

One Person Company: A Critique of the New Act

Introduction

Companies (Second Amendment) Act 2020 was passed by the Parliament on 22 November 2020 with the main aim of introducing a new concept in the country: “one person company”.

The statement annexed to the bill proclaimed that the new form of company was being implemented in order to expand and simplify business. It was expected that this would take Bangladesh up a few notches in the World Bank’s “Ease of Doing Business” index.

The concept of a company consisting of a single person is not new. It has already been put into practice in countries like China, Singapore, UK, Australia and the USA. It was introduced in Pakistan in 2003 and in India in 2013.

Currently, we only have public companies with seven or more members and private companies with two or more members. Therefore, introduction of one person companies will certainly have a considerable impact in our country.

But there are some anomalies and deficiencies in the provisions contained in the Act relating to one person company. The aim of this essay is to bring forth these incongruities.

New provisions

A new sub-clause (bb) is inserted after clause (b) of subsection (1) of section 2, which defines “one person company” as follows (author’s translation):

“(bb) “One Person Company” shall mean a company which has only one natural person as its shareholder.”

The specific term $\text{ÒGK e}^{\text{w}^3} \text{†Kv}^{\text{v}^3} \text{vbxÓ}$ or “One Person Company” is also used in India and China. In Pakistan and Ireland it is termed “Single Member Company” or “SMC”. In the UK and in the European Union there are no specific terminology, but such companies are generally referred to as single member companies. In the UK there is no separate category of companies for single members: private companies may be formed with a single member. In the USA too companies with a sole member are referred to as “single-member LLC”. In Bangla $\text{ÒGKK m}^{\text{m}} \text{†Kv}^{\text{v}^3} \text{vbxÓ}$ would probably have been more to the point than $\text{ÒGK e}^{\text{w}^3} \text{†Kv}^{\text{v}^3} \text{vbxÓ}$ |

A new section 11A has been inserted after section 11, which states, with regard to a one person company, that such companies shall state $\text{ÒGK e}^{\text{w}^3} \text{†Kv}^{\text{v}^3} \text{vbxÓ}$ or “One Person

Company” or “OPC” at the end of their names. The section also provides that the public limited companies shall write $\text{\textcircled{O}cvewjK mxwgZ`vq \text{\textcircled{K}v\text{\textcircled{u}vbx\text{\textcircled{O}}}}$  or “PLC” at the end of their names, and the private limited companies shall only write  $\text{\textcircled{O}mxwgZ`vq\text{\textcircled{O}}}$ or “LTD.”

A whole new part, Part–XA ($\text{\textcircled{kg-K L\text{\textcircled{U}}}}$), titled “Formation, Incorporation, Operation etc. of One Person Company” is inserted after Part–X. There are 12 sections in this Part, sections 392A – 392L, which deal with different aspects of a one person company (“OPC”).

A single natural person can form an OPC by subscribing his name to a memorandum of association and fulfilling other requirements prescribed by the Companies Act 1994. A person may form only one OPC. The method of incorporation will be similar to that followed in case of a private limited company.

The memorandum must state details of a nominee who will become the company’s sole shareholder in case of the original shareholder’s death or incapacitation or insanity. The memorandum and articles must contain the nominee’s consent. The nominee may withdraw his consent. The sole shareholder may also change the nominee if the nominee dies or if he otherwise deems it necessary. The method of altering the nominee must be mentioned in the articles of the company.

The contents of the memorandum and articles of association of an OPC are prescribed in the attached schedules.

This idea of nominee is similar to that in India. In Pakistan the requirement is to name two nominee directors, who will manage the affairs of the company until the shares are transferred to the legal heirs of the deceased single member.

The paid up capital of an OPC will be minimum Tk. 50 lakh and maximum Tk. 10 crore, and its annual turnover in the previous year must be minimum Tk.2 crore and maximum Tk.100 crore. If these amounts exceed the maximum limit, an OPC *may be* (not “must be”) converted to a private or a public limited company complying with other requirements of the Act.

An OPC will have only one person as its member, who will be its sole director. But he may appoint manager, secretary and other employees for the company’s management. There will be no other director in the company, unlike in India and Pakistan where there may be more than one directors (who are not members).

Regarding meetings, it is provided that the director of the OPC must hold at least one director’s meeting in six months. Nothing is said about the requirement of holding general meetings.

The memorandum or articles of an OPC may be altered in the usual method contained in section 12, subject to necessary adaptations.

An OPC must keep proper accounting records as per the provisions of the Act. The existing provisions relating to auditors and audit reports will apply to an OPC with necessary adaptations. Its financial statements must be signed by the sole shareholder and submitted to the Registrar within 180 days of completion of the financial year.

In case of borrowing or repayment of loans by an OPC, existing sections 159-175 will be applicable with necessary adaptations.

The existing provisions of the Act will be applicable in case of voluntary winding up of an OPC.

Incompatibilities/deficiencies

The newly inserted Part-XA does not sit comfortably with many existing provisions.

A separate and dedicated Part, containing all the provisions relating to one person companies, was in fact unhelpful. Instead of clustering these provisions together, the draftsmen could have arranged them in context throughout the Act. That would have preserved the fluidity and the coherence of the Act.

For example, the existing section 189 lays down provisions regarding persons responsible for signing the financial statements, and section 190 requires that a company's financial statements be submitted with the Registrar within 30 days of the annual general meeting. The new section 392I provides for the same things regarding an OPC: the financial statements are to be signed by sole shareholder, and the time limit for submission of financial statement is 180 days of the completion of the financial year. These requirements could easily have been accommodated in the existing sections 189 and 190, with only slight additions. Inserting a separate section was unnecessary.

Other countries that have recently introduced single-member companies (including India and Pakistan) have adopted this context-based approach in placing the new provisions in their respective Companies Acts.

If the law relating to private companies and public companies can be placed alongside each other, there is no reason why the OPC provisions should be isolated in such a way. It required less effort, of course, on the part of the draftsmen, to simply throw in a separate Part, instead of sifting through all the provisions of the Act in order to accommodate the new provisions. One wonders whether that was the reason why this shortcut way was preferred.

Predictably, this has resulted in some contradictions. The problem is made worse by the fact that the new Part does not claim to have any overriding effect, through the use of a clause which is commonly known as "non-obstante clause". These clauses are used indiscriminately in this part of the world, often at the expense of negating one another. But in this case such a clause could indeed have helped to skirt round some of the contradictions.

Let us now focus on specific problems.

Memorandum of Association

The new section 392B(3) requires that the memorandum of an OPC must mention the name of the nominee. Section 392A lays down that memorandum and articles of a one person company shall mean memorandum and articles contained in the new schedules 9A and 9B. But Schedule 9A, the memorandum of an OPC, does not contain any provision on nominee. This is an unfortunate lapse.

Further, as per Schedule 9A, the memorandum of an OPC should contain only four clauses: name, address and objects of the company, and a table containing each subscriber's particulars and subscription. There is no requirement of mentioning the share capital, or that the liability of the sole shareholder is limited.

This is a serious omission, which directly contradicts section 6 of the Act that prescribes that all companies limited by shares shall state, among others, "that the liability of the members is limited", and "the amount of share capital with which the company proposes to be registered, and the divisions thereof into shares of a fixed amount."

Thus Schedule 9A containing the contents of the memorandum of an OPC is deficient. It shows sheer non-application of mind on the part of the draftsmen. A one person company is intended to be a limited liability company: the new section 11A expressly says so. But can it be called a limited liability company if its memorandum is registered without a declaration that the liability of members would be limited?

Articles of Association

Schedule 9B is a one-page document titled "Articles of a company limited by shares". There are only two articles, one containing four and the other containing three sub-articles. Article 1 addresses the method of share transmission on death of an OPC's member, while Article 2 contains provisions relating to the company's meetings and resolutions. And that is all there is in the Articles.

Thus according to Schedule 9B the Articles of a one person company will only contain provisions relating to transmission of shares and meetings, and nothing else.

But a company's Articles, be it a one person company, should contain other necessary provisions in order to prescribe how the company is to be run and governed. Granted that many usual provisions may be discarded, such as provisions relating to lien, calls on share, forfeiture, directors, meetings, voting etc., given that the company has only one shareholder. Still, matters like alteration of capital, the seal, accounts, audit, the company's borrowing power, appointment of manager and/or secretary, winding up, indemnity etc. are all

indispensable aspects of a company's functioning. These should have been mentioned in Schedule 9B.

Also, Schedule 9B only contains provisions relating to transmission of shares after the death of the sole shareholder: it does not have prescriptions on transfer *inter vivos*. Though section 392H provides that the shares of a one person company may be transferred to a natural person, and in such transfer the provisions contained in section 38 must be followed, there should have been specific provisions in the Articles too.

It is one thing to abolish the requirement of articles of association altogether, which the draftsmen could possibly have done, on the ground that a one person company is not an "association" *per se*, and there being only one person as shareholder-director there is no relationship between shareholders to govern. But since the Act has contemplated the necessity of the Articles of Association and has devoted a separate schedule, the essential provisions should have been mentioned in the schedule.

Singapore is an example where there is no requirement to have a separate "articles of association". There is a single "constitution" of the company, which contains certain mandatory provisions, e.g. name, registered office, liability, capital, subscribers and objects – provisions typically found in a memorandum. The companies are free to adopt "rules" to govern various aspects pertaining to the running of the company.

Another appalling omission in the new scheme is that, while section 392B(4) and (8) have laid down that the name of the nominee, and the method to change the nominee, must be written in the Articles, the prescribed Articles (Schedule 9B) do not have any such provision. The error of this magnitude in statutes is unthinkable.

Mode of forming incorporated company

Section 5 of the original Act is titled "Mode of forming incorporated company", which provides that seven or more persons may form a public limited company, or two or more persons can form a private limited company, by subscribing their names to a memorandum of association. It does not speak of a one person company.

Although the new section 392B(1) provides the same thing about forming a one person company (i.e. a single natural person can form an OPC by subscribing his name to a memorandum of association), section 5 is a basic provision describing the types of company possible in Bangladesh, and this should have been amended to insert the new kind of company.

Contrast the Indian Companies Act 2013, where section 3, which deals with formation of company, now includes one person company.

Meetings

Regarding meetings the new section 392F provides as follows:

“One Person Company’s meeting.—The director of the one person company shall conduct at least one directors meeting in half calendar year.”

Why the sole director of the company was burdened with meeting requirements is not clear.

In the Indian scheme of one person companies, there may be other directors appointed in addition to the sole member-director. When there are more than one directors, the board must meet twice a year; but when there is only one director, there is no meeting requirement (section 173(5), Companies Act 2013). All businesses to be transacted at the board meeting are entered into the minutes book and signed and dated by director (section 176, Companies Act 2013). This is a common-sense position for a single-director board, because the single director should not be saddled with the requirements of conducting meetings.

Regarding general meetings, there is not a word in the new Part–XA. Section 392F speaks of directors’ meeting, not shareholders’ meeting or general meeting.

But according to Schedule 9B, Article 2, the articles of an OPC shall provide the following in respect of the company’s meetings:

- (a) If the sole member agrees to a resolution on any matter, and if the resolution is entered into the minutes book, it will be deemed to have been adopted;
- (b) The sole member shall sign and date the minutes book;
- (c) The resolution will take effect from the date of signing of the minutes book by the sole member.

Thus from the articles of an OPC it would seem that the draftsmen did not want an OPC to formally hold any general meeting: entering a resolution in the minutes book and signing it is enough.

It is curious to note that the meeting requirements of the directors are kept intact while the requirements of holding general meetings are attempted to be discarded.

However, the existing section 81 clearly provides that “every company” shall hold an annual general meeting each year. Section 81 does not make any exception for one person companies, neither has it been amended to include such an exception.

In India and Pakistan the relevant provisions which provide for annual general meetings (sections 96 and 132 respectively) now expressly provide that every company other than a one person company/single member company shall hold an annual general meeting each year.

Section 81 is likely to prevail over the provisions contained in the new Schedule 9B, and one person companies may find themselves burdened with the requirement of holding annual

general meetings notwithstanding the exemption indicated in Schedule 9B. More so because Schedule 9B has not been 'entrenched' in the statute, unlike Schedule-I (model regulations/articles) which has been so entrenched by section 18. According to section 18 all regulations contained in Schedule-I shall be deemed to have been contained in the duly registered articles, unless expressly excluded or modified by the company's Articles.

Thus, if the draftsmen indeed wanted one person companies to be free from the obligation to hold annual general meetings, the most appropriate way was to amend section 81.

Conclusion

Introduction of one person companies is a very significant step. It is likely to revolutionize the business environment in the country. People intending to commence a business will have more choices. The sole traders will have an option of converting their business into limited liability companies. One person companies offer the twin attractions of limited liability of the sole member and the ease of raising business loans from banks.

From the above discussion it is clear that some of the new provisions contained in the amending Act are either incompatible with the existing provisions of the Companies Act or lacking in some respects.

Meeting requirements in particular should have been relaxed for one person companies. General meetings are already becoming rarer in many countries. In the UK private limited companies are no longer legally required to hold annual general meetings unless a provision to the contrary is included in the articles. Even public companies most often make decisions through circulating written resolutions, without holding a general meeting.

As noted above, it was not enough to simply squeeze in a separate part in the Act describing the features of the new type of company. For effective implementation relevant provisions of the existing Act should have been amended. Some insertions and a few exceptions at appropriate places were needed for the Act to function as a coherent whole.

We do not know whether the bill was adequately scrutinized. There are provisions in the Rules of Procedure of Parliament for scrutinization of bills by the Standing Committee or the Select Committee; a bill may also be circulated for the purpose of eliciting public opinion. This being an important bill, having wide-ranging implications, it should have been properly examined before it became the law, so that the errors and contradictions mentioned above could have been removed.