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-LAW IN ACTION



Legal Updates

The Ministry of Power (“**MOP**”), vide notification dated 01.10.2021, has issued the Electricity (Transmission System Planning, Development and Recovery of Inter-State Transmission Charges) Rules, 2021 (“**Transmission System Rules**”) for regulating the inter-state transmission charges. The Transmission System Rules aims to provide optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity. Some of the salient features of the said Rules are as under: -

1. The Central Electricity Authority (“**CEA**”) will draw up short term plan on annual basis for up to next five years and perspective plan every alternate year for next ten years. Both the plans will be on rolling basis.
2. The Central Transmission Utility (“**CTU**”) will draw up plan for Inter-State Transmission System (“**ISTS**”) for upto next five years on rolling basis every year in consultation with the State Transmission Utilities, Central Government, State Governments, generating companies, Regional Power Committees, CEA etc.
3. The ISTS plan shall ensure that it is available as per the requirements of the States and the generators which are reflected by their General Network Access (“**GNA**”) requests and the planning should ensure that the growth of different regions is not obstructed by lack of availability of the ISTS.
4. The CTU shall place the ISTS projects along with their timeline for implementation before the National Committee on Transmission (including a nominee of each Regional Power Committee) constituted by the Central Government for their approval.
5. The generation or Distribution Companies (“**Discoms**”) or ISTS consumers shall be connected to the network and shall be able to sell or buy power from any generator or Discom or ISTS connected entity. The Appropriate Commission shall issue appropriate regulations to regulate GNA.

Ministry of Power
notifies the
Electricity
(Transmission
System Planning,
Development and
Recovery of Inter-
State Transmission
Charges) Rules,
2021

6. GNA shall be applied for and provided for a specific capacity and for a specific duration as may be specified by regulations of the Central Electricity Regulatory Commission (“**CERC**”) from time to time including the procedure and fees thereof. The costs of the connectivity system to the network shall be borne by connecting entity and the costs of strengthening of the system shall be a part of system cost and recovered in tariff.
7. The entire ISTS shall be treated as one integrated system and any Designated Inter-state Customer seeking GNA shall pay onetime GNA charges as prescribed by the CERC unless it is an existing Designated Inter-state Customers with existing Long Term Access quantum.
8. The monthly transmission charges shall be paid by all Designated Inter-state Customers on per Mega Watt basis at the rates determined by the CERC.
9. The CTU shall be responsible for billing, collection and disbursement of the transmission charges on the basis of regulation on fees and charges to be notified by the CERC.
10. The Central Government may, if it is satisfied, waive ISTS charges and losses for notified sources of energy for a specified duration.

The MOP, vide notification dated 08.10.2021, has modified the “Policy for Biomass Utilisation for Power Generation through Co-firing in Pulverised Coal Fired Boilers” issued in November 2017 (“**2017 Policy**”). The revised policy aims to further promote use of biomass pellets in coal based thermal power plants (“**TPPs**”). The revised policy, *inter alia*, modifies the 2017 Policy in following manner:

1. All coal based TPPs of power generation utilities with bowl mill and ball & race mill shall use 5% blend of biomass pellets primarily made of agro residue (torrefied in case of TPPs with ball & race mill) alongwith coal on annual basis w.e.f. one year of the date of issuance of this revised policy. The obligation shall increase to 7% w.e.f. two years after the date of this revised policy.
2. All coal based TPPs of power generation utilities with ball & tube mills shall use 5% blend of torrefied biomass pellets with volatile content below 22%, primarily made of agro residue alongwith coal on annual basis within one year from the date of the revised policy.
3. All generating utilities having some of their units/plants under Reserve Shutdown or not being despatched due to Merit Order Despatch (“**MOD**”) consideration shall increase the percentage of co-firing upto 10% in their other thermal power units/plants and 5% in TPPs with ball and tube mills.
4. TPP seeking exemptions/ relaxation from above co-firing guidelines maybe considered on case-to-case basis by a committee headed by the Chief Engineer (TE&TD), Central Electricity Authority (“**CEA**”), based on recommendations of the CEA.
5. The policy for co-firing of biomass would be in force for twenty-five years or till the useful life of the TPPs whichever is earlier.
6. The minimum contract period for procurement of biomass pellets by generating utilities shall be for seven years. There may be provision of firm price of biomass pellets during the first year of the contact with yearly rate variation from second year onwards.
7. The MOP will issue a model Request for Proposal and contact by 15.11.2021 for adhering to by all generating utilities in regard to their future contracts for biomass co-firing.
8. The increase in cost due to co-firing of biomass pellets shall be pass through in Energy Cost Rate (“**ECR**”) for all coal based TPPs set up under Section 62 of the Electricity Act, 20013 (“**Electricity Act**”). For the TPPs set up under Section 63, the ECR due to co-firing of biomass pellets can be claimed under ‘Change in Law’ provisions. However, the additional impact of ECR shall not be considered whilst deciding the MOD of the TPP.
9. The obligated entities such as Distribution Licensees (“**Discoms**”) can meet their renewable purchase obligation (“**RPO**”) by buying such generation of co-firing.

The MOP, vide public notice dated 06.10.2021, has notified its intention to bring out a comprehensive policy on Energy Storage in Power Sector focusing on regulatory, financial and taxation, demand management and technological aspects in order to speed up the implementation of storage capacity. The MOP aims to formulate the said policy to increase flexibility in Indian Power System to absorb the large-scale integration of the Renewable Energy (“**RE**”) into the system during the coming years.

Ministry of Power issues revised policy for Biomass Utilisation for Power Generation through co-firing in coal-based power plants

Ministry of Power invites suggestions with regard to formulation of comprehensive policy framework

and recommend other interventions to promote Energy Storage in Power Sector.

The stakeholders and interested persons are invited to send their suggestions on or before 31.01.2021 at the email address rp.pradhan@nic.in

The Hon'ble Supreme Court, vide order dated 06.10.2021 in *Power Exchange of India Ltd. v. Securities and Exchange Board of India and Ors.* in Civil Appeal No. 5290-5291 of 2011, settled the decade old dispute between the Central Electricity Regulatory Commission (“**CERC**”) and the Securities and Exchange Board of India (“**SEBI**”) concerning jurisdiction over forward trading / future contracts in electricity.

The Supreme Court observed that the jurisdiction would be delineated based on the settled terms between the two regulators in terms of the recommendations of the ‘Committee on Efficient Regulations of Electricity Derivatives’ (“**CERED**”) constituted by the MOP. Pursuant to the recommendations of CERED, both the SEBI and CERC have come to an agreement that the CERC will regulate all the physical delivery based forward contracts whereas the financial derivatives will be regulated by the SEBI. CERED in its report dated 30.10.2019, had made the following recommendations:

1. Ready Delivery Contracts and Non-Transferable Specific Delivery (“**NTSD**”) Contracts as defined in the Securities Contracts (Regulation) Act, 1956 (“**SCRA**”) in electricity, entered into by members of the power exchanges, registered under the CERC (Power Market) Regulations, 2010, shall be regulated by the CERC subject to the following conditions, namely: -
 - (a) the contracts are settled only by physical delivery without netting;
 - (b) the rights and liabilities of parties to the contracts are not transferable;
 - (c) no such contract is performed either wholly or in part by any means whatsoever, because of which the actual delivery of electricity covered by the contract or payment of the full price therefore is dispensed with;
 - (d) no circular trading shall be allowed and the rights and liabilities of parties to the specific delivery contracts shall not be transferred or rolled over by any other means whatsoever;
 - (e) the trading shall be done only by authorised grid connected entities or trading licensees on behalf of grid connected entities, as participants;
 - (f) the contracts can be annulled or curtailed, without any transfer of positions, due to constraints in the transmission system or any other technical reasons, as per the principles laid down by the CERC in this regard. However, once annulled, the contract cannot be reopened or renewed in any manner to carry forward the same transaction;
 - (g) all information or returns relating to the trade, as and when asked for, shall be provided to the CERC, who shall monitor the performance of the contracts entered on the power exchanges.
2. Commodity Derivatives in electricity other than NTSD contracts as defined in SCRA shall fall under the regulatory purview of the SEBI.

The CERC, vide orders dated 17.10.2021 in Petition No. 143/MP/2021 titled *Power Exchange India Limited v. National Load Despatch Centre* and in Petition No. 146/MP/2021 titled *Indian Energy Exchange Limited v. National Load Despatch Centre* approved the Integrated Day Ahead Market (“**IDAM**”) based on the Ministry of Power’s letter dated 24.03.2021 on “Development of Integrated Day Ahead Market (“**DAM**”) in Power Exchange with separate price formation for renewable energy (“**RE**”) Power and Conventional Power” on the platforms of Power Exchange India Ltd. (“**PXIL**”) and Indian Energy Exchange Limited (“**IEX**”).

The CERC approved the proposal of PXIL and IEX to introduce IDAM consisting of Green Day Ahead Contract in renewable energy segment (“**GDAC**”) and day ahead contract in the existing conventional segment subject to compliance of *inter-alia* following directions:

- a. There shall be a single window for bidding as per the existing timeline of 10 am to 12 noon. The Market Clearing shall take place in a sequential manner i.e., first RE segment will be cleared

Supreme Court settles 10-year long CERC - SEBI dispute; paves way for power derivatives, futures contracts

CERC approves Integrated Day Ahead Market for Power Exchanges

followed by the conventional segment considering the unselected bids of RE segment, if any. Further, the scheduling of the transactions of RE segment and conventional segment shall be done separately based on the procedure of Collective Transactions.

- b. Timelines for Collective Transactions have been specified in the procedure for scheduling of Collective Transactions. Further, in the event of real time transmission constraint, curtailment of transmission shall be done in accordance with the provisions of the Grid Code.
- c. The buyers may claim respective Renewable Purchase Obligation (“RPO”) based on the statement issued by power exchanges, in pursuance of the source of generation as indicated in No Objection Certificate / Standing Clearance of State Load Despatch Centre /Regional Load Despatch Centre.
- d. Participation in RE segment of IDAM shall be restricted to RE generators which are not registered under Renewable Energy Certificate mechanism and sale of power by such RE generator in the conventional segment of IDAM (uncleared bids) would not be eligible for issuance of renewable energy certificates.
- e. Waiver of interstate transmission charges and losses shall be governed as per the provisions of the Sharing Regulations as amended from time to time.

The CERC further directed PXIL and IEX to incorporate appropriate provisions in its Bye-laws, Rules and Business Rules with respect to introduction of GDAC.

PXIL was represented by Neeti Niyaman before the CERC.

The Supreme Court, vide its judgment dated 04.10.2021 in Civil Appeal No. 6216 of 2021 titled as *Garg Builders v. Bharat Heavy Electricals Limited*, has held that if the contract contains a specific clause that expressly bars payment of interest, then it is not open for the arbitrator to grant *pendente lite* interest. Referring to Section 31(7)(a) of the Arbitration and Conciliation Act, 1996 (“1996 Act”). The Supreme Court observed that the provisions of the 1996 Act give paramount importance to the contract entered into between the parties and categorically restricts the power of an arbitrator to award pre-reference and *pendente lite* interest when the parties themselves have agreed to the contrary.

The Supreme Court further observed that Exception I to Section 28 of the Contract Act, 1872 which refers to arbitration any dispute that arises can be made as a condition precedent before going to court and it does not restrict any party from enforcing their rights. However, the Court further observed that no cause of action accrues until the Arbitrator has made an award and the only amount awarded in such arbitration is recoverable in respect of the dispute so referred. While observing that Section 3(3)(a)(ii) of the Interest Act, 1978 stipulates that the Interest Act will not apply to situations where the payment of interest is “barred by virtue of an express agreement”, the Supreme Court held that when there is an express statutory permission for the parties to contract out of receiving interest and they have done so without any vitiation of free consent, it is not open for the Arbitrator to grant *pendente lite* interest.

The Supreme Court, vide judgment dated 08.10.2021, in Civil Appeal No. 6252 of 2021 titled as *Gujarat State Disaster Management Authority v. M/s Aska Equipments Limited*, held that the requirement under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (“MSME Act”) to deposit of 75% of the awarded amount as a pre deposit while preferring the application/appeal for setting aside the award, is mandatory. While answering the query whether in an appeal/application filed under Section 34 of the Arbitration & Conciliation Act, 1996 (“Arbitration Act”) read with Section 19 of the MSME Act, the appellate Court would have any discretion to deviate from deposit of 75% of the awarded amount as a pre-deposit, the Court observed that the expression “in the manner directed by such court” in Section 19 of the MSME Act indicates the discretion given to the Court to allow the pre-deposit to be made, if felt necessary, in instalments. In case, the Court is so satisfied with the explanation of hardships faced by the party, the direction to pay in instalments can be passed.

The Supreme Court, vide judgment dated 23.09.2021 in *Re: Cognizance for Extension of Limitation in Miscellaneous Application No. 665 of 2021 in SMW(C) No. 3 of 2020*, took up the issue of extension of limitation. Revising the order passed by the Supreme Court on 23.03.2020, wherein the period of limitation in all proceedings before Courts and Tribunals were extended, the Supreme Court issued following parameters for computing period of limitation for any suit, appeal, application or proceeding:

Supreme Court hold arbitrator cannot grant *pendente lite* interest if contract contains a specific clause expressly barring payment of interest

Supreme Court holds that pre-deposit of 75% of awarded amount u/s 19 of the MSME Act is mandatory while preferring application to set aside arbitration award

Supreme Court extends period of limitation in all proceedings before the Courts/Tribunals

1. The period from 15.03.2020 till 02.10.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2021, if any, shall become available with effect from 03.10.2021.
2. Cases where the limitation would have expired during the period between 15.03.2020 till 02.10.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 03.10.2021. In the event the actual balance period of limitation remaining, with effect from 03.10.2021, is greater than 90 days, that longer period shall apply.
3. The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

The Supreme Court has further directed the Government of India to amend the guidelines for containment zones, to state that regulated movement for time bound applications including for legal purposes will be allowed.

The Insolvency and Bankruptcy Board of India (“**IBBI**”), vide notification dated 30.09.2021, issued IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021 (“**Amendment Regulations**”) amending the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**Principal Regulations**”). The Amendment Regulations propose to make following modifications in the Principal Regulations: -

1. The Amendment Regulations insert Sub-Regulation (1A) in Regulation 17 which deals with ‘Constitution of Committee’ directing the committee and its members to discharge functions and exercise powers under the Insolvency and Bankruptcy Code, 2016 (“**Code**”) and these regulations in respect of corporate insolvency resolution process in compliance with the guidelines as may be issued by the Board.
2. Section 36A of the Principal Regulations dealing with ‘invitation for expression of interest’ has been amended to provide that any modification in the invitation for expression of interest may be made in the manner as the initial invitation for expression of interest was made. However, such modification shall not be made more than once.
3. The request for resolution plan or the evaluation matrix issued under Sub-regulation 36B (1) shall not be modified more than once.
4. In the Principal Regulations, in Regulation 39 (1A) stipulating for ‘approval of resolution plan’, shall be substituted to incorporate that the resolution professional may, if envisaged in the request for resolution plan, allow single time modification of the resolution plan received under Sub-Regulation 39 (1); or use a challenge mechanism to enable resolution applicants to improve their plans.
5. Regulation 39 (1B) of the Principal Regulations shall be substituted to enumerate that the committee shall not consider any resolution plan if: -
 - (a) received after the time as specified by the committee under Regulation 36B; or
 - (b) received from a person who does not appear in the final list of prospective resolution applicants; or
 - (c) does not comply with the provisions of Section 30 (2) of the Code and Regulation 39 (1) of the Principal Regulations.

The Amendment Regulations came into effect from the date of its publications i.e., 30.09.2021.

The IBBI, vide notification dated 30.09.2021, has notified the IBBI (Liquidation Process) (Second Amendment) Regulations, 2021 (“**Amendment Regulations 2021**”) to further amend the IBBI (Liquidation Process) Regulations, 2016 (“**2016 Regulations**”). The Amendment Regulations came into effect from the date of its publications i.e., 30.09.2021. The salient features of the Amendment Regulations 2021 are as following: -

IBBI notifies Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations, 2021

IBBI notifies IBBI (Liquidation Process) (Second Amendment) Regulations, 2021

1. Regulation 31A (1) of 2016 Regulations has been amended to stipulate that the liquidator shall constitute a stakeholder's consultation committee within sixty days from the liquidation commencement date, based on the list of stakeholders prepared under Regulation 31, to advise him on matters relating to-
 - (a) appointment of professionals and their remuneration under Regulation 7;
 - (b) sale under Regulation 32, including manner of sale, pre-bid qualifications, reserve price, amount of earnest money deposit, and marketing strategy;
2. The decision(s) taken by the liquidator prior to the constitution of consultation committee shall be placed before the consultation committee for information in its first meeting.
3. If the stakeholders of any class fail to nominate their representatives, such representatives shall be selected by a majority of voting share of the class, present and voting.
4. Where an asset is to be sold through auction, a liquidator shall do so in the manner specified in Schedule I provided the liquidator shall not require payment of any non-refundable deposit or fee for participation in an auction under the liquidation process. It is further provided that the earnest money deposit shall not exceed 10% of the reserve price.
5. The Amendment Regulations 2021 further provides that where the liquidator rejects the highest bid in an auction process, he shall intimate the reasons for such rejection of the highest bidder and mention it in the next progress report.

The Ministry of Finance (Department of Revenue) (“**MOF**”), vide its Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021, (“**2021 Notification**”) has notified 6% Goods and Services Tax on the renewable energy devices and parts for their manufacture. Some of the salient features of the 2021 Notification are as below: -

1. The MOF has inserted S. No. 210A in Schedule II of its earlier Notification No. No.1/2017-Central Tax (Rate) dated 28.06.2017 stipulating 6% GST on the following renewable energy devices and parts for their manufacture:
 - (a) Bio-gas plant;
 - (b) Solar power based devices;
 - (c) Solar power generator;
 - (d) Wind mills, Wind Operated Electricity Generator;
 - (e) Waste to energy plants / devices;
 - (f) Solar lantern / solar lamp;
 - (g) Ocean waves/tidal waves energy devices/plants;
 - (h) Photo voltaic cells, whether or not assembled in modules or made up into panels.
2. The 2021 Notification explains that if the goods specified under the new entries with S. No. 201A are supplied, by a supplier, along with supplies of other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the notification No. 11/2017-Central Tax (Rate), dated 28.06.2017, the value of supply of goods for the purposes of this entry shall be deemed as 70% of the gross consideration charged for all such supplies, and the remaining 30% of the gross consideration charged shall be deemed as value of the said taxable service.

The 2021 Notification came into effect on 01.10.2021.

Ministry of Finance levies includes “renewable energy devices and parts of their manufacture” under Schedule II for levy of 6% tax

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