HSA ADVOCATES
HEMANT SAHAI ASSOCIATES

Corporate & Commercial

Monthly Newsletter
February 2022

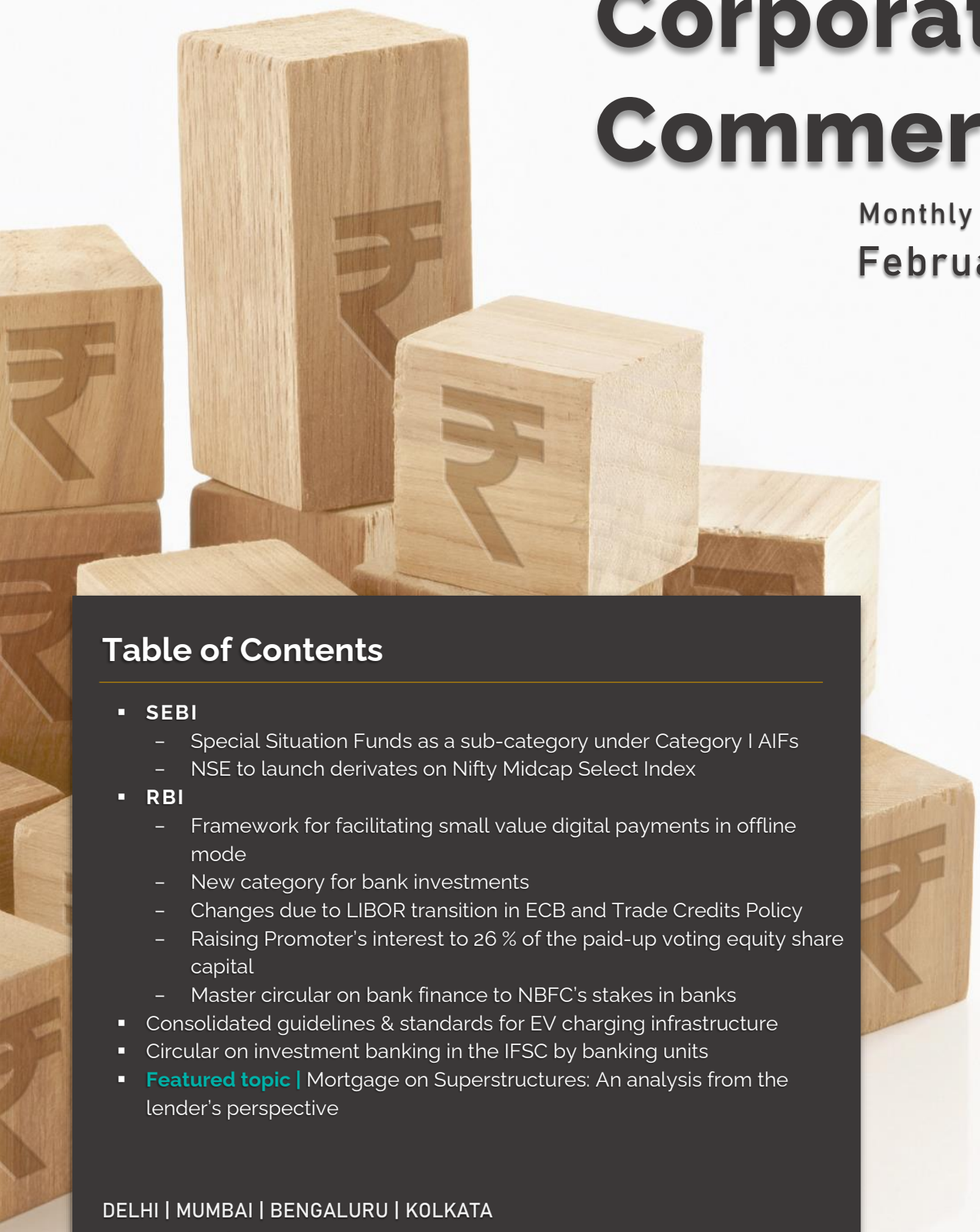

Table of Contents

DELHI | MUMBAI | BENGALURU | KOLKATA
www.hsalegal.com

SEBI | Special Situation Funds as a sub-category under Category I AIFs

On January 24, 2022, SEBI amended SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations)** to introduce Special Situation Funds (**SSF**) as a sub-category under Category I Alternative Investment Funds (**AIF**), with the main purpose to invest in 'Special Situation Assets'.

Requirements for SSFs:

- Minimum corpus requirements
- Minimum investment value to be accepted from investors
- Eligibility requirements to participate as a resolution applicant under Insolvency and Bankruptcy Code, 2016 (**IBC**)
- Comprehensive framework for SSF acquiring a stressed debt in accordance with Clause 58 of the Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021 (**Master Direction**)

Definition

SSFs will become a sub-category under Category I AIF and therefore will invest only in 'stressed assets'. Infrastructure funds, venture capital funds, angel funds, and social and SME funds were all encompassed by SEBI's Category I AIF until now. When compared to other AIF categories, such as Category III, which is primarily related to public market investments, this category enjoys additional tax benefits. Distressed loans available for acquisition under the Master Direction or as part of a resolution plan approved under the IBC will be regarded as stressed assets.

Key aspects

- Each scheme of SSF shall have a minimum corpus requirement i.e., INR 100 crore.
- SSF shall accept an investment of value not less than INR 10 crore from an investor and in the case of an accredited investor, the SSF scheme shall accept an investment of value not less than INR 5 crore. In furtherance to this, the SSF scheme investment limit has been lowered further to INR 25 lakh if in case the investment is from investors who are employees or directors of the SSF or employees or directors of the manager of the SSF.
- If SSF is intending to act as a resolution applicant under the Insolvency and Bankruptcy Code, 2016, SSF shall ensure to comply with the eligibility requirements.
- Furthermore, if the SSF is acquiring a stressed loan pertaining to terms of Clause 58 of the Master Direction, the following amendments have been notified by the SEBI:
  - SSF is allowed to acquire a stressed loan with respect to Clause 58 of Master Direction with and on the inclusion of SSF in the respective annexure.
  - The stressed loan SSF has acquired as per Clause 58 of Master Direction shall also have a lock-in period of six months and this mandatory lock-in period shall not be applicable to the SSF if there is a recovery of stressed loan from the borrower.
  - The initial continuous due diligence requirements shall be fulfilled by the SSF for its investors, if the acquisition of stressed loan is as per the Master Direction, as those mandated by the RBI for investors in Asset Reconstruction Companies (**ARC**s). These funds will also be invested in security receipts issued by ARCs, securities of companies in distress and any other asset/security as may be prescribed by the board from time to time.

The development of a SSF sub-category under Category I AIF is relevant considering ongoing measures to provide a remedy on the matter of stressed assets for the banking system. SEBI also ruled last month that SSFs will be exempted from the investment concentration norm in a single investee firm and will have no restrictions on investing their investible funds in the investee company's unlisted or listed shares.

SEBI | NSE to launch derivates on Nifty Midcap Select Index

On January 1, 2021, the National Stock Exchange (**NSE**) said that it has received SEBI approval to launch derivatives on Nifty Midcap Select Index. The midcap accounts for 17% of market capitalization and the launch of derivatives for this section will provide participants an additional hedging tool to manage their portfolio risk effectively. The index will be available for trading from 24 January, 2022.

Key features

- Nifty Midcap Select Index will track the performance of a portfolio of 25 stocks within the Nifty Midcap 150 index.
- The trading in Nifty Midcap Select derivatives will be on weekly and monthly contracts.
- Expiry will be Tuesday with a lot comprising of 75 shares. If the Tuesday is a trading holiday, then the expiry date will be the previous trading day.
- The contract file made available to trading members on the NSE Extranet from January 21, 2022, end of day will reflect the new the weekly and monthly futures and options contracts.
- Members have also been advised to load the file in the trading application before trading on January 24, 2022.
- Members may note that for testing purpose certain weekly and monthly futures and option contracts on Index symbol MIDCPNIFTY shall be made available, the details of these strikes and contracts will be communicated to members via separate circular will shall be issued one day prior to the January 22, 2022, mock.
- Existing clearing and settlement procedures along with the extant risk management measures adopted for futures and options contracts such as initial margins, minimum margins, position limits, etc., including the right of clearing corporation to close out positions, shall apply mutatis mutandis to these contracts.

Nifty Midcap Select Index has delivered returns of 39% in the last 1 year and 19% annualized returns in the last 5 years ending December 2021. The midcap segment has come into focus during the recent market rally with improved participation levels from across investor classes and consequent liquidity.

RBI | Framework for facilitating small value digital payments in offline mode

RBI released the framework for facilitating small value digital payments in offline mode (**Framework**) on January 03, 2022, with the aim of promoting the digital transactions in rural and semi-rural areas having low internet connectivity. The Framework has allowed authorized Payment System Operators (**PSO**s), Payment System Participants (**PSP**s), Acquirers and Issuers (banks and non-banks) to conduct small value offline digital payments. An offline digital payment essentially refers to a transaction that is conducted without the use of internet or telecom connection.

As per the Framework, offline transactions can be conducted for any value between INR 200 to INR 2,000, using any channel or instrument like cards, wallets, and mobile devices physically in a face-to-face mode. In order to enable an offline payment, consent is required from the consumer. However, there is no additional requirement of Additional Factor of Authentication (**AFA**), and an SMS/e-mail alert will be received by the customer after a time lag, after which the customer can check the final balance in online mode.

The Framework further provides that the offline payments shall be covered under the provisions of circulars limiting customer liability issued by RBI (as amended from time to time) and the customers shall also have the recourse to the RBI's Integrated Ombudsman Scheme, as applicable, for grievance redressal.

RBI | New category for bank investments

RBI proposed new norms for their classification and valuation to align the investment portfolio of banks with the global prudential framework and accounting standards

According to a discussion paper by the central bank, 'Review of Prudential Norms for Classification, Valuation and Operations of Investment Portfolio of Commercial Banks', the new bank portfolio classification norms will come into effect from April 1, 2023. It has invited comments on the paper from stakeholders by February 15, 2022.

As per the proposed norms, the investment portfolio of banks will be divided into three categories:

- Held-to-maturity (**HTM**)
- Available for sale (**AFS**)
- Fair value through profit and loss account (**FVTPL**)

Within FVTPL, Held-For-Trading (**HFT**) shall be a sub-category aligned with the specifications of 'Trading Book' as per the Basel-III framework.

The new norms propose to bridge the gap between the existing guidelines and global standards and practices with regards to classification, valuation, and operations of the investment portfolio of commercial banks. The extant instructions pertaining to the prudential norms on the classification and valuation of the investment portfolio are largely based on the Report of Informal Group on Valuation of Banks' Investment Portfolio, which was submitted in 1999.The recommendations of this informal group culminated in the issue of prudential guidelines on the investment portfolio in October 2002, which forms the basis of the current norms.

While the RBI has been tweaking the guidelines in response to situations as they emerge, a comprehensive review has not been undertaken so far, resulting in a wide gap between the country's norms and the global standards and practices. It is against this backdrop that a discussion paper reviews the rationale and the evolution of the current framework, the corresponding global standards, and developments in the financial markets before framing its proposals.

RBI | Changes due to LIBOR transition in ECB and Trade Credits Policy

In order to ensure that the transition from LIBOR remains easy and smooth, the RBI has allowed widely accepted Interbank Rate or Alternative Reference Rate (**ARR**) for External Commercial Borrowings (**ECB**) and Trade Credits (**TC**). The RBI has proposed the following changes keeping in mind the imminent discontinuance of LIBOR as a benchmark rate, and in consultation with stakeholders, to all-in cost benchmark and ceiling for Foreign Currency (**FCY**) ECBs/ TCs[1]:

- **Redefining benchmark rate for FCY ECBs and FTCs:** RBI redefined the benchmark rate as any widely accepted interbank rate or alternative reference rate of a 6 months tenor, applicable to the currency of borrowing in case of FCY ECBs/ TCs.
- **Change in all-in-cost ceiling for new ECBs/TCs:** In order to manage differences with respect to term premia and credit risk between LIBOR and the new ARRs, the all in-cost ceiling for new FCY ECBs and TCs has been increased by 50 bps to 500 bps and 300 bps, respectively, over the benchmark rates.
- **One-time adjustment in all-in-cost ceiling for existing ECBs/TCs:** To enable smooth transition of currently LIBOR linked ECB/TC the all-in cost ceiling for such ECBs/ TCs has been revised upwards by 100 bps points to 550 bps and 350 bps, respectively.

However, RBI clarified that there is no change in the all-in-cost benchmark and ceiling for Indian Rupee dominated ECBs/TCs.

RBI | Raising promoter's Interest to 26 % of the paid-up voting equity share capital

In 2020 RBI had constituted the Internal Working Group (**IWG**) to review the guidelines on ownership and corporate structure of Indian private sector banks. The IWG submitted their report in November 2020 and this report was uploaded on the RBI

[1] https://www.rbi.org.in/scripts/FS_Notification.aspx?Id=12204&fn=5&Mode=0

website, inviting comments of stakeholders and the general public. RBI has accepted most of the IWG recommendations.[2]

RBI accepted following recommendations of IWG:

- During the lock-in period, promoter shareholding may continue as a minimum of 40% of the paid-up voting equity share capital of the bank for the first 5 years.
- Cap on promoters' stake is increased in the long run of 15 years from the current levels of 15% to 26% of the paid-up voting equity share capital of the bank. This stipulation should be uniform for all types of promoters and would not mean that promoters who have already diluted their holdings below 26% will not be permitted to raise it to 26% of the paid-up voting equity share capital of the bank.
- Shareholding of non-promoters will be capped at 10% of the paid-up equity capital in the case of natural persons and non-financial institutions or entities.
- A higher ceiling of 15% will be allowed for all categories of financial institutions/entities, supranational institutions, public sector undertaking or Government.
- When a pledge is invoked for over 5% of the paid-up capital, the RBI will restrict the voting rights of the pledgee until the pledgee applies for the regularization of the share acquisition.
- Minimum requirement of experience of promoting entity, including for a converting Non-Banking Financial Company (**NBFC**), may continue at 10 years for Universal Banks and 5 years for small finance banks (**SFB**).
- The initial paid-up voting equity share capital/ net worth required to set up a new universal bank is increased to INR 1,000 crore from the current INR 500 crores and in the case of SFB, it is increased to INR 300 crores from INR 200 crore.
- Non-operative financial holding companies (**NOFHC**) should continue to be the preferred structure for all new licenses to be issued for Universal Banks. NOFHC may be mandatory only in cases where the individual promoters/promoting entities/converting entities have other group entities.
- Whenever a new licensing guideline is issued, the benefit of any relaxation in the rules would be extended to existing banks immediately. If the new rules are tougher, the legacy banks will have to comply, but a transition path will be finalized with the banks to ensure regulatory compliance is achieved in a non-disruptive manner.

RBI | Master circular: Bank Finance to NBFC's stakes in banks

To make a regulatory policy regarding the financing of NBFCs by banks, RBI issued this master circular[3] on January 5, 2022.

- **Bank finance to NBFCs:** Banks can finance RBI registered NBFCs and unregistered NBFCs.
  - **NBFCs registered with RBI:** The ceiling on bank credit linked to Net Owned Fund (**NOF**) of NBFCs has been removed and Banks may formulate suitable loan policy with the approval of their Boards of Directors within the prudential guidelines and exposure norms.
  - **NBFCs not Registered with RBI:** In terms of 'Master Direction - Exemptions from the provisions of RBI Act, 1934' dated August 25, 2016, few categories of NBFCs are exempted from the need for registration with the RBI. Banks may take their credit decisions on the basis of usual factors like the purpose of credit, nature and quality of underlying assets, repayment capacity of borrowers as also risk perception, etc.
- **Bank finance to factoring company:** The banks can finance the factoring companies which:
  - Derive at least 50 % of their income from factoring activity
  - The receivables purchased / financed, form at least 50 % of the assets of the Factoring Company
- **Prudential norms for banks:** The definition and method of computation of exposure would be as prescribed in the circular on Large Exposures Framework dated June 03, 2019:
  - Banks' exposures to a single NBFC (excluding gold loan companies) will be restricted to 20% of their Tier I capital. Banks' exposures to a group of connected NBFCs or group of connected counterparties having NBFCs in the group will be restricted to 25% of their Tier I Capital.
  - The exposure of a bank to a single NBFC which is predominantly engaged in lending against collateral of gold jewellery shall be in accordance with circular on Bank Finance to NBFCs Predominantly Engaged in lending against Gold dated May 18, 2012.
  - Banks shall adhere to the intra-group limits in accordance with Guidelines on Management of Intra-Group Transactions and Exposures dated February 11, 2014.
  - Banks may also consider fixing internal limits for their aggregate exposure to all NBFCs put together.
- **Restrictions on financing:** There are some restrictions placed on the bank for NBFC financing:
  - Banks should not grant bridge loans of any nature, or interim finance against capital/debenture issues and/or in the form of loans of a bridging nature pending raising of long-term funds from the market by way of capital, deposits, etc. to all categories of Non-Banking Financial Companies.
  - Shares and debentures cannot be accepted as collateral securities for secured loans granted to NBFCs.
  - Banks should not execute guarantees covering inter-company deposits/loans thereby guaranteeing refund of deposits/loans accepted by NBFCs/firms from other NBFCs/firms.
  - Banks should not invest in Zero Coupon Bonds (**ZCBs**) issued by NBFCs unless the issuer NBFC builds up sinking funds for all accrued interest and keeps it invested in liquid investments/securities (**Government bonds**).
- **Activities not permitted for bank to finance:** There are activities like:
  - Bills Discounted or Rediscounted by NBFCs
  - Investments of NBFCs both of current and long-term nature, in any company/entity by way of shares, debentures

[2] https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=52618

[3] https://rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=12218

- NBFCs lending to individuals for subscribing to Initial Public Offerings (**IPO**s) and for purchase of shares from secondary market
- Unsecured loans/inter-corporate deposits by NBFCs to/in any company
- All types of loans and advances by NBFCs to their subsidiaries, group companies/entities are not allowed by banks to finance for the NBFCs

RBI accepted following recommendations of IWG

- During the lock-in period, promoter shareholding may continue as a minimum of 40% of the paid-up voting equity share capital of the bank for the first 5 years.
- Cap on promoters' stake is increased in the long run of 15 years from the current levels of 15% to 26% of the paid-up voting equity share capital of the bank. This stipulation should be uniform for all types of promoters and would not mean that promoters who have already diluted their holdings below 26% will not be permitted to raise it to 26% of the paid-up voting equity share capital of the bank.
- Shareholding of non-promoters will be capped at 10% of the paid-up equity capital in the case of natural persons and non-financial institutions or entities.
- A higher ceiling of 15% will be allowed for all categories of financial institutions/entities, supranational institutions, public sector undertaking or Government.
- When a pledge is invoked for over 5% of the paid-up capital, the RBI will restrict the voting rights of the pledgee until the pledgee applies for the regularization of the share acquisition.
- Minimum requirement of experience of promoting entity, including for a converting Non-Banking Financial Company (**NBFC**), may continue at 10 years for Universal Banks and 5 years for small finance banks (**SFB**).
- The initial paid-up voting equity share capital/ net worth required to set up a new universal bank is increased to INR 1,000 crore from the current INR 500 crore and in the case of SFB, it is increased to INR 300 crore from INR 200 crore.
- Non-operative financial holding companies (**NOFHC**) should continue to be the preferred structure for all new licenses to be issued for Universal Banks. NOFHC may be mandatory only in cases where the individual promoters/promoting entities/converting entities have other group entities.
- Whenever a new licensing guideline is issued, the benefit of any relaxation in the rules would be extended to existing banks immediately. If the new rules are tougher, the legacy banks will have to comply, but a transition path will be finalized with the banks to ensure regulatory compliance is achieved in a non-disruptive manner.

Ministry of Power | Consolidated guidelines & standards for EV charging infrastructure

Ministry of Power (**MOP**) on January 14, 2022 issued the revised and consolidated 'Charging Infrastructure for Electric Vehicles - Guidelines & Standards (Guidelines)' with the aim to enable faster adoption of Electric Vehicles (**EV**s) in India and accelerate the e-mobility transition of the country. The Guidelines were first released in 2018, revised in 2019 and subsequently amended in 2020. The Guidelines emphasize on provisions for Public Charging Stations (**PCS**) and individual owners.

Key highlights

- **Definitions:** Key definitions such as a Public Charging Station, Captive Charging Station, Battery Charging Station, Battery Swapping Station have been provided.
- **Use of existing electricity connections:** Owners are allowed to charge their EVs at their residence/offices using their existing electricity connections.
- **Who can set-up a PCS?** As per the Guidelines, any individual/entity is free to setup a PCS subject to meeting technical and safety requirements as laid down by the MOP, Bureau of Energy Efficiency (**BEE**) and Central Electricity Authority.
- **Alternate mode of obtaining electricity:** any PCS or chain of Charging Stations may obtain electricity from any generation company through open access. Such Open Access shall be provided within 15 days of receipt of application and shall be subject to payment of applicable surcharge, as per Tariff Policy Guidelines.
- **Setup requirements:** The Guidelines have provided a set of certain requirements to be fulfilled for setting up the public charging infrastructure, such as appropriate exclusive transformer, civil works, fire protection equipment, tie up Network Service Providers (**NSP**s) to provide real time status of charging stations, compliance to all relevant Acts and Rules by Authority, etc.
- **Online information to EV owners:** A tie-up with an NSP will be required while setting up the public charging infrastructure, to enable advance remote/online booking of charging slots by EV owners, which shall also include information of location, types and no. of chargers installed/available, service charges, etc.
- **Public charging infrastructure for long range/heavy duty EVs:** Enable setup of Fast Charging Stations (**FCS**) for long range/heavy duty EVs such as trucks, buses, etc.
- **Easy accessibility of charging stations:** It will be enabled that at least one charging station will be available in every 3 km, and one charging station to be setup at every 25 km on both sides of highways/roads. For long range/heavy duty EVs, to ensure setup of FCS at every 100 km, on both sides of highways/roads.
- **Database of PCS:** the BEE shall create and maintain a national online database of all PCS in consultation with the State Nodal Agencies (**SNA**s), where the BEE shall create a Web Portal/Software/Mobile Application for such database throughout the country.
- **Tariff and service charge:** The tariff for supply to PCS shall be a single part tariff and shall not exceed the 'average cost of supply' till March 31, 2025. Additionally, State Government shall fix the ceiling of the service charges to be charged by such PCS/FCS.
- **Provision of land at promotional rates:** As per the Guidelines, the land available with the Government/Public Entities can be provided for setting up PCS to a Government/Public entity on a revenue sharing basis for installation of PCS at a fixed rate of INR 1/kWh to be paid to the Land-Owning Agency from such PCS business payable on quarterly basis. Whereas the land by Land-Owning Agency is provided to a private entity for installation of PCS on bidding basis with floor price of INR 1/kWh

- **Rollout mechanism:** Phases divided in sets of 1-3 years and 3-5 years post consultations with State Governments and different agencies/departments of Central Government. BEE has been appointed as the Central Nodal Agency for the development of PCS Infrastructure. Every State Government will nominate a State Nodal Agency. An Implementation Agency may also be selected by the respective SNA for installation, operation, maintenance of PCS/FCS for designated period as per the policies in place and as entrusted by the SNA.

The Guidelines have been framed after careful consideration of progress made and suggestions received from various stakeholders and has been revised to support creation of EV Charging Infrastructure in India. With the onset of the Union Budget 2022 and the proposed framing of battery swapping policy to shall provide clarity and lead India towards an all-EV Nation.

IFSCA | Circular on investment banking in the IFSC by banking units

The International Financial Services Centers Authority (**IFSCA**) under Capital Market Intermediaries Regulations, 2021 (**CMI Regulations**) provides the regulatory framework for various categories of intermediaries operating in the capital markets in the International Financial Service Centre (**IFSC**) including investment banking activities in the IFSC. In the interest of facilitating ease of doing business, this circular[4] provides the framework for the banking unit licensed by the IFSCA to undertake investment banking activities in the IFSC.

Key provisions

- The banking unit shall inform the authority about the commencement of investment banking operations in the prescribed form along with the prescribed fees.
- The banking unit operating as an investment banker shall comply with CMI Regulations and other requirements prescribed by authority from time to time.
- The banking unit shall maintain an arm's length relationship between its investment banking activities and other activities.
- All investment bankers in the IFSC shall submit a report to the IFSCA on a half-yearly basis, within 45 days, in the format prescribed in this circular.

Featured topic | Mortgage on superstructures: From the lender's perspective

The concept of mortgage involves the mortgagor transferring its interest in immovable property in favor of the mortgagee or the lender, for securing the mortgagor's or a third party's financial obligation. The Transfer of Property Act, 1882 (**TPA**) comprehensively expounds on the concept as well as related laws. With mortgage being a part and parcel of lending and borrowing transactions, the article intends to discuss the nuances of separation of rights between the superstructures built over the land and the land underneath.

Separate ownership of land and superstructure under Indian laws

The general presumption is that the right of ownership on a superstructure/building is merged with the ownership of land, unless there is a contrary intent, whereby ownership of the superstructure vests in a separate entity than that of the land underneath. Indian law allows for separate ownership of the land and the building above.

Even before the TPA was enacted, in the case of *Thakoor Chander vs. Ramdhone Buttacharjee*[5] known as Paramanick's case, it was settled that building and other improvements do not, by the mere fact of their attachment to the soil, become the property of the owner of the soil[6].

In the case of *Narayandas Khettry vs. Jitendra Nath Roy Chowdhury & others*[7], it was particularly underlined as hereunder:

"(33) …..having special regard to the view held in India respecting separation of the ownership of buildings from the ownership of the land, and to recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it….."

In the case of *Dr. K.A. Dhairyawan and others vs. J.R. Thakur and others*[8], SC reiterated as follows:

"(6).....We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself….".

In the matter of *Dattaram Waman Kambli & Ors. vs. Shantaram Bapu Kambli & Ors*[9], the High Court of Bombay held that:

"(11) In view of the aforesaid position of law, it is apparent that the concept of the dual ownership, one of the lands and the other in the building or structure standing thereon has been recognised and accepted by the Courts in India. Merely because, the plaintiff has a share in the land beneath the building, it does not automatically follow that he would have shared in the building constructed also…."

[4] https://ifsca.gov.in/Viewer/Index/253
[5] (1866 6WR 228)
[6] Mulla: The Transfer of Property Act – 13th Ed 2018- page 28
[7] AIR (1927) PC 135
[8] AIR (1958) SC 789
[9] MANU/MH/1217/2014

On account of the above-mentioned judicial pronouncements, it is clear that there can be separate ownership of the underlying land from that of the building or structure standing thereupon. However, while it is legally permissible to create a mortgage on the superstructures erected/constructed without the land underneath, there are practical challenges associated with such a mortgage.

Challenges for creating mortgage over superstructure

- **Mortgage on superstructures constructed on leasehold land:** As a consequence of a borrower creating a mortgage on the superstructures constructed on leasehold land in favor of the lender, the said mortgage will practically exist only till the period of the lease. The right of the lender over such superstructure shall stand nullified once the lease period expires. Commercially, in such a case, the lender would have to limit its exposure so that, at any point in time, its outstanding dues do not exceed the commercial valuation of the unexpired period of the lease.
- **Equitable mortgage on superstructures:** The Indian laws are silent on what would constitute title documents with respect to immovable property attached to the land and superstructures constructed over it. For the creation of equitable mortgage by deposit of title deeds, the borrower may not have the title documents pertaining to the said superstructure. It will be challenging to establish documentary evidence of ownership of the superstructure, excluding the land. While this evidence may take up the form of documents relating to leasehold improvement expenses or other records that the concerned income tax department considers adequate to verify the expenditure incurred towards such immovable property, however, the aforesaid documents may require further corroboration and may not be sufficient to satisfy the documentary requirements of creating an equitable mortgage as per extant laws.
- **Registered mortgage:** The lenders may also face difficulty whilst creation of registered mortgage over the said immoveable properties as the sub-registrar may not be agreeable to creating a mortgage over the superstructures without the underlying land. Having said that, this problem is subject to the interpretation of extant registration regulations by the sub-registrars. The compulsion of creation of mortgage by a registered instrument (except in mortgage by deposit of title deeds) flows from Section 59 of TPA, read with Section 17 of the Registration Act, 1908, having been elucidated by the Hon'ble Supreme Court of India in the judgments of *The State of Haryana and Others V. Narvir Singh & Another*[10] and *Suraj Lamp & Industries Private Limited V. State of Haryana & Another*[11].
  Hence, creating mortgages over superstructures without the underlying land may bring hurdles in the process of registration by concerned sub-registrars, making the process onerous.
- **Enforcement-related:** In the case of creation of a mortgage on the superstructure without the creation of security over the underlying land, it may not be commercially viable for the lender to generate enough proceeds to fulfill the debt obligations of the borrower, in the event of enforcement of the mortgage. Hence, without the transfer of an interest in the concerned land, the creation of mortgages on superstructures solely may hinder the lender's rights of realization of the borrower's impending debts.
  On a conjoint reading of the above-mentioned legislations and judicial pronouncements, it may be noted that although it is legally permissible to create a mortgage on the superstructures constructed, without creating mortgage on the land underneath, the practical challenges that may arise on account of non-exclusive title over the land might limit the benefits of transfer of interest by borrowers in favor of lenders. Hence, it may be prudent for the lenders to tread cautiously while deciding to secure their interests by permitting the borrower to create charge solely on the superstructures built over the land.

[10] (2014) 1 SCC 105

[11] (2009) 7 SCC 363:(2009) 3 SCC (Civ) 126

Contributors

Dipti Lavya Swain
Partner

Sharmil Bhushan
Partner

Sumit P
Partner

Sunando Mukherjee
Partner

Vaibhav Srivastav
Senior Associate

Himanshu Seth
Associate

Hema Naik
Associate

Mishthi Seth
Associate

Pranav Rattan
Associate

Yash Parihar
Associate

HSA
AT A GLANCE

FULL-SERVICE CAPABILITIES

- BANKING & FINANCE
- COMPETITION & ANTITRUST
- CORPORATE & COMMERCIAL
- DEFENCE & AEROSPACE
- DISPUTE RESOLUTION
- ENVIRONMENT, HEALTH & SAFETY
- INVESTIGATIONS
- LABOR & EMPLOYMENT
- PROJECTS, ENERGY & INFRASTRUCTURE
- PROJECT FINANCE
- REAL ESTATE
- REGULATORY & POLICY
- RESTRUCTURING & INSOLVENCY
- TAXATION
- TECHNOLOGY, MEDIA & TELECOMMUNICATIONS

GLOBAL RECOGNITION

CONTACT US

www.hsalegal.com

mail@hsalegal.com

HSA Advocates

PAN INDIA PRESENCE

New Delhi
Email: newdelhi@hsalegal.com

Mumbai
Email: mumbai@hsalegal.com

Bengaluru
Email: bengaluru@hsalegal.com

Kolkata
Email: kolkata@hsalegal.com