

Promoters: Their Position, Powers, Duties And Liabilities

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This paper defines the promoter and tells about intricacies and legal issues involved in promotion. This module also deals with duties and liabilities of promoters. In doing so it chalks out the liabilities of promoters who are promoting companies for their vested interests. The module provides for remuneration and ways of remuneration to promoters. The module analyzes the role of pre-incorporation agreements in promotion. The module clears the inter linkage of promoters with pre-incorporation agreement.

The prospective readers before perusal of this module need to have a working knowledge of principles of contract. The readers also need to correlate the content with relevant provisions and case laws available on the company law.

INTRODUCTION

The objective of this paper is to apprise the reader about the promoter their role in promotion. The module also aims to give a glimpse about the range of activities that a promoter shall be doing in promotion of a company. Promotion of a company is not a piece of cake as it brings accountability. The module highlights the duties of liabilities of promoters. The module also wants to apprise the prospective readers about pre-incorporation agreements and its role in promotion. Lastly the module deals with remuneration and discusses various ways through which promoters can be remunerated for their work of promotion.

Promoter is the person who comes first in the chronological order of the company incorporation process. Promotion of a company is tiring and tardy work as it comprises a variety of activities. Promoters of the company are like parents of the company who give birth to the company as a child. Promotion includes conception of idea, incorporation, floatation and commencement of business. Promoters are deeply involved in the incorporation process and almost do everything for making a company. Formation of a company is work related with compliance of laws, regulators and authorities which involves an integrated team work by various people led by promoters. Company is a mode of doing business which is run by the motive of profit maximization. Entrepreneurship depends on modus operandi chosen by businessmen from sole proprietorship, Hindu Undivided Family, firm, Limited Liability Partnership and Company. We know that a company is the best suited legal device for running business and commerce because of separate legal existence, limited liability, wealth management and corporate financing.

As we are aware that we have a fundamental right to do business which results in a fundamental right to form a company as well but if promotion is done for fraudulent activities or in promotion scams are committed or position is misused the law has to come into action.

Promotion & Promoters

Promotion

Promotion of companies is a hydra-headed task. Promotion generally means forming a company. In India we have seen promotion generally is done by individuals who are entrepreneurs as 'occasional promoters'. In case of promotion of private companies the intended promoters sign a 'Prior Agreement' wherein they lay down the terms and condition and the way they want to establish a company which is followed by a 'Promoters' Agreement' subsequently after incorporation wherein they record their contributions in terms of pooling of capital. In public companies entrepreneurs are supported by Public Financial Institutions like LIC, FCI, IFCI, ICICI, IDBI which as 'institutional promoters' promote government enterprises. Big public companies are generally promoted by big companies being the shareholders. In west especially investment companies like Goldman Sachs, Bank of America, Morgan Stanley, Merrill Lynch, Citigroup, UBS, Deutsche Bank promote companies on professional basis as 'professional promoters'.

Definition of Promoter

The term promoter was not defined in Companies Act, 1956 but was frequently used in various sections e.g. secs. 56, 62, 69, 76, 478 & 519. In *Whaley Bridge Co.v. Green Bowel LJ* while defining the term promotion held that ‘*promotion*’ is not a term of law but of business operations familiar to the commercial world, by which a company is generally brought into existence. Promotion includes a wide range of commercial activities which include many technical and non-technical operations. Amongst the technical include project planning, feasibility study, looking for technical cooperation and collaboration and locational studies. Non-technical activities include assembling the required number of signatories, obtaining advice on different legal requirements, appointing key people like company lawyers who make documentation and enter into all types of pre-incorporation contracts.”

SEBI Regulation 1997 also mentions promoters. Securities Exchange Commission Rule of US405 (a) defines promoter as a “person who acts alone or in conjunction with other persons directly or indirectly takes the initiative in founding or organizing the business enterprise.”

Definition of Promoter in Companies Act, 2013

Recently in the Companies Act 2013 the term was defined in section 2(69) in following way: “Promoter” means a person—

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

This definition is the result of various regulations of SEBI and judicial decisions. In this definition, if a person’s name appears in the prospectus or annual return as promoters or when he directly or indirectly controls the affairs of a company as a shareholder or director or he maintains control over the Board of Directors, he is promoter of that company. However the people who are rendering services to the company in professional capacity shall not be promoters e.g. Company Secretary, Lawyers, Merchant Banker, Lead Manager etc.

Having seen all these definitions one may conclude that promoters play a crucial role in founding the company. They assemble required number of subscribers, prepare the Memorandum and Articles of company, apply for incorporation, arrange capital via IPO, private placement, public deposits and debentures and external commercial borrowings, appoint first director of company, establish registered office, corporate office, sign all pre incorporation agreements on behalf of the company for making production conducive such as buying land for manufacturing units, signing technology transfer agreement with foreign counterparts, supply of raw materials, hiring proper work force etc. In this they enjoy enormous powers to do such things which are *intra vires* that means that promoters are competent to do all such things in finding an enterprise which is warranted by terms of incorporation.

Generally they are the persons who are involved in the process of conception, planning during the formative stages of a company. Whether a person is a promoter or not is a matter of fact. Undischarged insolvent can’t be promoted. Natural as well as juridical persons can be promoters. Person providing technical services/assistance in lieu of money to a person who is involved in above mentioned activities is not a promoter.

Promoters Activities

A promoter does a range of activities comprising the following:

- i. Conceiving the scheme of forming a co./suitable company for the business
- ii. Assembling the required number of subscribers;
- iii. Applying for Corporate Identity Number (CIN), Global Location Number (GLN) & PAN/TAN to relevant authorities;
- iv. Getting documents of company i.e Articles and Memorandum prepared, executed and registered;
- v. Finding bankers, brokers and legal advisors;
- vi. Preparation and circulation of prospectus;
- vii. Raising capital via Initial Public Offering (IPO), private placement, debenture or public deposits or external commercial borrowing;

viii. Vetting and due compliance of laws and regulations relating to corporate financing and disclosures via annual and periodic returns to Registrar of Companies, Regional Directors, SEBI, Ministry of Corporate Affairs, Foreign Investment Promotion Board, Serious Fraud Investigation Office and Reserve Bank of India.

ix. Settling the terms and conditions of pre-incorporation agreements.

Legal Position of Promoters

Promoters are deeply involved in the incorporation process of a company so a pertinent question arises what is the legal position of the promoters in the company. Promoters are not agents as before incorporation the company is *non est* (does not exist) in the eye of law so there can be no principal. They are also not trustees, as the company is not a beneficiary. They are in fiduciary capacity as in *Erlanger v. New Sombrero phosphate co. Ltd.* Cairns LJ said that, “*The promoters undoubtedly stand in a fiduciary position. They have in their hand the creation and molding of the company. They have the power of defining how and when and in what shape and under whose supervision it shall come in to existence and begin to act as a trading corporation.*”

Duties of Promoters

A promoter stands in fiduciary capacity to the company so because of that he owes certain duties to the company. Promoters' duties are the same as a person who acts on behalf of a person without a contract of employment, namely not to deceive and to exercise reasonable care & skill. He may be made liable for misrepresentation and fraud in prospectus.

Fiduciary Duties

In Indian Companies Act, 2013 there are no clear provisions but Sec.34&35 impose liability for untrue statements in prospectus and for fraudulent trading (sec. 339 & 447). In particular two duties in fiduciary position are:

1. Duty not to make secret profit
2. Duty to disclose to the co. any interest in a transaction

1. Duty Not To Make Secret Profit

A promoter enjoys an advantageous position in relation with access to information, business opportunity and opportunity to sell in the company formation process. He may sell his own land, intellectual property, professional services at a reasonable rate to companies and in that he can make disclosed profits but he is not allowed to make secret profits. In cases of public companies in the first Annual General Meeting all dimensions of promotion and all types of pre-incorporation agreements are investigated so as to check whether promotion was done meticulously and honestly or not and if the promoter is found to make secret profit he may be made accountable for that. However a promoter is allowed to make profit if the same is disclosed.

In *Gluckstein v. Barnes*, a syndicate of persons, bought ‘Olympia’ (an amphitheatre) and sold this to a company promoted by them and made a secret profit of 20,000 £, not disclosed in prospectus. The profit of 20000 £ is a secret profit and promoters are bound to pay it to the company because the disclosure was not sufficient.

Again in, *Erlanger v. New Sombrero Phosphate Co.* a syndicate of which Erlanger was a member, purchased an island consisting of phosphate mines for 5,000£. A nominee of the syndicate sold the property to co. For 1,10,000 £ formed by Erlanger details of sale were not disclosed to the directors. It was held that the company could rescind the contract as there had been no disclosure of the profit which was made.

Disclosure To Whom

A pertinent question arises that such profits should be declared to whom and how. In this regard it may be submitted that such disclosures of personal profits may be made to following:

- i. Independent board of directors or
- ii. Articles of association or
- iii. Prospectus or
- iv. To existing and intended shareholders.

Generally all such disclosures are made in detail in prospectus or offer documents. Details of property, including price purchases from promoters within two years must be disclosed according to Issue of Capital & Disclosure Requirements Regulation, 2009 of SEBI. But in certain circumstances it is impossible to find an independent board of directors like in Solomon's case, in such circumstances the real truth should be disclosed to those who are invited to become shareholders and not merely to the first few shareholders.

2. Duty To Disclose Interest In A Transaction

In addition to his duty not to make secret profit, a promoter is also duty bound to disclose to the company any interest which he has in a transaction entered into or proposed to be entered into by it. This is even then when he sells his own property to the company raised by him because he acquired the property before the promotion began⁷. Such disclosures must be made to the company and in full.

After incorporation of a company if a property is received by promoters he is trustee of such property and all must be handed over to the company in due course otherwise the promoter may be liable for conversion or misappropriation or breach of trust of property. Generally a company is a baby child of a promoter so he does not dispose off such properties which are worthless on a high rate but there can be cases where he may try to wash off his hands from bad properties by selling the same to a company promoted by him as he has a better access to it.

Remedies for Breach of Duties:

Remedies to Company

In cases of breach of duties following remedies may be claimed by the company against the promoter who stands in fiduciary capacity to company:

1. Rescission of Contract

The company can rescind all such pre-incorporation agreements where the promoter has made a secret profit and has not disclosed his material interests in the transactions. The company must have done nothing to show an intention to ratify the agreement after finding breach involving nondisclosure & misrepresentation. The company is not precluded from rescinding by the fact that the property has been transferred to it under a contract, nor by the fact that promoter has been allotted shares under the contract. The right to rescind will be lost if the company fails to exercise such right within reasonable time.

2. To Recover Secret Profit:

If the promoter has made a secret profit by selling his own property to the company in return for allotment of shares in it, the company may recover from him the difference between the price at which it sold the shares and the price at which it bought the property. But this remedy depends on two situations: (a) if promoter is in fiduciary position as only seller, profit can't be recovered; which means if the property on which the profit was made was acquired before the promoter became a promoter, there can be no claim for the recovery of the profit as such.

(b) the acquisition and selling of property both should be in fiduciary capacity as a promoter then contract may be rescinded and property may be retained at actual cost depriving the promoter of his claimed profit.

Termination of Duties

A pertinent question regarding the duties of promoters may be how long he remains duty bound. Generally a promoter's duty starts from the day of conceiving an idea about making a co. and terminates with the appointment of Board of Directors or with the incorporation of the company. In reality it continues until the co. has acquired the property and raised its initial share capital. Even after floatation or corporate financing in India the promoters fail to separate themselves from the affairs of the company. They actively participate in corporate governance, management and operation of corporate affairs. They keep controlling shares in their hand and with the help of a person acting in concert work as head and brain in the company which runs on the rule of majority. They actively participate in future expansion of the company, merger and acquisitions, takeover, buyback, portfolio management, reduction of capital etc.

Liabilities of Promoters

The companies Act, 2013 in various sections mention about promoter's role in corporate governance especially in sections Sec 2(59), 2(60), 7, 26, 34, 35, 42(10), 92, 102, 149, 167, 184, 230, 266, 284, 289, 300, 339, 361.

Due to a series of corporate scams like Satyam, Enron, Sahara, Saradha etc., the new Act was concerned to plug the loopholes wherein entrepreneurs are abusing corporate personality as promoters of the company. In section 2(59) & 2(60) Companies Act, 2013 defines the term 'Officer' and 'Officer in default'. Section 2(59) defines the term "officer" which includes any director, manager or key managerial personnel or any

person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act. If we see this definition closely though it does not mention promoter but because of the definition of term promoter as defined in section 2(69), the promoter is an officer of the company. Because section 2(59) and 2(69) have something in common i.e. '*any person in accordance with whose directions or instructions the Board of Directors or any one or more of the directors is or are accustomed to act.*' A promoter holds a better position in corporate governance and has information to crucial and sensitive information which are undisclosed and he can misuse such

information for personal and vested interests so the new Companies Act holds the promoter liable as officer and officer in default wherever he contravenes the provisions of the Companies Act and other corporate and securities laws. A promoter is generally liable for furnishing wrong information and credentials for incorporation of company, owes a civil and criminal liability for misstatement in prospectus, disclosures of interests in periodic annual return filed to Registrar and SEBI, disclosure of interests in notice served in AGM. He also plays a crucial role in the appointment of first directors of the company; if directors are not appointed by promoters, they are treated as deemed directors of the company. He also plays a crucial role in corporate mergers, amalgamation and takeovers. He also plays a very crucial role in winding up the affairs of the company. Companies Act, 2013 under sections 336 to 342 provides for various offences and punishment there for, committed by officers of companies which equally covers promoters which comes out during winding up of the company. Section 447 to 453 provides for certain offences which are committed by officers of company and others and make it punishable. Section 447 provides that, *“Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud: Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.”* It is a general provision that can be applied to any case of fraud and covers a fraud committed in the course of promotion.

Section 450 is of residuary nature which provides that, *“If a company or any officer of a company or any other person contravenes any of the provisions of this Act or the rules made there under, or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, and for which no penalty or punishment is provided elsewhere in this Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to ten thousand rupees, and where the contravention is continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues”.* This section again fixes a greater amount of liability in relation with compliance and corporate disclosures to various authorities under various corporate and Securities laws. SEBI under SEBI Act, 1992 also has enormous powers to prevent such people who are indulged in fraudulent activities to have access to the capital market as issuer, investor or intermediary.

Liabilities Related With Prospectus

Section 26 of the Companies Act, 2013 and ICDR Regulations 2009 provides for contents and matters to be provided in the offer document i.e. prospectus. Prospectus is a document which presents the general information, financial information and issue information before prospective investors so as to help them to make a decision regarding share subscription of the particular company.

In case if the prospectus includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead then promoters of the company owe civil and criminal liability under section 34 and 35 of the Act and accordingly they shall be liable for punishment under section 447 with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Apart from this the prospective investors can file a civil suit or any other action for rescission, suit for contractual breach and damages in section 37 of the Act for misleading information in prospectus.

William Derry v. Henry Peek is a case upon which the whole provisions of section 34 and 35 are based. In this case a company applied to the British Board of Trade for a license for running tramways by steam power and in apprehension that they will get the license issued a prospectus to raise capital stating that the company has been licensed to run tramways by steam-power but actually they did not get. The directors of the company were not held guilty of fraud. Lord Herschell held that, *“I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of the opinion that the charge of fraud made against them has not been established.”*

But under section 35 general and special defenses are available to such people who are sued under section 35 for criminal

liability. If they are rendering professional services or they withdrew their consent for authorizing the issue or they are ignorant about misstatement in prospectus; they shall not be liable.

Remedies to Subscribers against Promoters

Subscribers can repudiate the contract and require the money passed under it. In case of an untrue statement in prospectus an action may be taken against directors and promoters of co. If there is failure or omission in the prospectus he may make directors as well as promoters liable. In addition to promoters and directors all officers of co. who authorize the prospectus with an untrue statement may be made liable.

Pre incorporation Agreements

Incorporation of a company includes a variety of activities which are done by agreements for example buying land for manufacturing and registered office, technology transfer, loan agreement, agreement with stock exchange, agreement with intermediaries, agreement with third parties for procurement of raw materials and mobilization of stock in trade. Before incorporation, a company has no contractual capacity so on behalf of a prospective company all such agreements are signed by promoters and these contracts are known as pre-incorporation agreements. No contract can bind the co. before it becomes capable of contracting by incorporation.

A very apt question in this regard is what will be the liability of promoter or company or third party in pre-incorporation agreement. Whether companies and promoters may misuse their position in these agreements or not? In *Kelner v. Baxter*²¹ plaintiff and defendant both were promoters of Gravesend Royal Alexandra Hotel Company in which the plaintiff was to be Manager. Plaintiff offered to sell a stock of wine for 900 pounds which was accepted by defendants on Jan 27 1866. Directors of co. ratified the agreement on February 1st 1866. They received a certificate of incorporation on 20th February. On 11 April the directors again ratified it. But both ratifications were held invalid. As two consenting parties are necessary for ratification whereas the company before incorporation is non-entity. The court held that, "Until the company has been incorporated it cannot contract or enter into any other act in the law. Nor once, incorporated, can it become liable on or entitled under contracts purporting to be made on its behalf prior to incorporation, for ratification is not possible when the ostensible principal did not exist at the time when the contract was originally entered in to."

The problem in pre-incorporation agreements is twofold. On the first hand the promoters are at risk as the company may avoid such agreements holding that these were beyond the scope of incorporation and it can make the promoters personally liable and on the second hand the third parties may be at risk as the contract may be avoided by company after incorporation saying so that it was not authorized by it. In 1962 on the recommendations of Jenkins Committee this problem was removed in England under English Companies Act, 1985 under section 36 and in Indian under Specific Relief Act, 1963 provisions were incorporated regarding pre-incorporation agreements.

Position before Specific Relief Act, 1963

Before Specific Relief Act, 1963, the effect of pre-incorporation agreement is as follows: (a) It does not bind the co. Reason promoters are proverbially profuse in their promises and if the corporation were to be bound by them it would be subject to many unknown, unjust & heavy obligations.

(b) Ratification was not possible.

(c) The company is also not entitled to sue on pre-incorporation agreement to third parties.

After Specific Relief Act, 1963

Sec. 15(h) provides that, "Where the promoters of a company have made a contract for the company before its incorporation and if the contract is warranted by the terms of incorporation the company may enforce it." 'Warranted by terms of incorporation' means within the scope of a company's objects as stated in Memorandum of Association. Likewise sec. 19(e) allows the other party to enforce the pre-incorporation contracts against the company. If company, had adopted the same and contract is warranted by terms of incorporation. If no ratification is done the position remains same as under common law which means the promoter shall be personally liable. If no ratification or warranty by terms of incorporation the contract takes effect as a personal contract. In India and England both the statutory safeguards do not recognise rights of promoters under the statute to enforce pre incorporation agreements. Gower and Davies say, "*Many common law countries have recognized, either by judge made laws or by statute that a company when formed can effectively elect to adopt pre-incorporation transactions purporting to be made on its behalf without the need for a formal novation and that the liability of promoter ceases when the company adopts it.*" So they have recommended that if parties are willing to perform their obligation there is no problem in pre-incorporation agreements but in calamitous circumstances it makes the liability of promoters personal as there is a legal technicality that even after adoption of pre-incorporation agreements by the company after incorporation the promoter are not exonerated from their liabilities as the ratification dates back. So this feature of ratification should not apply in relation with promoters. However one may be mindful that these

apprehensions, that pre-incorporation agreements may not be ratified after incorporation by the company, shall keep the promoters to be honest and unscrupulous in incorporation of companies.

Remuneration of Promoter

Promoter is not an employee of the company, nor is he an agent of the company so no issue of remuneration arises generally. Robert Pennington says that, “*The inability of a company to enter into contracts before its incorporation makes it impossible for its promoters to obtain contractual rights against a company to claim remuneration for their services rendered before its incorporation and to recover an indemnity for their expenses incurred before that time.*” The Chancery Court in *Re English & colonial Produce Co* held that, “*No legal right to claim promotional expenses unless authorized by valid contract.*” However he is entitled for reasonable remuneration which may be provided by Articles of Association. The need for remuneration was highlighted by Lord Hatherly in these words, “*The services of a promoter are very peculiar, great skill, energy and ingenuity may be employed in constructing a plan and bringing it out to the best advantages.*” Therefore he must be given remuneration.

In practice a Promoter is remunerated in following way:

1. If disclosed for sold property he may get cash or fully paid up shares of Company.
2. An option to buy further shares in co.
3. Commission on shares sold.
4. A lump-sum amount.
5. Articles may provide a fixed sum to be paid to the promoter in the form of his remuneration. But the promoters cannot enforce such clauses in Articles in their favour. The best provision which promoters may have is to include a power in the Articles for the directors to pay them the value of their promotional services.
6. The company after incorporation may by a contract written, signed and sealed with promoters for payment for their promotional services, pay to the promoters. However such remuneration must be disclosed in prospectus and accounted for in the first Annual General Meeting of the Company. Normally in India the promoter keeps ‘controlling shares’ with him, due to Equity with differential voting rights or with other persons acting in concert with the promoters so he is not worried about his remuneration.

Summary

Promotion is related to incorporation of a company. It may be of several types. Occasional promotion, institutional promotion, professional promotion etc. In promotion promoters do all those compliance which a legal system requires to establish a corporation. The term promoter was defined as people who do all technical and non-technical activities which are necessary to establish a corporation. Companies Act, 2013 defines promoters as the persons whose name appears on the face of prospectus, who controls the affairs of the company or according to whose directions the members of board of directors are accustomed to work. But the promoter does not include those people who are rendering professional services in professional capacities.

The promoter performs a range of activities including drafting of prospectus, signing technology transfer agreement, agreement related with procurement of raw materials and stock in trade, listing, corporate financing, corporate governance, disclosures and winding up of the affairs of the company. The legal position of promoters is that he is neither agent nor employee of the company but he stands in fiduciary capacity. Fiduciary capacity brings two duties of promoters i.e. duty not to make secret profit and duty to disclose to company. Such disclosures may be made in Articles, board of directors or in AGM. If he makes secret profit he may be made accountable or the company may sue him for difference of price and damages.

The liabilities of promoters in the Companies Act, 2013, Securities Laws and ICDR Regulations, 2009 are various. But he owes a great amount of duty in relation to drafting the prospectus and he owes a civil and criminal liability for misstatement and untrue statements in the prospectus. Investors also have power to rescind such share agreements where the prospectus contains misleading and untrue contents.

Pre-incorporation agreements are all those agreements which are entered into by the promoters on account of the company to be promoted. In these agreements the question of enforcement is a real question as ratification is not possible as company before incorporation in a non-entity so company may avoid all such agreements and make promoters directly and personally liable for all such agreements but Specific Relief Act, 1963 provides that if subjects dealt in pre-incorporation agreements are warranted by terms and conditions of incorporation then third party and company may enforce such agreements.

Generally being in fiduciary capacity the work of promotion is not paid work. But promoters may ask for promotion by articles or separate agreement after incorporation or in the form of share subscription in lieu of their services.