

The (un)ease of doing business in India – Is the World Bank Group’s ranking determinative of ground realities?

One of the greatest weaknesses of the Indian economy (or really of India’s businesses) is the failure to change mindsets, the failure to take a long term view and the persistent practice of taking a narrow, short term view – hence the many financial scams that the country routinely faces. In the eighties, a defense procurement scam was the one most talked about; more recently, we have had absconding businessmen, be it a Lalit Modi, or a Vijay Mallya or a Nirav Mody, who managed to spike the system because of some rotten apples. In fairness to them, our political, judicial and law enforcement processes do not engender any confidence in the system – people are routinely convicted by the media as soon as there is any hint of suspicion (some years ago Shashi Tharoor had written an excellent article on this subject), and now-a-days the anonymous reach of social media and the psychological power of “fake news” effectively destroys the sound judicial principle that “one is presumed innocent, until proven guilty.” Law enforcement follows suit by putting one behind bars first and investigating later. By the time judicial process follows and exonerates a person, it is too little too late. India’s administrators, love to bolt the stable doors after the horses have bolted.

In 2017 India was ranked 100th in the ease of doing business rankings published by the World Bank. Much was made of this rank by the political class, particularly because India had jumped 100 ranks in one year. Such rankings are considered good for attracting foreign investment. Next year, is election year in India and already the first signs of the government’s eagerness to showcase statistics and numbers is visible. Yet, the ground reality is vastly different. Of course, India is nowhere near the seventies and eighties, when bureaucratic red tape mired every minor and major investment. Starting 1991, when India began to untangle the red tape, regulatory and licensing hurdles have certainly reduced considerably. For legal practitioners, like this author, who have seen the pre-1991 scenario, it is remarkable how much India has changed – most of it for the good, but some of it also not so good.

Recently, it was reported that the Maharashtra Government was upset that its internal ranking had fallen behind a few other States. But, what the Maharashtra Government and many others in India, including the Government of India, do not realise is that, simply digitizing the bureaucratic red tape and converting multiple manual applications to online filings do not make for ease of doing business. The ground reality is that digitization has in fact made the process even more cumbersome than ever before.

Here are three recent examples –

(1) With effect from July 10, 2018, new rules require an annual revalidation of every director’s identity and address by electronic submission of ID and address documents and by receiving and confirming a system generated two-factor password on their personal mobile number and personal e-mail ID. The initial revalidation has to be completed by August 31, 2018 and thereafter by April 30 of each year. Directors who do not complete their revalidation will have their registration suspended and will therefore not be able to either act as directors or sign documents for the company. Late revalidation will lead to a high monetary penalty or fine.

The email and mobile number based authentication is an unnecessary hardship for a director based outside India who may be several time zones away. Government of India, or its bureaucrats who

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must have formulated this policy have forgotten that it's not daylight all over the world at the same time, and some people are sleeping when India is awake.

Besides, what about the right to privacy !! Should a person's mobile number be given to a government source? Experience with the government's Ministry of Company Affairs database shows that once information is entered into a government database, it often becomes public, and the person is flooded with spam email and mailers, by all and sundry.

(2) Earlier this year, Section 139A(1) of the Income Tax Act, 1961, was amended to henceforth require that every managing director, director, partner, trustee, author, founder, karta, chief executive officer, principal officer or office bearer of the person being a resident, other than an individual, which has a financial transaction of Two Lakh Fifty Thousand Rupees or more in a financial year, is required to obtain an Indian tax registration (PAN) number. There appears to be no exclusion for foreign directors, and like with any tax authority, foreign directors are concerned why they should register with the Indian tax authorities simply because they are or in many cases have been nominated by their foreign employer as directors of an Indian company.

(3) With effect from June 13, 2018, new beneficial ownership disclosure rules require every beneficial owner to disclose to the company by September 12, 2018 (and subsequent beneficial owners must disclose within 30 days of acquiring beneficial ownership) details of their beneficial ownership in a prescribed form. In turn, the company must file with the Ministry of Corporate Affairs, the disclosures received in another prescribed form within 30 days of receipt, along with prescribed fees; and the company must maintain a register of beneficial ownership in yet another prescribed format. The company is also obligated to give notice to all beneficial owners to comply with these rules, but even absent such a notice, the obligation is on the beneficial owners to comply with the disclosure rules. Noncompliance will attract a very high monetary penalty or fine.

“Beneficial owner” is defined as the ultimate individual or natural person who directly or indirectly ultimately holds or controls 10% or more shares in a company. The definition is worded to cover almost everyone and only excludes certain kinds of pooled investors/investment funds like mutual funds, alternate investment funds, REITS and infrastructure investment trusts regulated by the Securities Board of India.

These are three recent examples. However, the filing and reporting landscape is awash with many such examples of bureaucrat-ease, which is far from the “ease” of doing business and creates a lot of un-ease among the international investor community. Is India using a sledge hammer to kill a fly?

And my favourite rant – Why can't the Government of India not standardize the operating software and apps it uses across all its web platforms – every ministry and every department uses (and forces users to use) a different version of adobe reader or java or flash. Therefore, we are constantly upgrading or downgrading our software and apps based on which government website we need to access.

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