



Dear Readers,

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A) LEGAL AND REGULATORY UPDATES:

I. Clarification on passing of ordinary Resolution and special resolutions under the Companies Act, 2013¹

~Anand Asawa

MCA vide its circular dated 8th April 2020² allowed companies till June 30, 2020 to hold Extraordinary General Meetings (EGMs) through video conferencing or other audio-visual mode. MCA vide its circular dated 13th April 2020 issued further clarifications in continuation to its earlier

circular for providing clarifications to stakeholders on the following points:

- Manner and mode of issue of notice to members before convening the general meeting
- Requirement for voting by show of hands
- Passing of certain items only through postal ballot without convening a general meeting
- Sending of emails by members, where a poll on any time is required for

1

http://www.mca.gov.in/Ministry/pdf/Circular17_13042020.pdf

2

http://www.mca.gov.in/Ministry/pdf/Circular14_08042020.pdf

companies covered under para 3-B of circular dated 8th April 2020

II. Internal ML/TF risk assessment by REs - Amendment to Master Direction (MD) on KYC³

~Anand Asawa

The RBI on April 20, 2020, has updated to reflect the following changes in line with Rule 9(13) of the PML Rules 2005:

“A new section (5A) has been added to chapter II of the MD on KYC requiring REs to carry out ‘Money Laundering (ML) and Terrorist Financing (TF) Risk Assessment’ exercise periodically to identify, assess and take effective measures to mitigate its money laundering and terrorist financing risk for clients, countries or geographic areas, products, services, transactions or delivery channels, etc. While assessing the ML/TF risk, the REs are required to take cognizance of the overall sector-specific vulnerabilities, if any, that the regulator/supervisor may share with REs from time to time. Further, the internal risk assessment carried out by the RE should be commensurate to its size, geographical presence, complexity of activities/structure, etc.

Also, the REs shall apply a Risk Based Approach (RBA) for mitigation and management of the identified risk and should have Board approved policies, controls and procedures in this regard.”

The above instructions shall come into force with immediate effect. It may be noted that the first such internal risk assessment by the REs should be completed by June 30, 2020 and thereafter reviewed periodically.

3

<https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11873&Mode=0>

III. Reserve Bank Announces Targeted Long-Term Repo Operations 2.0 (TLTRO 2.0)⁴

~Suprabhat Pathak

In order to channel liquidity to small and mid-sized corporates, including non-banking financial companies (NBFCs) and micro finance institutions (MFIs), that have been impacted by COVID-19 disruptions, it has been decided by Reserve Bank of India to conduct Targeted Long-Term Repo Operations (TLTRO) 2.0 at the policy repo rate for tenors up to three years for a total amount of up to ₹ 50,000 crores, to begin with, in tranches of appropriate sizes.

The funds availed under TLTRO 2.0 shall be deployed in investment grade bonds, commercial paper (CPs) and non-convertible debentures (NCDs) of Non-Banking Financial Companies (NBFCs). At least 50 percent of the total funds availed shall be apportioned as given below:

- 10 per cent in securities/instruments issued by Micro Finance Institutions (MFIs);
- 15 per cent in securities/instruments issued by NBFCs with asset size of ₹ 500 crore and below; and
- 25 per cent in securities/instruments issued by NBFCs with assets size between ₹ 500 crores and ₹ 5,000 crores.

The asset size shall be determined as per the latest audited balance sheet of the investee institution/company.

4

<https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR2237379D65C898244520B79D8889EE42888E.PDF>

APAC Financial Services Private Limited

First Floor, Ashford Centre, Shankar Rao Naram Marg, Lower Parel (W), Mumbai 400013

IV. Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020⁵

~Suprabhat Pathak

IBBI vide its notification dated 20th April 2020 notified the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2020.

In regulation 47 of the Insolvency and Bankruptcy Board of India (Liquidation Process) (Second Amendment) Regulations, 2016, the following regulation shall be inserted:

“Exclusion of period of lockdown.

47A. Subject to the provisions of the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of computation of the timeline for any task that could not be completed due to such lockdown, in relation to any liquidation process.”.

The above shall be deemed to have come into force from 17th April 2020.

V. Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020

~Saurav Agarwal

IBBI vide its notification dated 20th April 2020 notified the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2020 for amending the Insolvency and Bankruptcy Board of India (Insolvency Resolution

Process for Corporate Persons) (Third Amendment) Regulations, 2016.

After regulation 40B, the following regulation has been inserted for exclusion of time period of lockdown:

“40C. Special provision relating to time-line.

Notwithstanding the time-lines contained in these regulations, but subject to the provisions in the Code, the period of lockdown imposed by the Central Government in the wake of Covid-19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.”.

VI. RBI Circular on COVID19 Regulatory Package - Asset Classification and Provisioning⁶

~Anand Asawa

The RBI has issued a Circular on COVID19 Regulatory Package - Asset Classification and Provisioning pursuant to the Governor’s Statement of April 17, 2020:

1. In terms of the RBI circular dated March 27, 2020 (the “Regulatory Package”), the lending institutions were permitted to grant a moratorium of three months on payment of all term loan instalments falling due between March 1, 2020 and May 31, 2020 (‘moratorium period’). As such, in line with the clarification provided by the Basel Committee on Banking Supervision, in respect of all accounts classified as standard as on February 29, 2020, even if overdue, the moratorium period, wherever granted,

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<https://www.ibbi.gov.in/uploads/legalframework/51250311f7791102b612ff9c9810b997.pdf>

6

<https://rbidocs.rbi.org.in/rdocs/notification/PDFs/ASSETCLASSIFICATIONE5F6BD8C6D574086B7D36DC8CF7E13A9.PDF>

shall be excluded by the lending institutions from the number of days past-due for the purpose of asset classification under the IRAC norms.

2. In respect of working capital facilities sanctioned in the form of cash credit/overdraft ("CC/OD"), the Regulatory Package permitted the recovery of interest applied during the period from March 1, 2020 up to May 31, 2020 to be deferred ('deferment period'). Such deferment period, wherever granted in respect of all facilities classified as standard, including SMA, as on February 29, 2020, shall be excluded for the determination of out of order status.
3. NBFCs which are required to comply with Indian Accounting Standards (IndAS) shall, as hitherto, continue to be guided by the guidelines duly approved by their Boards and as per ICAI Advisories for recognition of the impairments.
4. In respect of accounts in default but standard where provisions of paragraphs (1) and (2) above are applicable, and asset classification benefit is extended, lending institutions shall make general provisions of not less than 10 per cent of the total outstanding of such accounts, to be phased over two quarters as under: (i) Quarter ended March 31, 2020 – not less than 5 per cent (ii) Quarter ending June 30, 2020 – not less than 5 per cent. The above provisions may be adjusted against the actual provisioning requirements for slippages from the accounts reckoned for such provisions. The residual provisions at the end of the financial year can be written back or adjusted against the provisions required for all other accounts. The above provisions shall not be reckoned for arriving at net NPAs till they are adjusted against the actual provisioning requirements as mentioned above. Further, till such adjustments, these provisions shall not be netted from gross advances but shown separately in the balance sheet as appropriate. All other provisions required to be maintained by lending institutions, including the provisions for accounts already classified as NPA as on February 29, 2020 as well as subsequent ageing in these accounts, shall continue to be made in the usual manner.
5. The exclusions permitted in terms of paragraph (1) and (2) above shall be duly reckoned by the lending institutions in their supervisory reporting as well as reporting to credit information companies (CICs) i.e., the days past due and SMA status, where applicable, as on March 1, 2020 will remain unchanged till May 31, 2020.
6. The lending institutions shall suitably disclose the following in the 'Notes to Accounts' while preparing their financial statements for the half year ending September 30, 2020 as well as the financial years 2019-20 and 2020-2021: (i) Respective amounts in SMA/overdue categories, where the moratorium/deferment was extended, in terms of paragraph 2 and 3; (ii) Respective amount where asset classification benefits is extended; (iii) Provisions made during the Q4FY2020 and Q1FY2021; (iv) Provisions adjusted during the respective accounting periods against slippages and the residual provisions

B) Case Study: Anant Raj Limited vs. Yes Bank Limited⁷

~Suprabhat Pathak and Saurav Agarwal

The Reserve Bank of India, to mitigate the burden of debt servicing, has issued a notification RBI/2019-20/186 on March 27, 2020 ("Notification") permitted lending institutions, including commercial banks, cooperative banks, all-India Financial Institutions, and NBFCs (including housing finance companies), to allow a moratorium of 3 months on the payment of instalments (which includes principal and/or interest components and bullet repayments) in respect of all term loans (the payment of which was due between March 1, 2020 and May 31, 2020). The intention of the RBI seems to be to shift the repayment dates for payment of instalments by 3 months, i.e., the moratorium should start from the due date, falling immediately after March 1, 2020, against which the payment has not been made by the concerned borrower. Accordingly, under the Notification, the repayment schedule, subsequent due dates as well as the tenor for the loans may be shifted across the board by three months by lending institutions. However, as per the Notification, it is to be noted that the moratorium is a 'payment holiday' and the interest shall continue to accrue on the outstanding portion of the term loans during the moratorium period, which will be payable after the moratorium period as per the revised terms of repayment schedule. Many banks were offering the option to defer the payment of loan interest and principal only to borrowers who specially asked for it. However, the RBI provided instructions to the banks, that the moratorium period of 3 months should be given to all unless a borrower informs the bank or NBFC that it is not willing to opt for the moratorium.

In the matter of **Anant Raj Limited vs. Yes Bank Limited**, the Delhi High Court, while dealing with a petition led by a borrower, whose instalments, payable on January 01, 2020, were not paid till March 31, 2020, and accordingly its account was classed as 'Non Performing Asset' by the respondent/bank, interpreted the provisions of Notification and held that the account of the petitioner/borrower could not have been declared as a 'Non Performing Asset' in case the instalment is not paid during the moratorium period i.e. between March 1, 2020 and May 31, 2020 and that for the said period of 3 months, there will be a moratorium from payment of instalment. However, stipulated interest and penal charges shall continue to accrue on the outstanding payment even during the moratorium period.

After considering the submission made by the parties, the Court opined that the Notification prima facie showed that the intention of the RBI was to maintain status quo as on March 01, 2020, with regard to the all the instalments payment which had to be made post March 1, 2020 till May 31, 2020.

The case is listed for further hearing.

C) Advanced Processing Facility (APF)

~J.P. Trivedi

Advanced Processing Facility (APF): 'APF is the pre-approval of multi-unit projects other than those developed by Development Authorities, Resale or Self Construction properties. The objective of this facility is to manage risk of funding under-construction properties and to provide the option of approving the entire project of select/ approved builders in one go. The

⁷ http://delhihighcourt.nic.in/writereaddata/OrderSAN_PDF/URGENT/wpcurgent5202006042020.pdf

technical and legal evaluation of the individual dwelling unit is done in bulk, rather than as & when it comes to the banks for financing.

For all the fresh Individual Home Loans (IHL) cases, which are in the under- construction phase, it needs to be processed through APF window. Therefore to process an IHL application of units in these projects, the project as a whole needs to be approved as APF. To approve a project as APF, there should be a prescribed process and the objective of this document is to finalize the same.'

Type of transactions covered:

1. Direct allotment from the Builder including Apartments, Villas and Plots.
2. Balance Transfer and Resale cases in these projects.

Exclusions:

- A. Fully completed projects.
- B. Self-Construction and resale of completed properties.
- C. Direct allotment from Development Authority.

For these exclusion cases individual legal and technical checks need to be done as specified in the Credit Policy.

Reports to be obtained:

'Legal report: Credit Manager will initiate the legal report with empanelled lawyer. The lawyer needs to submit a search cum legal opinion on the title of the project land. It should also state the list of documents to be collected one time from the builder and also the list of documents to be collected with each individual case. If builder has taken project finance by mortgaging project land, NOC from the lender (One time or specific unit) will be required.

'Technical Report: Technical Manager will initiate technical report through empanelled valuer. A comprehensive report along with photographs will be submitted by the valuer.

APF Policy and Process Note

Any one of the following would be taken from the developer in this category: ' A self-declaration from the builder stating that the said project is not mortgaged to any bank or financial institution and that the developer has not availed of any loan facilities against said project.

'A certification from the builder's Chartered Accountants stating that there is no lien marked against said project.

Most developers have tie-ups with leading banks or non-banking financial companies (NBFC's) to provide home loan facilities to their customers. When a bank or NBFC approves a project for home loan facility, it provides the APF number to the concerned developer. This makes it easy for buyers, who can just quote this number and submit their documents while applying for a home loan. This also means that the APF number saves home buyers the hassle of collecting the legal documents of the project from the developer.

In order to sanction a home loan, the bank carefully checks details pertaining to the individual property and the project. It needs to ensure that the property is built on a legitimate land and the construction adheres to the prescribed norms. A bank easily offers home loans for a project that has an APF number. This is because an APF code or number is proof that the project is authorised by the housing finance companies (HFC).

D) ESG: COVID-19 brings down legal system but, technology comes to its rescue

~Saurav Agarwal

Legal system in India is considered to be conventional when it comes to archaic practices and comparison with legal system of other countries. But, recent COVID-19 crises have shown that Indian Courts can use technology to enable their functioning and adapt to any situation while keeping the wheels of justice moving.

All Courts showed extraordinary preparedness in these times of crisis by shifting from Courtrooms to video screens of laptops efficiently. Judges took up the matters from their homes and offices while Advocates argued from their own places. Though the Courts took up only the urgent matters of national importance and bail matters in some High Courts, this crisis paved the way for what we can call “inculcation of tech-enabled justice” in the system.

Though, there were certain glitches in the proceedings through video conference at Supreme Court as change is not always easy but beautiful and necessary. Supreme Court enabled the Advocates to appear through Video App for which it provided link. Registrar added Advocates who had to make appearance in some matter in a “Video Conference” group on Whatsapp through which Petitioners and respondents were informed that they had to be ready with their matters.

High Courts using their power also developed their own systems and provided email id from wherein an Advocate could send his own details with Identification and details of the case. Email id's of Government counsels were also provided to serve notice immediately. Also exemption was granted easily for affidavits in these times of crises.

Renowned law Firms and Advocates also shifted from conventional practices to “Work from Home” mode of functioning, thereby adding to more flexibility and convenience in the work styles. Bar Associations formulated schemes to assist Advocates which were popularized through Whatsapp groups, social networking sites and widely viewed legal reporting websites like India Legal.

COVID-19 threat has forced Indian Courts to embrace greater digitisation and use of technology to reduce the need for physical interface between litigants, lawyers and judges, but it will take years for courts to transition to the next level use of Artificial Intelligence as envisaged by Chief Justice of India SA Bobde. He has always encouraged use of technology in justice system. He has also remarked recently that “Technology is here to stay” which shows that short term emergency measures which are being taken now will take justice system on a new road of unexplored paths. Prime Minister Narendra Modi is also a firm believer in technology and has a vision to put it to a better use.

There is a need for more research and development of uniform tech-enabled system to link all courts including Supreme Court, High Courts, District Courts , Advocates and litigants with the help of Bar Councils and Bar Associations so that any such challenge in future can be easily met and justice is delivered with comfort and convenience.