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A dynamic company law

The new Companies Act is framed to negotiate emerging challenges in a rapidly-evolving business environment

Written by M S Sahoo

September 10, 2013 02:46 IST

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The new company law has come after the longest and the widest ever consultation in the legislative history of India. This is evident from the debate in Rajya Sabha on the subject where members across party lines welcomed and supported the Companies Bill. A concern that a few members expressed related to the use of the word 'prescribed' 416 times in the legislation with 470 clauses where 'prescribed' means prescribed by rules made by the central government under the Act. This means that the government would make rules over 400 matters which, the Bill claims, are of procedure and detail and it is not practicable to provide for them in the law.

Let us take an example. It defines 'key managerial personnel (KMP)' to mean chief executive officer, company secretary, whole-time director, chief financial officer and other such officers as may be prescribed. This would allow the authorities to deal also with the KMPs who are not listed in the Act, should the need arise in future and also the new KMPs that may emerge in future, without an amendment to the law. At the time of enactment, the legislature could not possibly visualise all KMPs who all would need to be regulated in future. The import of this provisions is that KMPs are important and the law needs to deal with them in a particular manner and an officer irrespective of designation can be a KMP depending on the environment and such designation or environment can't be specified today which would hold good for all times to come. The government needs to be empowered to deal with a KMP that emerges any time by resorting to 'prescribed' without legislative intervention, particularly when this particular legislation has taken almost a decade for enactment.

Of late, the business environment has become very dynamic. Change that used to take centuries earlier is coming about in months, or at the very slowest, in a few years. Former chairman of Sebi, C B Bhave reportedly likened governance challenges in this environment to a flight that has developed snag at 30,000 feet and it is too late to land and too dangerous to continue flying. The options are limited? Fly, we must. Repair, we must.? The governance

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response to this has been empowerment of the executive with the ?almost incomplete? regime of law. This regime believes that it is not possible to visualise all the possible circumstances and provide for the same in the legislation. Here, the legislations tend to be skeletal, but have the potential to deal with all the possible circumstances, including unforeseen emergencies. This enables the

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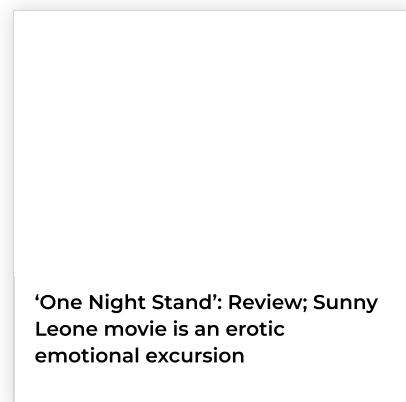


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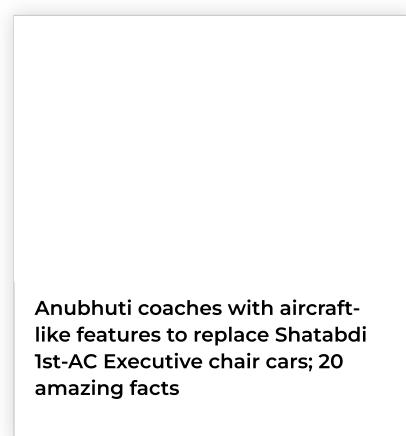
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Name	LTP	Chg
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Nifty Bank	51,400.25 AD Ratio: 0.22	-288.85 -0.56%
Nifty Next 50	75,450.55 AD Ratio: 1.20	36.90 0.05%
Nifty 100	26,275.75 AD Ratio: 0.89	-65.95 -0.25%
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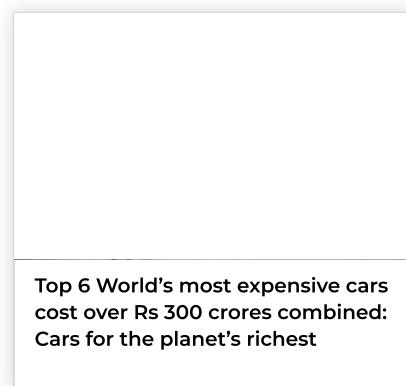
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authorities to strike moving targets at the right time, and at the same time, keep the laws relevant. This form of law is eminently suitable for business environment and financial markets which evolve very fast and the authorities need to respond proactively.

The ?prescribed? is an absolute necessity in legislations dealing with dynamic business environment and dependence on this has been increasing, particularly since liberalisation, for various reasons. The issue is whether the essential legislative functions have been delegated. *Prima facie* the number 416 catches the attention giving an impression that most of the legislative functions have been delegated. One needs to see the nature/depth of delegation rather than the number/width of delegations. A perusal of various delegations indicates the government would determine the manner of doing something, the details of disclosures to be made or the companies to which a particular provision would be applicable. For example, the law provides that a listed company shall have one director elected by such small shareholders in such manner with such terms and conditions as may be prescribed. Here the legislative intent is representation of small shareholders in governance. However, the mode of implementation is left to the rules. Similarly, the law lists out various activities under corporate social responsibility (CSR) and empowers the government to add to list such other activities. Here the legislation specifies that a profit making company should undertake CSR and what activities constitute CSR. It, however, empowers the government to add to the list other activities depending on the social environment. Thus, there is no delegation of substantive

legislative function.

Another issue is whether there are adequate safeguards to prevent possible misuse of delegated legislation. There is a misgiving that bureaucrats make the rules. In fact, the power is given to central government and it can be exercised only by the minister concerned, who is accountable to legislature. Most often, the powers are limited to ?such other?. The government cannot prescribe, for example, any activity under CSR; it has to be ?such other? to the activities already listed in the Act. Further, the rules need to be laid before

legislature for a period of thirty days and the legislature can modify or annul the said rules. Besides, a legislative committee on subordinate legislation scrutinises the rules to ensure that these have been made as per delegation. The rules are also subject to judicial scrutiny and are struck down if these are ultra vires the parent Act or the Constitution.

Though not required under the law, the authorities nowadays follow a consultative process for making rules. This generally involves development of the rules in consultation with experts and stakeholders, and consultation with the public before the rules are notified. However, the rigour of the consultation determines the quality and acceptability of the rules. It is understood that the government is following this approach for the rules under the new company law. The Financial Sector Legislative

Reforms Commission has devoted one full chapter in the draft Indian Financial Code (IFC) to the manner of making of subordinate legislation. The manner recommended in the IFC may be a useful guide for making rules under the company law. The most important, however, is that the government should not use any tool other than rules to specify any requirement.

The author is secretary-general, Institute of Company

Secretaries of India

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