
EASE OF DOING BUSINESS: LEGAL DEVELOPMENTS AND ITS IMPLICATIONS

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ABSTRACT

The current research paper seeks to analyse the recent legal developments in Ease of Doing Business and the practical implication of the same. The Ease of Doing Business is defined as per the parameters set in the Ease of Doing Business Report of World Bank which analyses the procedure involved and time taken as well as cost involved for any process within business to be fulfilled or followed. It takes into consideration various factors like starting of business in an economy, arranging and bringing credits, dealing with construction permits, trading across borders, protection of minority investors, contract enforcement regime, tax structure of an economy etc. to present any findings for the report. It basically analyses the investor's confidence for doing any kind of business in an economy. The given Research paper describes it from the perspective of India, by looking at the existing legal-business environment in India, by highlighting it through the above factors which has been laid down in the World Bank report. The impact of financial crimes on the investor's confidence and conduct for doing business in the economy has also been highlighted. The given research also analyses the recent changes and amendment introduced in company law and how the Insolvency and Bankruptcy code is a stepping stone towards Ease of Doing Business. This paper basically highlights the above statues from the lawmaker's perspective, by analysing its benefits and drawbacks and by giving appropriate recommendations for suggesting improvements in the law. This paper also highlights on the challenges faced on implementation of Ease of Doing Business regime. In the end, what can be understood is that even though the government has a positive intent about Ease of Doing Business, yet it is the implementation, procedural lacuna and bureaucracy which hinders in between the main objective of the government.

Keywords: Investor Confidence, Business Environment, Ease of Doing Business, insolvency, mechanism.

INTRODUCTION TO EASE OF DOING BUSINESS IN INDIA

Two decades back from the day, it was difficult to even imagine India as a top destination for conducting a business. The reason for the same being the complicated process involved in the setting up of the business. This was evident by the poor number of FDI (Foreign Direct Investment) in India. This made India a poor destination of investing and conduction of business.

From the point of view of an investor, it was an arduous task for him to run from pillar to post for taking approval and licences from various agencies, just for getting clearances from various agencies and bodies involved in regulating the business. If the business gets involved in a legal proceeding in the court of law, it would be very difficult for him to get out of it since it involves long waiting periods. Thus, such an environment hampers investor's confidence and all these factors make India a hub of red-tapism, and therefore unsafe for normal conduction of business in the eyes of the world community.

All the above outcomes of the business environment in India were realized after the World Bank had first published the rankings of Ease of Doing Business in the year 2006. The rank for India was 116th out of 155 countries surveyed that year. This was probably the first universal index on this subject matter which compared the countries for conduction of ease of doing business by taking into consideration several economic and social factors for the purpose of comparison between the economies and investor-friendly environment of the countries surveyed or listed.¹ It was Simeon Djankov, a Bulgarian economist in the World Bank group who had created the index. This index basically contains an aggregate figure which defines ease of doing business, a sum of different figures compiled. The rankings are basically calculated by sorting the aggregate distance to frontier scores on 10 topics, each comprising various indicators, allotting equal weight to each topic. Overall, this ranking indicates that the legal environment and compliance requirements and procedure are more conducive for starting a business in a country.² Currently, the no. of countries ranked has increased to 190.

Things have changed in recent times by introducing certain amendments in *Companies Act*, where the procedure was made easier to incorporate companies, through online process as well

¹ Ease of Doing Business : Changes in Law <https://www.deccanherald.com/opinion/ease-of-doing-business-need-for-changes-in-law-935999.html> (Last Accessed on 14th December 2023)

² Anjali Singh and K.K. Jaiswal, *Ease of Doing Business: A Vision in India*, New Delhi Publishers (Economic affairs, Volume 63, March 2018) <http://ndpublisher.in/admin/issues/EAv63n1q.pdf> (Last Accessed on 14th December 2023)

as certain compliances in the companies act as well as in the labour laws have been tweaked. Certain offences in the *Company Act, 2013* have been decriminalized. All this has been introduced and incorporated by re-engineering government processes, and by aiming to bring various government department and ministries together to coordinate to make India a preferred business destination. The task was given to the Department of Promotion of Industry and Internal Trade (DPIIT) for being the institutional anchor to the Ease of Doing Business programme.

These changes have really helped in boring fruits for the Indian economy as the rank of our country has reached 63rd out of 190 in 2020 than the position of 142rd in the year 2014. This is because more than 39,000 compliances have been reduced and more than 3,400 offences have been decriminalized. But more needs to be done to make a more conducive business environment in India which this research article seeks to analyse from various indicators used by the World Bank and to analyse the effect of it considering recent amendments which have been introduced by the Government of India in further sections.

DESCRIPTION OF INDICATORS

The World Bank while preparing the Ease of Doing Business uses certain indicators to prepare and publish the rankings. These indicators are basically different areas of business regulation. An aggregate figure is arrived at by taking into consideration a sum of all these indicators.³

The first indicator is **starting of business**. This indicator measures and takes into consideration minimum paid up capital requirements, steps of procedure involved and cost incurred for small and medium-sized firms to start up a business and formally operate in the country's largest business city. Like, in case of India, it can be Mumbai, Delhi or Bengaluru.

The second indicator is concerned with **arranging and bringing credits** or loans or borrowings for a small business. It involves measurement of legal rights of borrowers and lenders concerned by taking into consideration the standards of collecting credit information as well as determining a rate of interest which is favourable, reasonable, and affordable to both borrower and lender.

The third indicator is **dealing with construction permits**. This factor deals with the compliances and procedures required for a business in the construction industry and ideal time

³ CS Bhavesh Chheda, *Ease of Doing Business- A Case Study*, Law Street India <https://www.lawstreetindia.com/experts/column?sid=671> (Last Accessed on 14th December 2023)

and cost to build a particular warehouse or a business unit, from where regular operations will be conducted. This helps in studying and knowing the quality control indices, evaluating quality building evaluation, insurance regime, and safety mechanisms.

The fourth indicator is **trading across borders**. This factor determines the ease with which the goods can be imported and exported in a country. It evaluates the formality required and time taken for custom clearance of the goods and the extent to which the economy has opened up for trading freely with other countries in the face of globalization.

The fifth indicator is **protecting minority investors**. This indicator helps in measuring protection of minority interest from conflict of interest and shareholders rights in respect of corporate governance.

The sixth indicator is **getting electricity benefits**. This indicator helps in determining the procedure and requirements for setting up a basic facility like electricity for a particular business. It not only procedural and regulatory requirements for setting up a basic electricity connection, but also involves the cost and time taken for setting it up, for smooth functioning of the core activities of the business.

The seventh indicator is **enforcing contracts**. This indicator in the economy indicates the strength of the legal relationship between the parties and the way it is governed, regulated, and adjudicated in case of any dispute between the parties. Making contracts and entering a contractual relationship with various stakeholders is the key of any business. Therefore, one also needs to take into consideration the time taken and cost involved for resolving a commercial dispute through a first-instance court, as well as to evaluate whether each economy has adopted practices that promote good quality and efficiency in the court system.

The eighth indicator is **paying taxes**. Tax is considered as a legal burden by many businesses' enterprises, which they must pay to the government from their hard-earned money. It is a mandatory contribution which a business cannot avoid at any cost, otherwise it would involve serious legal violations. So, this factor evaluates the percentage of tax they must pay from the revenue or profits earned by the business and the strictness with which it is collected in a particular economy. It also takes into consideration exemptions and special tax benefits which are offered by the tax laws of the countries and how it is applicable and favourable to the business concerned.

The ninth indicator is **resolving insolvency**. The time, cost and recovery rate under the bankruptcy code is taken into consideration in this factor. This factor is more concerned with the outcome of the insolvency proceedings and how the company or business unit will be restructured after going through the proceedings. It also takes into consideration the rate of revival of the business in the economy and strength of the legal framework which is applicable to re-organization proceedings.

The tenth indicator is **registering property**. This indicator measures the procedures, time and cost which is needed to register the commercial real estate.

ANALYSIS OF LEGAL - BUSINESS ENVIRONMENT IN INDIA

Starting with the basic legal environment in India, the fundamental problem with our system is not the enactment of law, but actual enforcement of law is the area where we lack. This lack of enforcement has led to a huge backlog of cases in India. Even though the government has eased out and tried to expedite commercial transactions, by setting up commercial courts, it has resulted in lack of effective results. This environment is not business friendly, since one may have an apprehension before being involved in a judicial process, considering the number of years they may take to dispose of the case. This is a negative factor for any business which heavily invests in planning, which needs to be efficient and effective in all circumstances.⁴

Mentioning about the pendency of cases, the maximum number of pending cases in India is because of government litigation, i.e., where the government departments are themselves the initiator of litigation. As per a report, total 46% cases pending before court of law are of government litigation. The 126th Law Commission of India report has mentioned that the over-enthusiastic nature of most government departments and their choosing to litigate at the drop of hat is the primary reason behind the government's litigious nature. It further notes about the mindless attitude of the government officials to pursue litigation till the Hon'ble Supreme Court of India. If this is the condition of the government department, then it is obvious to think about the situation of a businessman. He has no option but to comply with all the procedures and requirements mentioned in the statute or rules provided, otherwise the government may itself litigate against him. It is the duty of the government to create a stable economy, in the interest of economic welfare of the people, and to ease out all the hurdles for them for smooth start of

⁴ Pramod Rao and Vishank Memon, *IMPORTANCE OF LEGAL ENVIRONMENT TO INDIA'S DEVELOPMENT, An Idea of a Law School Ideas from the Law School: A Collection of Essays Importance of Legal Environment to India's Development (Assessed from SCC Online)*

the business, to save costs. But, if the government itself pursues litigation and threatens the other party to follow this mechanism, they themselves are violating their primary duty and thus, making it difficult for a suitable business environment in India.

Secondly, taking about the sovereign credit rating of the country, which is defined as a tool for evaluation for the fiscal and regulatory environment of a company, prepared by Standard & Poor (S&P) LLP Global, it gave India's rating as BBB-, which is the lowest investment grade with stable outlook. The important determinants of sovereign credit rating are economic and financial indicators, whereas it is a lesser-known fact that unbiased enforcement of contract and respect for rule of law are used as a factor to determine sovereign credit rating. As per a study conducted, it laid down and found that a country that has better legal environment gets significantly higher credit rating than those that have a poorer legal environment. The sovereign credit rating has a direct impact on the borrowing costs for a country, higher the sovereign rating, lower the borrowing cost.

Talking about the Indian position with reference to credit rating, India has a higher rate of interest, since it has a lower sovereign rating. The prevailing rate of interest in India is much higher for the purpose of securing loans from banks and financial institutions, i.e., a negative factor for ease of doing business in India. Since a newly set up business requires credit financing for the purpose of starting the operations of a company, it may have to think twice before taking loan considering the higher rate of interest. Consider a country which has a higher sovereign credit rating, it will have an interest rate of around 0.5 to 2 percent per annum whereas a country like India will have a rate of interest of around 7 to 8 percent per annum. This will impact the investor's confidence in any business set up in India in comparison to any country having an A+ sovereign credit rating. The higher rate of interest implies higher cost for the setting up any new business, thus higher burden on pockets of any individual. Imagine the spur to the Indian economy of lower interest, whether in terms of government spending or corporate projects or the sheer benefit to an individual's pocket in having more to save and less to pay as interest outgo. It can and it will be transformational. This will be transformational by increasing efficiency and effectiveness in enforcing contracts and access to justice.

Mentioning about the tax structure in India, the government has introduced the historic *GST (Goods and Service Tax)* in the year 2016 as a unified structure for payment of indirect taxes, subsuming multiple central and state government law. However, the pain felt in the pre-GST area cannot be easily erased from the minds of the business-people, considering the

compliances one must follow to undertake periodic GST payments which includes logging the invoices generated for e-invoicing, generate an e-way bill, filing a cumulative invoice statement, the need for reconciliation of the invoices with the one reported by the supplier etc. In this process, the taxpayers are required to re-submit all the details already submitted, by which all the datasets can be reconciled. Mentioning the import duty structure, it has multiple components like basic customs duty, countervailing duty, anti-dumping duty, safeguard duty and social welfare surcharge, etc., that too, computed on different base values. There is no uniformity in rates. Therefore, even after the introduction of the GST regime, though it has simplified the process, the compliances yet remain cumbersome, which is yet again a negative factor of the business environment in India.⁵

Thus, even though there are some attractive factors within the population for conducting the business, one cannot think of having a friendly environment in terms of legal compliances, procedure and system existing in India for which one needs serious reform.

ANALYSIS OF LEGAL-BUSINESS ENVIRONMENT IN INDIA VIS-À-VIS INDICATORS OF EODB REPORT

In the Ease of Doing Business Report, India has made substantial gains by introduction of GST and formulation of *IBC (Insolvency and Bankruptcy code)*, which has been analysed in further sections. India continues to trail in several parameters within the EODB report like Ease of starting Business, Registering Property, Pay Taxes, Enforcing Contracts etc.⁶

Mentioning about the number of days required for registering a business in India, it roughly takes around 18 days, down from 30 days in 2009. India has significantly reduced the cost incurred and time required for the start of business by introducing online forms like Spice +, but much needs to be done for reducing the cumbersome procedure required for registering the business. If I compare with a High-Performing nation like New Zealand, it takes just a half-a day to register a business through a single window. The main issue is number of approvals, licenses and permission required from various authorities. If we take an example of the services sector in the food and beverages sector, any restaurant to be opened in Delhi at least requires 26 licenses, in comparison with a restaurant in Singapore, where only 4-5 licenses are required.

⁵ Gunjan Prabhakaran and Swati Agarwal, Ease of Doing Business in India – Procedural Aspects to be Revisited <https://www.taxsutra.com/gst/experts-corner/ease-doing-business-india-procedural-aspects-be-revisited> (Last Assessed on 14th December 2023)

⁶ Targeting the Ease of Doing Business, https://www.indiabudget.gov.in/budget2020-21/economicsurvey/doc/vol1chapter/echap06_vol1.pdf (Last Assessed on 14th December 2023)

The most shocking part of it is in Delhi, the no. of documents to obtain a license from Delhi Police to operate a restaurant is 45, which is more than the documents required for taking up Arms License! This proves the hostile regulatory environment for starting a business in India.

Next comes the time required for construction permits. Any business or corporate company needs to have an office for the purpose of planning and running its operations, where they take a particular decision. If the company is manufacturing products, it needs a factory for the purpose of production of goods. In India it takes an average of 118.5 days to do so, whereas in Hong Kong, which is the highest performing nation in construction permits, it takes mere 60 days to obtain construction permits. The other aspect of the EODB report is scale of business which is of very small capacity in India, and because of that low manufacturing efficiencies in comparison to countries like China and Vietnam where they are trying to increase value chain by increasing competitiveness by improving delivery time and domestic production capacity.

When it comes to trading across borders, it takes 60-68 and 88-82 hours in border and documentary compliance for exports and imports respectively. It has been observed that the majority of the delays occur on account of port or border handling process which essentially consists of documentation involved from various agencies for approval and clearance. This time delay, eventually adds to the cost of trade of goods. Comparing it with Italy, the cost of compliance is zero, since in Italy it takes only 1 hour each for border and documentary compliance. Therefore, more the delay is caused, the more the cost of goods increases.

When it comes to enforcement of contracts, it has been mentioned in the Economic Survey of 2018-19 that the single largest constraint to ease of doing business in India is enforcement of contract and to resolve disputes based on it. India has all the potential economic and social multipliers of a well-functioning legal system, where the government can easily invest by setting up Alternate Dispute Resolution Mechanism like mediation and arbitration. Sadly, India has lagged far behind in contract enforcement ranking and has been a parameter where India has been performing poorly over the last many years.

IMPACT OF FINANCIAL CRIMES ON EASE OF DOING BUSINESS

The Ease of Doing Business ranking is based on several criteria which are affected by white collar crime a state is subjected to. People have become more cautious to venture or invest into business, with an increase in white collar crimes, and thus affecting the smooth functioning of the corporate business sector. It then affects the market performance, thus affecting the whole

economy. The financial crimes in India are not a new phenomenon. It has been plaguing the society since the years of post-independence era. Starting from the ‘Mundhra Scam,’ where LIC was defrauded into investing the shares of six troubled companies to the ‘Saradha’ scam in 2009 which exposed the loopholes in the SEBI regulations, it has been affecting the economy from its roots. Apart from the scams, the crime which has been affecting the economy is bribery. The crime of bribery is common for those sectors which require a high amount of investment. These are usually for those sectors where it is difficult to start a business. Bribery has a negative impact on ease of doing business, since it increases transaction cost, increases uncertainty in the economy, and inhibits the development of a healthy marketplace. It has been observed that such scams impact the overall inflow of FDI in the economy. Bribery is the reason for which investors have to go through a more austere bargaining process before entering into any transaction.⁷

Second impact of financial crimes in society is by fraud. Take for instance, the fraudulent actions of Nirav Modi and Mehul Choksi, who had defrauded Punjab National Bank by giving fake MOU’s. for procuring funds. This had a huge impact on the jewellery sector. This scam caused hurt to the market sentiment on this sector, which not only hit the credit flow to it, but had various short-term impacts on the sector. Banks had become varied in the jewellery sector. The outcome of any such fraud in the market is that investors and lenders do not believe in small companies or players in the market and it becomes difficult for them to secure finance or get credit/loans for their business. Incidents like these bring about more regulations which are more stringent and a less flexible procedure, which makes it difficult to take loans or obtain credit from the banks. It will lead to unnecessary tightening of regulation from the banks. Frauds of such kind therefore, affect the economy as a whole. As per the World Bank data, India is ranked third among major economies for having bad loans. Such bad loans lead the bank to recover less money than projected from the borrower, and thus affects the ability to generate fresh loans to any new borrower, which leads to increase in interest for which loans are generated.

Third impact of financial crimes in society is corporate lobbying. Unfortunately, it is not yet defined in the laws of the country. The participation of the people in democracy is based on the

⁷ Shriya Mishra and Aishwarya Surana, *Financial Crimes: Disturbing the Ease of Doing Business in India*, Vol 5 Issue2, RFMLR(2018), Pg.285-312, https://www.rfmlr.com/_files/ugd/0fa0b3_797985d827ad4df6a028a3b5c82441e2.pdf (Last Accessed on 15th December 2023)

gravity of democracy. The people of the country can influence the decision of the government by having a say on it. This influence on the decision of the government is called lobbying. It is usually motivated by interests, and is notified to the government official, capable of influencing the decision of the government. It can be done without compensation. However, the reality is that lobbying is done with the help of money and lobbying of one pressure group becomes repugnant to the other. The corporations are one of the pressure groups in democracy. It is prominent in India, and has become one of the ways to conduct business in India. It seriously needs to be checked in the current political scenario. Government needs to be cautious when corporate lobbying becomes corporate bribery. It affects the healthy environment of business in India, which cautions the new entrants or the already existing business to enter or diversify the sector in which they want to enter. They are cautioned by those already existing corporations in the field sector, who have the capability and means to affect the decision of the government to their benefits and thus affecting healthy competition in the market. This results in dampening the ease of doing business in India.

INSOLVENCY AND BANKRUPTCY CODE- A STEPPING STONE FOR LEGISLATION ON EASE OF DOING BUSINESS?

The recent jump of India to 63rd Position in Ease of Doing Business ranking is mainly attributed to the enactment of *Insolvency and Bankruptcy Code, 2016*. (IBC) One of the key aims of the code was to “effective legal framework for timely resolution of insolvency and bankruptcy which would support development of credit markets and encourage entrepreneurship.” The law of IBC has been historic since it is the first time in the legislative history of India that a statute was passed to enhance effectiveness in curbing Non-Performing Asset crisis, by dictating a proper resolution process. Before IBC, there was no comprehensive legislation in such a field and because of the multiplicity of laws, the judicial process took a lot of time, which the newly enacted IBC seeks to regulate. This was also the first code and full-fledged statute, in India with the aim of promoting the ease of doing business in India, by encouraging more investments in the market, through timely resolution of the disputes.⁸

As per the data in 2019, around 21,000 cases have been referred to NCLT (*National Company Law Tribunal*) out of which 8,500 cases settled prior to admission and 1,500 companies were ordered to be liquidated. The recovery rate of debt was drastically improved by the IBC. The

⁸ Raghav Pandey and Advait Govind, *Indian Insolvency Regime: Impact on Ease of Doing Business and Investment*, 7.1 RFMLR (2020) 58 (Accessed from SCC Online)

amount of time and cost involved has been drastically reduced in the process enacted by IBC. The average recovery time through the CIRP process in the code has been increased from 4.3 years in 2018 to 1.6 years in 2019.

The newly enacted code had shifted the regime from existing Debtor-in Possession to Creditor-in Control regime. It had taken the model adopted by the *U.K. insolvency Law*, where Creditor-in Control regime is followed. Countries like Germany and Sweden also follow the Creditor-in -Control Regime, which grants higher pedestal to the rights of the creditors. Whereas countries like France and Italy have a Debtor-in- Possession regime, it grants a higher pedestal to debtors. This earlier regime where the debtors were in control, emphasis was laid on their interest. The debtors were the corporate companies who themselves formulated a reorganizational plan which detailed the payment to the creditors and their proper timeline and schedule to follow the same. The main drawbacks for this regime were to generate sufficient income as there was a dearth of adequate resources on the side of the debtor company itself and also the lack of supervision by bankruptcy court. The new regime of Creditor-in -control is such that, as soon as the insolvency begins, the power of the company will fall into the hands of the creditors.

One of the earlier Acts to address the issue was *Sick Industrial Companies (Special Provisions) Act, 1987 (SICA)*, which was enacted with a view for timely detection of sick and potentially sick companies. The *Board for Industrial and Financial Reconstruction (BIFR)* was enacted under the act to regulate the same. However, it was ineffective since the borrowers took advantage of the unlimited moratorium time granted to them under the act. Then came the *Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act)* which provided secured creditors with certain rights to take charge and enforce security interest of the debtors. The account of the debtor was to be treated as a Non-Performing Asset in case of default of loan and were to be sold to Asset Reconstruction Company, but even this step failed to control the mounting number of Non-Performing Asset. The increasing number of Non-performing Asset led to denial of proper legal status and jeopardized the future of many companies, does declining the scope of running the business smoothly. This failure led to enactment of the Insolvency and Bankruptcy code which expanded its ambit to include individuals, companies, LLPs, and partnership firms.

The IBC was enacted because India was in dire need for a law which gives protection and confidence to investors to invest in Indian companies. If there is a formal statute which lays

down a detailed procedure in case a company is not able to pay its debts back, at least investors will feel safe there are certain statutory compliances which the borrower will need to fulfil, after which a detailed plan can be drawn for taking the company to its earlier position, so there are much more chances of revival of business where they have invested their money. This statutory provision has been created in a comprehensive code i.e., IBC. All these developments are happening when the key priority for the Indian government to invest is in the infrastructure sector, which requires a lot of investor's confidence.

The newly enacted code was formulated along the lines of *UNCITRAL Legislative Guide and World Bank Principles on Insolvency Regime*. One of the primary objectives of the act is Maximisation of Assets. Therefore, it ensures higher distribution of assets to the stakeholders, which results in reducing the burden of insolvency. The code offers incentives to the parties involved to achieve maximisation of assets. This results in a balance of all risks and interest involved in the insolvency proceedings. One of the key aspects of IBC has been enacted in *Section 13⁹ and Section 14¹⁰ of the IBC*, i.e. to declare a moratorium prohibiting all other judicial proceedings against corporate debtors by NCLT. Through constructive means, the above provision ensures the availability of all assets for the CIRP. When the process becomes a long drawn one in a normal judicial proceeding, it affects the value of assets. The IBC also always ensures access to finance/credit, and this can only be possible if the act is transparent and predictable. It also lays down well-defined, reasoned, and structured procedures for the process of CIRP. It can only be initiated for a minimum threshold of Rs.1,00,000 as well as the maximum time to be completed for a resolution process is 330 days. The IBC also caters to fix the lacuna for the need of balancing liquidation and reorganization, which was not present in earlier laws. In case the restructuring falls futile, only in that scenario the code initiates the liquidation process. The code also allows restructuring of doubtful assets.

Stakeholders are equally placed under the IBC. It balances all the stakeholders which includes workmen, debts owed to secured creditors, unsecured creditors, preference shareholders, equity shareholders etc. However, payments due to the government are ranked below the payments to the secured and unsecured creditors under *Section 53¹¹ of IBC*. This shows that the newly enacted law has tried to ease the burden on creditors on their repayment, even if the firm goes for insolvency. Although there is a difference between the priority given to financial creditors

⁹ S.13, Insolvency and Bankruptcy Code, 2016

¹⁰ S.14, Insolvency and Bankruptcy Code, 2016

¹¹ S.53, Insolvency and Bankruptcy Code, 2016

over operational creditors, the Hon'ble Supreme Court in its landmark judgement of *Swiss Ribbons Pvt. Ltd. V Union of India*¹², has clearly mentioned that “financial creditors are in the business of moneylending; banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor.” Therefore, as per the court the difference is neither discriminatory nor arbitrary.

However, IBC has certain drawbacks. Firstly, till 2018, 80% cases resulted in liquidation and only 20% cases were resolved. Secondly, it does not provide for a pre-insolvency resolution process between the parties. If the act had provided for the same, the company need not even enter the stage of insolvency proceedings and there is always a ready plan or Plan B provided with the company, in case it is on verge of being insolvent. This helps in efficient planning of any business in India. Thirdly, under the new regime, the jurisprudential drawback is the power being wielded to the Committee of Creditors, in which genuinity of creditors is doubtful since their interest would always be recovery of their claims, rather than thinking and planning for debt repayment in interest for valuable future for the business. Fourthly, the firm needs to incorporate certain Additional Dispute Resolution Mechanism like mediation instead of a judicial proceeding since it will lead to faster resolution of disputes on par with the developed nations like USA, so that the business can be back on track as early as possible.

ANALYSIS OF RECENT COMPANY LAW AMENDMENTS IN LIGHT OF EASE OF DOING BUSINESS

The *Company Law, 2013* was enacted, which introduced many changes from the prior *Companies Act, 1956*. The Act had introduced many new concepts which included One Person Company, Corporate Social Responsibility etc. The act had brought the company law in consonance with the global standards. However, there were certain issues regarding the implementation in the act, because of the hurriedness observed in taking effect of the act. There were some lacunae identified, because of the interpretational issues, because of which there were certain hurdles in carrying on the business. Some of the key amendments have been listed in the following paragraph.¹³

¹² *Swiss Ribbons v Union of India*, 2019(4) SCC 17

¹³ Ishita Chaudhary and Vanshika Taneja, *Analysis of Company Law amendments: As a progressive steps towards better corporate governance*, Volume 5 Issue 2, RFMLR (2018), Pg. 241-265 https://www.rfmlr.com/_files/ugd/0fa0b3_635cb836f04244cb8e973513683ea2de.pdf (Last Accessed on 15th December 2023)

Firstly, in the *Company Law Amendment Act* introduced in 2015 brought about the provision of removal of compulsion of common seal, which was provided in various sections of Company Law. This removal of procedural requirements may go a long way for smooth running of the business. Secondly, the act has removed the formality of public inspection for certain matters listed in *Section 179(3)*¹⁴ of the Companies Act, 2013 which includes matters related to buying back, issuance of securities, borrowing or investing money, approving financial statements, granting loans, acquisition of controls etc. It has facilitated smooth run of business by not only providing them with liberty to keep the knowledge of business operations limited within the company but also reduction of formalities and saving of time which can be used in the core business activities. Thirdly, the enabling provision of *Section 143(12)*¹⁵ of the Companies Act, makes it a responsibility for the auditors of the company to report to the central government if any fraud has occurred or is likely to occur in the company or its name. The act has provided a certain threshold above which the fraud must be reported to the companies. This provision will help in easy adjudication of the issue and the quicker relief, since it is in the notice of the central government. It will help in early investigation of the frauds happening in the company, so that later it does not lead on to the verge of closing of the business. Thirdly, with the 2015 Amendment, the audit committee may, subject to prescribed conditions, give omnibus approvals for related party transactions as provided under *Section 177(4)*.¹⁶ Omnibus approvals mean approvals for transactions which are very repetitive. With this, the decisions taken and its implementation will be much faster, thus resolving a procedural gap. As per the 2015 amendment, the company exempted the loan from holding to subsidiary companies from *Section 185*¹⁷ of the Act, i.e. from loans to directors, if such loans are given to subsidiary company for the purpose of carrying on business. This step will ensure that there is ease in conducting business for both the companies by getting relief from this tedious process.

The 2015 amendment introduced two major changes in subject matter of *Related Party Transactions*. Firstly, the Board of Directors may pass a simple resolution instead of Special Resolution. Secondly, if the related parties are holding and subsidiary company, their accounts can be put up before the shareholders for approval in general meeting by a consolidated manner. It is well-known that a company is engaged with a related party on a regular basis. This

¹⁴ S. 179(3), Companies Act, 2013

¹⁵ S. 143(12), Companies Act, 2013

¹⁶ S. 177(4), Companies Act, 2013

¹⁷ S. 185, Companies Act, 2013

relaxation will help in conducting such kind of business with ease and thus easy for operations of the business.

Certain key steps taken in *Companies Amendment Act, 2017* for ease of business are mentioned in the following lines. First, the maximum threshold of definition of small companies under *Section 2(85)*¹⁸ of the Companies Act, 2013 was increased from Rs. 5 crores to Rs. 10 crores. This increase in threshold helped in availing of benefits for the business, especially for a startup and a newly- incorporated business. Secondly, it increased the time period for declaration of registered office from 15 days to 30 days from the date of incorporation or notice of change. Thus, this provision gave liberty to business to decide on what basis it must operate its operation from a particular location or if there is a change, to shift its operations from one place to other, for whatever reason they think to do so. Thirdly, *Section 21*¹⁹ of the Companies Act was amended to empower every employee of the company to sign the documents on behalf of the company, thus making it easy for business to carry on day to day operation, as now they do not have to wait for a Key Managerial Personnel to be personally be present for any authentication signature on behalf of the company and now, with this amendment even his junior staff/employee can be duly empowered to sign the documents on behalf of the company concerned.

Certain key steps in incorporated in more recent amendment of 2021 in Companies act are that it provided for decriminalization for certain offences which include elimination of imprisonment for contravention of provisions in relation to buyback of securities, disclosure of interest by directors, formation of companies with charitable objects, disqualification of director and constitution of audit. This provision gave free hand for operation of any corporate entity without any hesitation. But this does not mean they should voluntarily and intentionally violate the company law provisions, but it has been eased so that there is no hindrance in the operation of the business concerned, because of fear of imprisonment. The amendment also provided for separate provision for producer companies which are there in the business of production, marketing, selling, marketing, import/export etc. with respect to incorporation, registration, formation, merger, amalgamation etc. so that laws, policies, and compliances can be made and formulated for their ease in conducting the business.

¹⁸ S.2(85), Companies Act, 2013.

¹⁹ S.21, Companies Act, 2013

CHALLENGES IN IMPLEMENTING EASE OF DOING BUSINESS REGIME

Firstly, policy stability is the biggest challenge in ease of doing business. The ever-changing policy and executive policy regime are the one of the biggest factors affecting business confidence. This then affects the ease of doing business, in the form that it is very unpredictable on the state policy and its implementation. The government's approach needs to be proactive rather than reactive, in reaction to practical situations that arise.

Second, is the implementation of the policy enacted by the state. The intent of ease of doing business for the government needs to be supported by the bureaucracy in the country. Even though incorporation has been made online in the form of *Spice Plus* form, and obtaining of PAN's and TAN's, the practical story is very different, as many times it has been rejected by the authorities, without providing any substantive basis. This can be considered as a drawback for online portals, where you are not physically present to justify your application.

Third, is the enforcement. The courts are very overburdened to handle all the subject matters and hence better means of adjudication needs to be developed, which unfortunately has not been properly regulated in the country. The most disappointing fact is that the government itself is the main litigator for all the issues involved.

CONCLUSION

The key to entrepreneurship, innovation, or wealth creation of any developing or developed country lies in the ease of doing business of any country. In recent years, India has emerged as one of the attractive places or destinations to conduct business. This is very well indicative of the increase in rank from 142nd in 2015 to 63rd in 2020 in the *Ease of Doing Business report* by the World Bank.

Although certain laws have been a welcome step like *Insolvency and Bankruptcy Code*, *GST Act*, Company Law amendments of 2015, 2017 and 2021, yet there are certain lacuna and procedure gaps which need to be identified. Some of them include earlier resolution processes, limiting excess compliances, use of technology to save time and cost of the company, introduce more transparency to the creditors and investors etc.

In order to increase the ranking in the index, India needs to look upon the investor environment. As analysed above, steps have been taken to increase investor confidence in the business, but these are not enough, and the laws need to be amended and formulated as per the prevailing

economic conditions. The government needs to reduce compliance burden to a certain extent, further de-criminalize provisions by reducing the fine to be paid only in special circumstances, promote reduction of cost in business and timely resolution of any legal dispute arising, where the company is involved. There should be a greater emphasis on technology to be promoted to facilitate transparency, efficiency, and speed of conducting a procedural and approval process. One such welcome step is *Spice + form* introduced for incorporation of business, which can save a lot of time. Certain challenges lying in the starting, operating and existing of the business need to be addressed at the earliest. Certain indicators which require focus include easing the process of approvals and renewals, land acquisition and registering property, trading across borders, paying taxes, construction permits, inspections, enforcing contracts, resolving insolvency, regulatory compliance burden and cost of doing business. Apart from this, it is the duty of the government to monitor all the crimes which may occur as a consequence of relaxing ease of doing business like money laundering, and increased lobbying of the public officials, which can create negative result of the efforts taken by it.

Moving forward, it is the duty of the government to have primary focus on effective delivery of benefits to the industry. The improvement of ranking in the Ease of Doing Business report will help in a long way to improve global competitiveness and increases chances of Indian companies to attract foreign investments.

RECOMMENDATION

- Implementation of a common e-governance platform will help in filing all the procedures and compliances online, which means a reduction in visits to government officials, so there are less chances of bribery and corruption.
- Before introducing regulatory measure, it is the duty of the government to take a survey and collect feedback from various classes of companies about whether they are facing any difficulties in implementation and what further it can do, so that it can lessen the burden on them.
- The reduction of time taken for import and export of goods will help in increasing the rank in Ease of Doing Business Index by reducing the amount of paperwork involved and provision of better facilities at port for faster movement of goods.

- The government should introduce laws which can result in faster implementation and enforcement of contracts, especially regarding contracts entered between creditors and borrowers, to raise confidence for investments in the country.

- The government should introduce mechanisms for faster adjudication of issues like mediation and arbitration rather than judicial proceedings in the company laws and insolvency laws.