief Act, 1963 essentially under Section 15(h) and Section 19(e) makes the preincorporation contracts and agreement valid deviating from the trajectory followed under the common law.

Section 15(h) provides details as to who may obtain specific performance, wherein clause h provides that when a promoter gets into a contract before incorporation on behalf of the company and the company warrants such contract and such company must have sent a communication of acceptance to the other party of contract.

Section 19(e) provides that a party claiming relief under specific performance can be claimed when the promoter of the company before incorporation had entered into contract and if such contract was warranted during incorporation. The company must have accepted the contract and communicated such acceptance to the other party of contract.

Case laws:

1. Kelner v Baxter –¹

Once Mr. Kelner approached the promoter of a firm about buying some of his wine, and the promoter agreed to do so on the company's behalf. Eventually, when the business was unable to pay Mr. Kelner, the promoter was sued. It was determined if the promoter and the company were acting as each other's principal and agent, and whether the company could be held liable. As the principal of the agent could not have existed without incorporation, the learned judge concluded that the principal-agent relationship did not exist. It was further added that the company could not assume responsibility for the Pre-incorporation contract through adoption because it was not a party to the contract and was not even aware of it at the time.

¹ Kelner v Baxter (1866) LR 2 CP 174

2. Newborne v Sensolid Ltd.² –

An unformed corporation entered into a contract where the other party refused to fulfil its obligations, and this is how the appeal court understood the results of *Kelner v. Baxter*. The judge had noted that there could not be a pre-incorporation contract action because the company could not have existed or entered into a contract prior to incorporation. The idea that if a contract was signed by an agent or promoter, the promoter would be held personally accountable, but that the contract would be unenforceable if that individual was acting as a representative of an unformed company, confusion was thus caused.

Joined Process of Company Registration-

The next step of the process is to complete the "simplified proforma for incorporation" form online. The proforma offers a practical way to incorporate a business online, which begins by filling out the necessary information for the company's promoter. Second, you can fill out the e-MOA (electronic Memorandum of Association) and the e-AOA (electronic Articles of Association) on the electronic proforma in form numbers INC-33 and INC-34, respectively. As we all know, the MOA serves as the company's constitution and typically outlines the goal of the organisation as well as the directors that participated in its establishment. An e-AOA option is offered after the memorandum of association to further simplify the incorporation process. It lays down rules and regulations of company affairs. E-AOA also lays down the powers, duties and rights of managers, officers and board of directors.

The Article of Association may be made by the company according to its own requirements, or maybe selected by such company from the various options available in the schedule of Companies Act. AOA must be signed by all the directors and also attested by two witnesses. All the documents declared to be necessary under Section 7 of the Companies Act are supposed to be attached along with the digital signature of all the directors. The Ministry of Corporate Affairs has tried to simplify the process of getting a DIN number for the directors of the newly incorporated company by including such request form along with the PAN & TAN card of the so proposed entity which is being incorporated.

² [1954] 1 QB 45, [1953] 1 All ER 708

Effect of the Certificate of Incorporation

1. Certificate of incorporation is the conclusive evidence of the legal existence or presence of the Company as per Section 35 of Companies Act, 1956.
2. Even if there are formal deficiencies in the documents submitted for the incorporation of the company, once the certificate of incorporation is issued, the certificate becomes conclusive evidence regarding the legal existence of the company from the date mentioned in the incorporation certificate.
3. If the certificate of incorporation was received on 24th but the certificate reflects the date 22nd then the company shall be taken to have come into existence from 22nd as reflected by the certificate of incorporation and this will also authenticate the transactions made by such company on 22nd and 23rd in the eyes of law.

Certificate of Commencement of Business

1. As soon as a private company gets the certification of incorporation it can start its business. Once the certificate of incorporation is received by the company, a public company issues a prospectus for inviting the public to subscribe to its share capital. It fixes the minimum subscription in the prospectus. Then, it is required to sell the minimum number of shares mentioned in the prospectus.
2. After completing the sale of the required number of shares, the certificate is sent to the registrar along with the letter from the bank stating that all the money is received.
3. The registrar then scrutinizes the documents. If all the legal formalities are done, then the registrar issues a certificate known as 'certificate of commencement of business'. This is the conclusive evidence for the commencement of business for the public company.

Memorandum of Association of a Company:

Is the company's charter or constitution that contains the authority of the company? Under the Companies Act of 1956, no company may be registered without a memorandum of association. According to Section 2(28) of the Companies Act, 1956, "memorandum" refers to the company's original memorandum of organisation or any subsequent amendments made in accordance with any prior company law or the Companies Act, 1956. Any of the four forms listed in tables B, C, D, and E of Schedule 1 to the Companies Act of 1956 should be used for

the memorandum of association. Companies limited by shares

must use form in Table B, and corporations limited by guarantee must use form in Table C.

- **Name clause**

The name of the company is mentioned in the name clause. A public limited company must end with the word 'Limited' and a private limited company must end with the words 'Private Limited'. The company cannot have a name which in the opinion of the Central Government is undesirable. A name which is identical with or the nearly resembles the name of another company in existence will not be allowed. A company cannot use a name which is prohibited under the Names and Emblems.

- **Domicile clause**

The state in which the registered office of company is to be situated is mentioned in this clause. If it is not possible to state the exact location of the registered office, the company must state it provide the exact address either on the day on which commences to carry on its business or within 30 days from the date of incorporation of the company, whichever is earlier. Notice in form no 18 must be given to the Registrar of Companies within 30 days of the date of incorporation of the company. Similarly, any change in the registered office must also be intimated in form no 18 to the Registrar of Companies within 30 days. The registered office of the company is the official address of the company where the statutory books and records must be normally being kept. Every company must affix or paint its name and address of its registered office on the outside of every office or place at which its activities are carried on in. The name must be written in one of the local languages and in English.

- **Objects clause**

This clause is the most important clause of the company. It specifies the activities which a company can carry on and which activities it cannot carry on. The company cannot carry on any activity which is not authorised by its MA.

Liability clause

A declaration that the liability of the members is limited in case of the company limited by the shares or guarantee must be given. The MA of a company limited by guarantee must also state that each member undertakes to contribute to the assets of the company such amount not exceeding specified amounts as may be required in the event of the liquidation of the company. A declaration that the liability of the members is unlimited in case of the unlimited companies must be given. The effect of this clause is that in a company limited by shares, no member can be called upon to pay more than the uncalled amount on his shares. If his shares are already fully paid up, he has no liability towards the company.

Capital clause

The amount of share capital with which the company is to be registered divided into shares must be specified giving details of the number of shares and types of shares. A company cannot issue share capital greater than the maximum amount of share capital mentioned in this clause without altering the memorandum.

Doctrine of the ultra-vires

Any transaction which is outside the scope of the powers specified in the objects clause of the MA and are not reasonable incidentally or necessary to the attainment of objects is ultra-vires the company and therefore void. No rights and liabilities on the part of the company arise out of such transactions and it is a nullity even if every member agrees to it.

Consequences of an ultra vires transaction :-

1. The company cannot sue any person for enforcement of any of its rights.
2. No person can sue the company for enforcement of its rights.
3. The directors of the company may be held personally liable to outsiders for some ultra vires.

Conclusion

According to the aforementioned article, the company's incorporation time can be interpreted as the fusion of the Pre incorporation period and the incorporation era. The time before incorporation might be viewed as the company's idea phase. When it comes to raising capital

for the business, the promoter whose name appears in the prospectus of the company is crucial. The promoter also performs a SWOT analysis of the business to determine its market potential and whether investors would be able to consider it as a viable investment. The promoter's obligations and liabilities have been thoroughly explained, demonstrating the fiduciary nature of their relationship with the company. The pre-incorporation contract principle has been thoroughly discussed, and it has been determined that the promoter will be held personally accountable for all pre-incorporation contracts unless there is a novation of the contract or, in the case of India, when the provisions of the Specific Relief Act apply, wherein the company ratifies the contract and notifies the other party of its liability. Since it affects possible investor intentions towards businesses in the market, the government's role in simplifying the incorporation procedure is quite important.

The Ministry of Corporate Affairs offers options to incorporate the company with a unique name by providing the online option of submitting the memorandum of association along with the articles of association online with the declaration digitally signed stating that all legal requirements for incorporation of a company have been met by the respective company. This has increased the ease of incorporation. This legislation reflects the State's obligation to support business in order to boost the economy. The certificate of incorporation is essential for demonstrating that the company has been properly created and cannot be revoked unless the registrar of companies decides to wind up the firm after discovering fraud in the incorporation process. The incorporation certificate speaks for itself, and the date of incorporation is unaffected by the date of receipt, so even if the certificate is received on February 20 but clearly states that the date of incorporation is February 14, all actions taken after that date are presumed to have been taken in accordance with the law.

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