

Chapter 2: Incorporation of Company & Matters Incidental Thereto

◆ 1. Promoter (Sec. 2(69))

Meaning: Person who takes steps to form a company.

- Identified in prospectus / annual return / has control / Board acts on his advice.
- Excludes: Professionals (CA, CS, Lawyers) acting only in professional capacity.

Duties:

- Fiduciary duty → act in good faith.
- Disclose all profits.
- Avoid misstatements & fraud.

Liabilities:

- Civil – misstatements in prospectus.
- Criminal – fraud, concealment.
- Accountable for secret profits.

⚡ *Case: Erlanger v. New Sombrero Phosphate Co.* – Promoter liable to disclose profits.

◆ 2. Formation of Companies (Sec. 3)

- **Public Co.** – Minimum **7 members**.
- **Private Co.** – Minimum **2 members**.
- **OPC (One Person Co.)** – Only **1 person**.

Types by liability:

1. Limited by shares.
 2. Limited by guarantee.
 3. Unlimited.
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◆ 3. One Person Company (OPC)

- Only a **natural person (not minor)**, Indian citizen (resident or non-resident) can form.
- Must appoint a **Nominee** (perpetual succession).
- Restriction → cannot be Sec. 8 company or do NBFC business.
- One person cannot form more than **1 OPC**.

Relaxations:

- No AGM.
 - Only 1 Board Meeting per half year.
 - Financials signed by single Director.
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◆ 4. Reduction in Members (Sec. 3A)

- If membership falls below:
 - 7 (Public), 2 (Private).
- Business continues > 6 months.
- Members aware → **severally liable** for debts of that period.

⚡ *Exam Qn:* Sec. 3A = **personal liability of members**.

◆ 5. Incorporation Procedure (Sec. 7)

Steps:

1. Choose type (Public/Private/OPC).
 2. Reserve name (SPICe+ Form).
 3. Draft MOA (INC-33) & AOA (INC-34).
 4. File Declarations (INC-8, INC-9).
 5. Consent of directors (DIR-2) & particulars (DIR-12).
 6. Proof of Registered office (INC-22).
 7. Pay prescribed fees.
 8. ROC scrutinises → Issues **Certificate of Incorporation (COI – INC-11)**.
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◆ 6. Certificate of Incorporation (Sec. 7 & 9)

- Conclusive evidence of incorporation.
- Effects:
 - Company becomes **body corporate**.
 - Separate legal entity.
 - Perpetual succession.
 - Can contract, own property, sue/be sued.

⚡ *Case: Moosa v. Ebrahim* – COI cannot be challenged once issued.

◆ 7. Commencement of Business (Sec. 10A)

- Applicable: Companies with **share capital**.
- Within **180 days** → file declaration (INC-20A):
 - Subscribers paid for shares.
 - Registered office verified.

Penalty:

- Company – ₹50,000.
- Officers – ₹1,000/day (max ₹1 lakh).
- ROC may strike off.

◆ 8. MOA (Sec. 4) – Memorandum of Association

Clauses:

1. Name.
2. Situation/Registered Office.
3. Object (Main + Ancillary).
 - **Doctrine of Ultra Vires** → Beyond objects = void, cannot be ratified.
 - *Case: Ashbury Railway v. Riche*.
4. Liability.
5. Capital.
6. Subscription.
7. Nominee (for OPC).

👉 MOA = Company's **Charter / Constitution**.

◆ 9. AOA (Sec. 5) – Articles of Association

- Internal rulebook of company.
- Binding contract between company & members.
- Can include **Entrenchment** (harder to amend).

◆ 10. Alteration

- **MOA (Sec. 13)**: Special resolution + filing. (Some cases need CG approval).

- **AOA (Sec. 14):** Special resolution. (Public → Private conversion needs CG approval).
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◆ 11. Registered Office (Sec. 12)

- To be established within **30 days** of incorporation.
 - Notice of change → Form INC-22.
 - Determines **legal jurisdiction & communication address**.
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◆ 12. Section 8 Companies (Not-for-Profit)

- Objects: Education, charity, art, sports, research, social welfare, etc.
- Profit applied only for objects → no dividend.
- Name need not carry “Ltd.” or “Pvt Ltd.”.

Relaxations:

- Shorter notice for meetings (14 days).
- No independent directors / certain committees.

Violation: Licence revoked → May be wound up or amalgamated with another Sec. 8 Co.

◆ 13. Miscellaneous

- **Service of documents (Sec. 20):** By post / email / electronic mode.
 - **Authentication (Sec. 21):** By KMP / authorised officer.
 - **Execution of documents (Sec. 22):** By authorised person / common seal (if any).
 - **Sec. 19:** Subsidiary cannot hold shares in holding company.
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⚡ QUICK REVISION POINTS

- **Promoter = Fiduciary** (disclose profits).
- **Sec. 3:** Public (7), Private (2), OPC (1).
- **Sec. 3A:** < Min members + 6 months = Personal liability.
- **Sec. 7:** Incorporation through SPICe+.
- **Sec. 9:** COI = Conclusive evidence.
- **Sec. 10A:** No declaration = No business.
- **MOA = Charter (Ultra Vires).**
- **AOA = Rulebook (Entrenchment).**

- **Sec. 12:** Registered office → 30 days.
- **Sec. 8 Co. = Not-for-Profit.**