NEWSLETTER

Legal, Compliance and ESG

05 March 2021

Dear Readers,

We bring to your reading and attention following topics:

A. LEGAL AND REGULATORY UPDATES:

~ Anand Asawa, Saurav Agarwal

I. Risk-Based Internal Audit (RBIA)[1]

RBI vide its circular dated February 03, 2021 notified Risk-Based Internal Audit Guidelines for selected Non-Banking Finance Companies (NBFC's), Urban Co-operative Banks (UCB's).

The regulator also specified that RBIA policy shall clearly document the purpose, authority, and responsibility of the internal audit activity, with a clear demarcation of the role and expectations from risk management function and risk-based internal audit function.

In order to strengthen the quality and effectiveness of the internal audit system, the Reserve Bank of India has issued guidelines on risk-based internal audit (RBIA). The entities have to implement the RBIA framework by March 31, 2022 and have been asked to constitute a committee of senior executives, to be entrusted with the responsibility of formulating a suitable action plan.

The new framework will be for all deposit-taking NBFCs, irrespective of their sizes, all non-deposit taking NBFCs (including core investment companies) with an asset size of Rs.

[1] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/88NBFCSUCBS9C069C43CFCB494795E304AC9D23C87F.PDF

5,000 crore and also for all UCBs, having an asset size of Rs. 500 crore and above.

II. Master Direction – Non-Banking Financial Company – Housing Finance Company (Reserve Bank) Directions, 2021[2]

RBI vide master direction dated February 17, 2021 came out with a slew of directions related to maintenance of liquidity coverage ratio, risk management, asset classification and loan-to-value ratio, among others, for housing finance companies.

"All non-deposit taking HFCs with asset size of Rs 100 crore and above and all deposit taking HFCs (irrespective of asset size) shall pursue liquidity risk management, which inter alia should cover adherence to gap limits, making use of liquidity risk monitoring tools and adoption of stock approach to liquidity risk,"
As per the definition, an HFC is an NBFC whose financial assets, in the business of providing finance for housing, constitute at least 60 per cent of its total assets.

The RBI said HFCs shall maintain a liquidity buffer in terms of liquidity coverage ratio, which will promote their resilience to potential liquidity disruptions by ensuring that they have sufficient high-quality liquid asset to survive any acute liquidity stress scenario lasting for 30 days. All non-deposit taking HFCs with an asset size of Rs 10,000 crore and above, and all deposit-taking HFCs irrespective of their asset size will have to achieve a minimum liquidity coverage of 50% By Dec. 1, 2021 and gradually to 100% by Dec. 1, 2025.

III. Providing copy of application to the Board, as mandated under Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019[3]

IBBI vide its circular dated February 02, 2021 issued format for Providing a Copy of Application for Initiation of Insolvency Resolution Process of Personal Guarantors. The IBBI has made available a facility on its website at https://ibbi.gov.in/intimation-applications/iaaa-personal-one for providing a copy of the application online to the Board. The Rule 9 of the Insolvency and Bankruptcy (Application to Adjudicating Authority for Insolvency Resolution Process for Personal Guarantors to Corporate Debtors) Rules, 2019 mandates an applicant to provide a copy of the application filed for initiation an insolvency resolution process of a personal guarantor to a corporate debtor, inter alia, to the Board for its record. On submission of the application online, the applicant shall get an acknowledgment.

[2] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/MD10007CE48ADE2FB4BF981444FE1349E3B71.PDF

[3] https://ibbi.gov.in/uploads/legalframwork/8d38ca4dc37264636b22daa2a3c637ba.pdf

IV. Investment in NBFCs from FATF non-compliant jurisdictions[4]

The Reserve Bank of India (RBI) vide their circular No. RBI/2020-2021/97 DOR.CO.LIC.CC No.119/03.10.001/2020-21 dated February 12, 2021 issued circular on Investment in NBFCs from FATF non-compliant jurisdictions applicable to Non-Banking Financial Companies (NBFCs) (including Housing Finance Companies) and Asset Reconstruction Companies.

1. The Financial Action Task Force (FATF) periodically identifies jurisdictions with weak measures to combat money laundering and terrorist financing (AML/CFT) in its following publications: i) High-Risk Jurisdictions subject to a Call for Action; and ii) Jurisdictions under Increased Monitoring. A jurisdiction, whose name does not appear in the two aforementioned lists, shall be referred to as a FATF compliant jurisdiction. Investments in NBFCs from FATF non-compliant jurisdictions shall not be treated at par with that from the compliant jurisdictions.

2. Investors in existing NBFCs holding their investments prior to the classification of the source or intermediate jurisdiction/s as FATF non-compliant, may continue with the investments or bring in additional investments as per extant regulations so as to support continuity of business in India.

3. New investors from or through non-compliant FATF jurisdictions, whether in existing NBFCs or in companies seeking Certification of Registration (COR), should not be allowed to acquire 'significant influence' directly or indirectly in the investee, as defined in the applicable accounting standards. In other words, fresh investors (directly or indirectly) from such jurisdictions in aggregate should be less than the threshold of 20 per cent of the voting power (including potential1 voting power) of the NBFC.

4. These instructions are applicable with immediate effect.

The list of Jurisdictions as per Sr. No. 1 are as follows:

(i) High-Risk Jurisdictions subject to a Call for Action:

- Democratic People's Republic of Korea (DPRK)
- Iran

(ii) Jurisdictions under Increased Monitoring:

Jurisdictions with strategic deficiencies	Jurisdictions no longer subject to monitoring
• Albania • Barbados • Botswana • Cambodia • Ghana • Jamaica • Mauritius • Myanmar • Nicaragua • Pakistan • Panama • Syria • Uganda • Yemen • Zimbabwe w.e.f. 1 March 2021: • Burkina Faso • Cayman Islands • Morocco • Senegal	• Iceland • Mongolia • The Bahamas

[4] https://rbidocs.rbi.org.in/rdocs/Notification/PDFs/NBFCS8FEB3B6C99654335837E941464F7ACB9.PDF

B. Case Study: Refusal to Condone Delay for Appeal Under Section 34 of Arbitration Act Appealable Under Section 37: Supreme Court

Chintels India Ltd v Bhayana Builders Pvt Ltd [LL 2021 SC 77]

~ Pramod Sonawane

In a significant verdict, the Supreme Court has held that an order refusing to condone the delay in filing an appeal under Section 34 of the Arbitration and Conciliation Act 1996 ("**Act**") is appealable under Section 37 of the Act.

Issue: Section 34 of the Act permits a challenge to an arbitral award on limited grounds within 3 months from the date on which the award is received. A 30 day extension can be sought on showing "sufficient cause". Sec. 37(1)(c) permits an appeal from orders "setting aside or refusing to set aside" an award under §34. In *BGS SGS Soma JV v NHPC Limited (2020) 4 SCC 234*, the Supreme Court had held that an order condoning delay in filing a Sec. 34 challenge is a preliminary order and so not appealable.

Facts: A challenge was filed under Sec. 34 after the prescribed period of 3 months. The Delhi High Court refused to condone the delay and dismissed the challenge. This decision was appealed to a Division Bench but because it was bound by *BGS SGS Soma*, it dismissed the appeal holding that an order refusing to condone delay is not appealable under Sec. 37(1)(c). However, the Division Bench granted leave to appeal to the Supreme Court.

Decision: Allowing the appeal, the Supreme Court set aside the impugned judgment of the Division Bench, and the matter was remitted to a Division Bench of the High Court of Delhi to decide whether the Single Judge's refusal to condone delay is or is not correct.

The Supreme Court distinguished *BGS SGS Soma* saying that, in that case, the delay was condoned, and this did not amount to a final decision on the challenge. However, a refusal to condone delay would be a final decision since it results in the challenge being dismissed. Such orders are therefore appealable under Sec. 37(1)(c). The Court said that Sec. 37(1)(c) says "setting aside...an arbitral award under section 34". This would include the dismissal of a challenge not only on the merits but also on the ground of delay.

The Court also reaffirmed the settled position that Sec. 5 of the Limitation Act 1963 does not apply to Sec. 34 challenges and, therefore, no delay beyond 3 months and 30 days can be condoned.

The Supreme Court observed that it is important to note that the expression "setting aside or refusing to set aside an arbitral award "does not stand by itself. The expression has to be read with the expression that follows under section 34. Section 34 is not limited to grounds being made out under section 34(2). The Court rejected the argument that since Arbitration Act allows for minimal judicial intervention, appeals against orders refusing to condone delay should not be entertained. The Court said that when the language of the provision allows for such appeals to be filed, the court cannot limit its scope.

C. ESG: Brief Analysis of 'The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, ("POSH Act")'

~ Suprabhat Pathak and Saurav Agarwal

Workplace sexual harassment is a form of gender discrimination which violates a woman's fundamental right to equality and right to life, guaranteed under Articles 14, 15 and 21 of the Constitution of India. Workplace sexual harassment not only creates an insecure and hostile working environment for women but also impedes their ability to deliver in today's competing world. Apart from interfering with their performance at work, it also adversely affects their social and economic growth and puts them through physical and emotional suffering.

India's first legislation specifically addressing the issue of workplace sexual harassment; the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 ("POSH Act") was enacted by the Ministry of Women and Child Development, India in 2013 with the objective to provide protection against sexual harassment of women at workplace and for the prevention and redressal of complaints of sexual harassment and for matter connected therewith or incidental thereto.

In *Vishaka v State of Rajasthan [(1997) 6 SCC 241],* workplace sexual harassment in India, was for the very first time recognized by the Supreme Court, wherein the Supreme Court, in exercise of power available under Article 32 of the Constitution, framed guidelines to be followed at all workplaces or institutions, until a legislation is enacted for the purpose to check the evil of sexual harassment of working women. The Supreme Court incorporated basic principles of human rights enshrined in Constitution of India under Article 14, 15, 19(1)(g) and 21, and provisions of Convention on Elimination of All Forms of Discrimination against Women (CEDAW), which has been ratified in 1993 by the Government of India. The guidelines laid down by the Supreme Court were to be treated as the law declared under Article 141 of the Constitution.

After 16 years of Vishaka, the POSH Act was enacted.

The POSH Act defines sexual harassment as unwelcome acts or behaviour (whether directly or by implication) namely, physical contact and advances, a demand or request for sexual favours, making sexually coloured remarks, showing pornography, any other unwelcome physical, verbal or non-verbal conduct of sexual nature. Any act of unwelcome and sexual nature shall be considered as sexual harassment.

The POSH Act also provides the circumstances under which an act may amount to sexual harassment. These are:

(i) implied or explicit promise of preferential treatment in her employment; or
(ii) implied or explicit threat of detrimental treatment in her employment; or
(iii) implied or explicit threat about her present or future employment status; or
(iv) interference with her work or creating an intimidating or offensive or hostile work environment for her; or
(v) humiliating treatment likely to affect her health or safety.6

Under section 4 of the POSH Act requires an employer to set up an 'internal committee' ("**IC**") at each office or branch, of an organization employing 10 or more employees, to hear and redress grievances pertaining to sexual harassment. Where the number of employees is less than 10, the POSH Act provide for setting up of Local Committee ("**LC**") in every district by the District Officer. The committee while inquiring into such complaint shall have the same power as vested in a civil court.

Failure to constitute the IC has led to imposition of a fine under the POSH Act.[5]

An aggrieved woman can file a written complaint to IC/LC from three months from the date of the incident and in case of series of such incidents within three months from the last such incident. However, any delay in filing the complaint can be condoned by the committee upto further three months. In case of physical or mental incapability of the aggrieved woman, her legal heirs or such other person as described in Rule 6 of The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("**the Rules**") may make a complaint.

On receiving the complaint, the committee, before initiating an inquiry, may take steps to settle the matter between her and the respondent through conciliation and when a settlement is arrived no further inquiry is conducted. If the conciliation fails or any term of the settlement arrived at has not been complied with by the respondent, the committee shall proceed further with the inquiry.

In case of a domestic worker, the Local Committee shall, if prima facie case exists, forward the complaint to the police, within a period of seven days for registering the case under Section 509 of Indian Penal Code or any other relevant provisions of the said Code where applicable.

Where both the parties are employees, the principle of natural justice is followed, and both the parties are heard, and opportunity is given to make representations against the findings of the committee. For the purpose of making an inquiry, the committee shall have the same powers as are vested in a civil court. The committee has to complete the inquiry within a period of 90 days. The committee can give certain interim reliefs to the aggrieved woman during the pendency of the inquiry.

The committee within 10 days after completion of the inquiry shall provide the report of its findings to the employer/District Officer and the concerned parties. When the allegation against the respondent has been proved the committee shall recommend the employer/District Officer to take action for sexual harassment as misconduct in accordance with provisions of service rules or where no such rules have been made, as prescribed in Rule 9 of the Rules and to pay such sum to the aggrieved woman as it considers appropriate, in accordance with the provisions of section 15, from the salary of the respondent. The employer/District Officer shall act upon the recommendations within 60 days.

In case of filing of false or malicious complaint or false evidence the committee may recommend to the employer or District Officer to take action in accordance with the provisions of service rules or where no such service rules exist, in such manner as prescribed in Rule 10 of the Rules.

An appeal can be filed against the recommendations made by the committee before the court or tribunal, within 90 days from the recommendations, in accordance with service rules and in absence of service rules, to the Appellate Authority under Section 2 of the Industrial Employment (Standing Orders) Act, 1946.

There is a prohibition on publication of identity of the aggrieved woman, respondent, witnesses, contents of the complaint, inquiry proceedings or recommendations of the committee, except information regarding the justice secured to any victim of sexual harassment. In contravention of Section 16 of the POSH Act, such person shall be liable for penalty in accordance with service rules and in absence of service rules, in accordance with Rule 12.

The POSH Act lays down certain duties of the employer and District Officer under Section 19 and 20 respectively such as creating awareness on sexual harassment at workplace, sensitize the employees,

[5] Global Health Private Limited & Mr. Arvinder Bagga v. Local Complaints Committee, District Indore and Others (W.P. No.22314 and 22317 of 2017)

assist the complaints committee in conducting the inquiry, act upon recommendations of the committee, monitor timely submissions of reports of the committee etc.

The non-compliance of the provisions of the POSH Act by the employer may result in fine which may extend to fifty thousand rupees and can also lead to cancellation of his license or withdrawal, or non-renewal, or approval, or cancellation of the registration, as the case may be.

Even though the POSH Act is in force since 2013, the awareness regarding consequences of sexual harassment and its redressal against the same is limited. The effective implementation of POSH Act not only requires creating an environment where women can speak up about their grievances without fear and get justice but sensitization of men towards treatment of women at workplace is equally necessary.