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Legal Updates

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

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:

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 (“**1996 Act**”), 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.

**Ministry of Power
notifies the
Electricity (Timely
Recovery of Costs
due to Change in
Law) Rules, 2021**

The MoP, vide its notification dated 22.10.2021, has introduced the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021 (“**Rules**”). Some of the salient features of the said Rules are as under:

1. Change in Law has been defined under the Rules to mean change in law in relation to tariff (unless otherwise defined in the contract) made after the determination of tariff under Section 62 or Section 63 of the Electricity Act, 2003 (“**2003 Act**”) and includes change in interpretation of any law by a competent Court, change in any domestic tax, including duty, levy, cess, charge, or surcharge levied by the Government and any change in the condition of an approval or license obtained or to be obtained for purchase, supply or transmission of electricity (unless specifically excluded from the contract) and explicitly excludes any change in any withholding tax on income or dividends distributed to the shareholders of the generating company or transmission licensee, deviation settlement charge changes or frequency intervals by an Appropriate Commission.
2. The affected party i.e., the generating company or transmission licensee, must give a 3-week prior notice to the other party about the proposed impact in the tariff or charges to be recovered and the monthly tariff or charges can be adjusted to compensate the affected party to restore such affected party to the economic position prior to the change in law.
3. The affected party would be required to furnish computation of impact in tariff or charges to be adjusted and recovered, within 30 days of the occurrence of the change in law or on the expiry of 3 weeks from the date of the notice, whichever is later.
4. The recovery of the proposed impact in tariff or charges shall start from the next billing cycle of the tariff and will be computed as one time or monthly charges or per unit basis or in a combination of the two and shall be recovered in the monthly bill as the part of tariff and such amount shall be calculated in accordance with the formula under the agreement or as per the formula provided in the Schedule of the Rules. The recovery of the impacted amount shall be within a period of 180 months in case of fixed amount and until the impact exists in case of recurring amounts.
5. The Appropriate Commission shall verify the calculation for adjustment within 60 days from the date of receipt of the relevant documents and calculations from the generating company or transmission licensee and the same shall be adjusted in the monthly tariff or charges annually based on actual amount recovered, to ensure that the payment to the affected party is not more than the yearly annuity amount.

**Ministry of Power
notifies Electricity
(Promotion of
Generation of
Electricity from
Must-Run Power
Plant) Rules, 2021**

The MoP, vide its notification dated 22.10.2021, has notified the Electricity (Promotion of Generation of Electricity from Must-Run Power Plant) Rules, 2021 (“**Must-Run Rules**”) which defines and lays down the functioning of:

1. An intermediary procurer (“**Procurer**”): A deemed trader under the 2003 Act can be an intermediary company, nominated by the Government (Central/State), between the distribution licensees and the generating company, who is required either to aggregate the purchase of electricity from different generators and sell it to the distribution licensee. They are allowed to retain only the trading margin as specified in the agreements or the regulations or as may be determined by the Appropriate Commission from the sale of electricity, which must be through a transparent bidding process.
2. A must-run power plant (“**Plant**”): Any wind, solar, wind-solar hybrid or hydro power plant (in case of excess water leading to spillage) or a power plant from any other sources, as may be notified by the Appropriate Government, which has entered into an agreement to sell the electricity to any person. Curtailment of electricity of these plants are only allowed due to technical constraint or for reasons of security of the electricity grid in accordance with the Indian Electricity Grid Code (“**Grid Code**”). Also, compensation shall be payable by the Procurer at the rates specified in the agreement for purchase or supply of electricity. In case prior notice (prior to the start of the day ahead market or real time market or any other product introduced from time to time in the power exchange) is given, the unscheduled electricity of the Procurer shall be sold in the Power Exchange and the amount realised shall be adjusted against the compensation payable by the Procurer after deducting actual expenses paid for the sale. Any deficit shall be paid by the Procurer on monthly basis; any excess realisation of amount during a month from such sale shall be carried forward and adjusted in the next month or months. The final adjustments if any, shall be paid by the Plant to the Procurer within one month of the close of the financial year.
3. The Appropriate Commission shall adjust the rate of tariff on annual basis based on the actuals or adopt the weighted average tariff pursuant to an application made by the Procurer or distribution licensee.

4. The Procurer or trading licensee would be offered a resultant bid rate computed by considering the weighted average of different rates of multiple successful bidders selected to meet the full quantum of electricity specified in the bid for sale to third parties and would be applicable to agreements entered into prior to the commencement of the Must-Run Rules between the Procurer and distribution licensees.

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 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 MoP’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:

1. 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 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.

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

2. 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.
3. 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.
4. Participation in RE segment of IDAM shall be restricted to RE generators which are not registered under REC 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.
5. Waiver of interstate transmission charges and losses shall be governed as per the provisions of the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020, 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 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, 1978 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 order dated 20.10.2021 in *Punjab State Civil Supplies Corporation Limited and Anr. v. Ganpati Rice Mills and Anr.* (Special Leave to Appeal No. 36655/2016) has held that Section 31(7) of the 1996 Act grants substantial discretion to the arbitrator in awarding interest. The Court upheld imposition of interest at the rate of 18% per annum by the arbitrator and distinguished an earlier judgment of the Supreme Court in *A.P. State Trading Corporation Limited v. G.V. Malla Reddy and Company* (2010 SCC Online SC 1081) by concluding that the said judgment pertained to arbitration proceedings under the Arbitration Act of 1940. The Court also observed that even the agreement between the parties envisaged interest as high as 21%.

The Bombay High Court, vide order dated 13.10.2021 in *Godrej Properties Ltd. v. Goldbricks Infrastructure Pvt. Ltd.* (Commercial Arbitration Petition No. 23500 of 2021), held that the 1996 Act does not confer power on an arbitral tribunal to pass ex parte ad interim orders on application filed under Section 17 of the 1996 Act. While coming to the above conclusion, the Court observed that even if the arbitral tribunal is recognized to have the same power for making orders as that of the Court, for the purposes of and in relation to any proceedings before it, due meaning to the provisions of sub-section (2) of section 24 read with Section 18 of the 1996 Act would be required to be given. The said provisions prescribe that a party shall be given sufficient advance notice of any hearing and that the arbitral tribunal will be under an obligation to treat all the parties equally and that each party shall be given a full opportunity to present its case, which is required to be recognized to be applicable at all stages of the proceedings before the arbitral tribunal.

The Insolvency and Bankruptcy Board of India (“IBBI”), vide notification dated 30.09.2021, issued the IBBI (Insolvency Resolution Process for Corporate Persons) (Third Amendment) Regulations,

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

Supreme Court holds that an arbitrator has substantial discretion in awarding interest

Bombay High Court holds that an arbitral tribunal does not have the jurisdiction to pass ex parte ad interim order

**IBBI notifies IBBI
(Insolvency
Resolution Process
for Corporate
Persons) (Third
Amendment)
Regulations, 2021**

2021 (“**Amendment Regulations**”) amending the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (“**Principal Regulations**”). The Amendment Regulations propose to make the 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 IBC and these regulations in respect of corporate insolvency resolution process in compliance with the guidelines as may be issued by the IBBI.
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, 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 IBC and Regulation 39 (1) of the Principal Regulations.

The Amendment Regulations came into effect from the date of its publication, i.e., on 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 2021 came into effect from the date of its publication, i.e., 30.09.2021. The salient features of the Amendment Regulations 2021 are as follows:

1. Regulation 31A (1) of the 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 provide 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 Supreme Court, vide judgment dated 22.10.2021 in *V Nagarajan v. SKS Ispat and Power Ltd.*, held that the period of limitation for filing of appeal against an order as per Section 61 of the IBC will start running as soon as the same is pronounced, and that it is not dependent on the date when the order is uploaded. A party who fails to file an application for the certified copy of the order immediately cannot raise a plea to extend the period of limitation on the ground of delay in uploading the order.

The Court observed that sub-sections (1) and (2) of Section 61 of the IBC consciously omit the requirement of limitation being computed from when the “order is made available to the aggrieved

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

**Supreme Court
holds that
limitation period
for appeal under
Section 61 of IBC
starts from the date
of pronouncement
of order**

party”, in contradistinction to Section 421(3) of the Companies Act, 2013. Owing to the special nature of the IBC, the aggrieved party is expected to exercise due diligence and apply for a certified copy upon pronouncement of the order it seeks to assail, in consonance with the requirements under Rule 22(2) of the National Company Law Appellate Tribunal Rules, 2016 (“**NCLAT Rules**”). It was further observed that it is not open to a person aggrieved by an order under the IBC to await the receipt of a free certified copy under Section 420(3) of the Companies Act, 2013 (“**CA 2013**”) read with Rule 50 of the NCLAT Rules and prevent limitation from running.

The Court further observed that Rule 22(2) of the NCLAT Rules mandates the certified copy being annexed to an appeal, which continues to bind litigants under the IBC. While it is true that the tribunals may choose to exempt parties from compliance with this procedural requirement in the interest of justice, the discretionary waiver does not act as an automatic exception where litigants make no efforts to pursue a timely resolution of their grievance.

The Supreme Court, vide judgment dated 27.09.2021 in *Ravindranatha Bajpe v. Mangalore Special Economic Zone Ltd.* (Criminal Appeal Nos.1047-1048/2021), has held that company officials such as chairman, managing director, director, etc. cannot be held vicariously liable under criminal law for offences committed by the company unless there are specific allegations and averments against them with respect to their individual role.

The Supreme Court opined that a Court / Magistrate has to record to his satisfaction that a *prima facie* case against the accused like directors of the company and the role played by them in their respective capacities are *sine qua non* for initiating criminal proceedings against them. A bald statement that all of the accused (including senior company officials) have connived with each other in absence of cogent evidence is not sufficient justification for issuing process for the offences punishable under Sections 427, 447, 506 and 120B read with Section 34 of the Indian Penal Code, 1860 (“**IPC**”).

The Supreme Court observed that criminal law cannot be set into motion as a matter of course as the IPC does not contain any provision for attaching vicarious liability on the part of the officials of the company when the accused is the company. Therefore, the chairman, managing director / executive director and / or deputy general manager and / or planner / supervisor of the accused company cannot be arrayed as an accused and cannot be held vicariously liable for the offences committed by the company without any specific role attributed to them.

The Ministry of Corporate Affairs (“**MCA**”), vide general circular dated 27.09.2021, has extended the last date of filing of cost audit report (“**Report**”) by the cost auditor to the board of directors of companies for the financial year 2020-21. The MCA clarified that the cost auditor can submit the Report by 31.10.2021 and the same would not be considered as violation of Rule 6(5) of the Companies (Cost Records and Audit) Rules, 2014 (“**2014 Rules**”) which prescribes filing of such Report within 180 days from the end of the financial year. The MCA further clarified that the companies shall file the Report in e-form CRA-4 within 30 days from the date of receipt of its copy from cost auditor. However, in case a company has got general extension to hold annual general meeting under Section 96(1) of the Companies Act, 2013, then e-form CRA-4 may be filed within the timeline provided under the proviso to Rule 6(6) of the 2014 Rules.

The MCA, vide general circular no. 16/2021 dated 26.10.2021, notified relaxation in paying additional fees in case of delay in filing Statement of Account and Solvency by limited liability partnerships (“**LLP**”) up to 30.12.2021. The MCA had earlier received a representation seeking extension of timeline for filing the Statement of Account and Solvency without paying additional fees by LLPs on account of challenges faced by the LLPs due to the COVID-19 pandemic. As part of the government’s constant efforts to promote ease of doing business and compliances for micro, medium and small enterprises doing business through the vehicle of LLP, it has been decided to allow LLPs to file Form 8 (Statement of Account and Solvency) for the Financial Year 2020-2021 without paying additional fees up to 30.12.2021.

Supreme Court holds that specific allegations of personal role is necessary for implicating any company official to be vicariously liable for criminal acts of a company

Ministry of Corporate Affairs grants extension of last date of filing of cost audit report to the board of directors

Relaxation in paying additional fees in case of delay in filing Form 8 by LLP

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

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) Windmills, 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.

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