

Untying The Knots In The Automated Incorporation Process

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The Government of India has been undertaking numerous initiatives to boost Foreign Direct Investment (FDI) into India and generally making it easier to do business. These include re-engineering existing administrative processes with an attempt to reduce dependence on manual interference.

The Digital Way

One of the most important steps taken was to automate the process of incorporation of the companies in India. From an era where to incorporate companies, forms had to be filled in physically including signatures of applicants, we have come a long way where the process is automated and even digital signatures are possible. As part of this initiative, the Ministry of Corporate Affairs (MCA) in January 2016, established the Central Registration Center (CRC). The CRC was created with the primary objective of automating the incorporation process so as to facilitate faster disposal of the applications for incorporation and reservation of names, in line with global best practices. The CRC operates as a central registration platform, receiving online applications for incorporation and reservation of names from across the country and completely eliminates the need for any form of personal interaction between the stakeholder and officials dealing with the applications.

Incorporation of a company earlier involved a two-stage process where at the first stage, the name of the proposed company was approved and then using that name, the company could be set up. The new process now also provides the option of filing a composite application for incorporating a company in a single step. The same form can be used to get the name as well as the company approved. Not just that, on approval, the incorporated company gets its tax identification number otherwise known as the PAN (Permanent Account Number). This, of course, cuts a layer of scrutiny process and logically should reduce delay as well. Technically, the intention of the Government has been to incorporate a company and obtain its PAN in a matter of a day or two, without the need to interact with the officials dealing with the matter.

The 'Official' Way

The CRC comprises of various officials and the fact remains that eventually not all forms of discretion can be taken away. If a company is being incorporated, its name or particulars mentioned in the applications, etc. do get reviewed and go through a compliance test against the procedural rules. Thus, the process is bound to involve an exercise of discretion by the dealing CRC official. Consequently, although the automation of the incorporation process and the establishment of the CRC are undoubtedly effective and welcome measures which are contributing immensely in expediting the incorporation process, it would reap results only when it is accompanied by the judicious exercise of discretion by the CRC. In reality, the sudden automation of the process, that otherwise involved at least some form of personal interaction seems to have created difficulties that the MCA will need to address to ensure that the ease of doing business initiatives are not undone by its officials.

One issue that seems to be fast becoming a consistent roadblock is the name approval process by the CRC. The CRC officials, while dealing with name approvals of prospective companies, seem to raise issues with the names proposed for companies, on grounds outside what are considered in the underlying rules, i.e., the Companies Incorporation Rules, 2014 or the Companies Act, 2013. One such ground seems to be that the proposed name resembles that of existing companies. Section 4(2)(a) of the Companies Act, 2013 (**2013 Act**) prohibits the use of a name that is "*identical with or resembles too nearly*" with the name of an existing company. This does not necessarily mean that in a case where an applicant has tradename registered in its name internationally would be denied its rights to set up a company in India relying on such brand/name merely in circumstances where an existing company has a similar sounding name.

Right to IPR vs Right to a Name

Notably, the words used in Section 4(2)(a) of the 2013 Act are "identical with" or "resemble too nearly" with the name of an existing company. The construction of this restriction cannot be to go so far as to prohibit the use of any other name merely because it contains one or two common words, or otherwise deny assertion of a proprietary right for its proprietor. In fact, the High Court of Bombay in *MRC Logistics Private Limited V Regional Director Western Region, Ministry of Corporate Affairs ((2009) 4 Bom CR 600)*, while dealing with a case under Section 22 of the Companies Act, 1956 (Section 16 of the 2013 Act), which gives the Central Government the right to rectify the name of a company if it is identical with, or too nearly resembles, the name of a company in existence, categorically stated that "*The purpose obviously is to ensure that two companies of similar nature or identical names should not be registered*" which would not be the case if only one word in the name of companies that are otherwise completely different in nature was identical.

In an attempt to tackle this issue, the MCA has recently introduced a "name check feature" on its official website which allows a user to check if the name being applied for resembles that of an existing entity. However, there are still some concerns as at times, the results provided by the software are positive for a name but it still gets rejected by the CRC officials on the basis that the proposed name resembles too nearly the name of an existing company. For instance, while running a search for the name "ABC India Private Limited" shows that there are no existing companies by that name, the CRC may still object to the name because there are existing company's such as "ABC Life Sciences Private Limited" or "ABC Pharma Private Limited".

Some More Ease in Doing Business Needed

Noble as their objective may have been, the CRC officials do seem to be somewhat trigger happy when it comes to dealing with this issue. It, therefore, would be worth considering by MCA to set out some guiding principles to clarify as to what would constitute resembling too nearly for the purpose of Section 4(2)(a) of the 2013 Act. It would greatly help if the CRC officials take into consideration the rights in respect of trademarks with transborder reputation. The law on this issue is well settled by the Hon'ble Supreme Court in *N.R. Dongre and Ors. v. Whirlpool Corporation and Anr. (1995) 32 DRJ 318* and hopefully not difficult for the MCA to implement or for the CRC to follow.

Whilst the efforts of the Government to re-engineer the incorporation processes and implement reforms is laudable, a few more steps to achieve the global benchmark for incorporation of a company within 24 hours would go a long way in allowing investors to commence business in India. This would go hand in hand with the positivity created among foreign investors by the continuous efforts of the current government to relax and reform India's FDI policy.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.