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-LAW IN ACTION

Legal Updates

MoP and MNRE issue advisory for transfer of 33 kV power system from DISCOMs to STU for performance improvement of sub-transmission system

The Ministry of Power ("**MoP**") and Ministry of New and Renewable Energy ("**MNRE**"), vide communication dated 01.09.2021, have requested the governments of all States and Union Territories to:

(i) hand over 33 kV power system from distribution companies ("**DISCOMs**") to the State Transmission Utility ("**STU**") for better planning, loss reduction and increased supply reliability in a phased manner. In the first phase, incremental assets in 33 kV network and existing overloaded asset(s) can be handed over to STUs;

(ii) provide financial assistance to STUs for upgrading / modernising their 33 kV assets;

(iii) in case the State Government is not in a position to provide financial assistance for such upgradation, then STUs can be asked to form joint venture ("**JV**") with Power Grid Corporation of India Ltd. ("**PGCIL**") on 50:50 equity basis for mobilising the financial resources.

PGCIL has already been advised by the MoP to form JV with STUs in case the State Government approaches PGCIL.

The MoP had constituted a committee to suggest measures for reduction of losses in the sub-transmission system ("**STS**") for ensuring reliability and efficient performance and to make recommendations for promoting investment in the STS. The committee issued the aforesaid advisory after collecting information regarding performance of utilities at different voltage levels for improvement in performance of 33kV system. Further, the committee also recommended technical measures for improvement of performance of 33 kV networks including robust network planning / network re-configuration, network reconductoring / use of higher capacity conductor, predictive maintenance, adoption of modern technology for improvement of reliability, and low loss power transformers.

MoP extends timeline for submission of comments on "Draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules 2021"

The MoP, vide notification dated 16.08.2021, had issued the draft Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules 2021 ("**Draft Rules**") inviting comments from stakeholders by 15.09.2021. The Draft Rules shall be applicable for purchase and consumption of green energy including energy from waste-to-energy plants. The Draft Rules, *inter alia,* put a restriction on the quantum of banked energy by green open access consumers up to 10% of the total annual consumption of electricity from the concerned DISCOM. Vide communication dated 16.09.2021, the MoP has extended the timeline for submission of comments on the Draft Rules by seven days i.e., till 22.09.2021.

MNRE issues clarification regarding time extension in scheduled commissioning date of RE projects considering disruption due to second surge of COVID-19

The MNRE, vide its office memorandum ("**O.M**") dated 15.09.2021, has clarified that the time extension in scheduled commissioning date of renewable energy ("**RE**") projects granted vide its earlier O.M.s dated 12.05.2021 and 29.06.2021 is an out-of-contract concession extended by MNRE to facilitate RE projects. The same is optional in nature and can be availed by RE project developers / EPC contractors provided they do not claim any increase in project cost on account of such time extension of 2.5 months. This increase in project cost includes any possible impact due to any change-in-law which would not have been there if the optional time-extension had not been claimed. The MNRE further clarified that RE developers would have the option of not claiming the time-extension under the earlier O.M.s issued by the MNRE, but approaching the appropriate forum as per their respective power purchase agreements ("**PPA**") for claiming appropriate time-extension, as may be admissible.

Vide the aforesaid previous O.M.s issued by the MNRE, a time extension of 2.5 months had been granted subject to the condition that the RE developer desirous of seeking such time extension would give an undertaking that the said time-extension would not be used as a ground for claiming termination of PPA or for claiming any increase in project cost, including interest during construction or upward revision of tariff. The said clarification has been issued by the MNRE in light of the concerns raised by many RE project developers that on submission of the above undertaking, they would have to relinquish their right to claim reimbursement under change-in-law provision under the PPA.

CERC invites comments from stakeholders on the Draft CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2021

The Central Electricity Regulatory Commission ("**CERC**"), vide notification dated 07.09.2021, has issued the draft CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2021 ("**Draft DSM Regulations**"). The Draft DSM Regulations provide for a regulatory mechanism for treatment and settlement of deviation from schedule of injection or drawal of electricity to ensure reliability, security and stability of the grid. The CERC has invited comments from stakeholders on the Draft DSM Regulations by 08.10.2021. The CERC (Deviation Settlement Mechanism and related matters) Regulations, 2014 will stand repealed on notification of the Draft DSM Regulations. The salient features of the Draft DSM Regulations are as follows, *inter alia*:

(i) 'Deviation' in a time block has been defined for a seller of electricity as total actual injection minus total scheduled generation including the schedule for ancillary services; and for a buyer of electricity as total actual drawal minus total scheduled drawal including the schedule for ancillary services.

(ii) The regulations will be applicable to all grid-connected regional entities and other entities engaged in inter-State purchase and sale of electricity. All grid-connected regional entities are required to adhere to their schedule as per the CERC (Indian Electricity Grid Code) Regulations, 2010.

(iii) The Draft DSM Regulations discourage deviation from schedules. Any deviation will be managed by the Load Despatch Centre as per the CERC (Ancillary Services Operations) Regulations, 2015.

(iv) The Draft DSM Regulations further provide for the computation of deviation; normal rate of charges for deviation; charges for deviation in a time block payable by a seller to Deviation and Ancillary Service Pool Account ("**Account**"); accounting of charges for the Account and schedule of payment of charges for deviation.

The Ministry of Petroleum and Natural Gas ("**MoPNG**"), vide notification dated 02.09.2021, has invited comments from interested stakeholders on the Draft Petroleum (Amendment) Rules, 2021

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("**Draft Amendment Rules**") – which further amend the Petroleum Rules, 2002 - on or before 17.10.2021. The salient features of the Draft Amendment Rules are as follows, *inter alia*:

(i) No person to import any ISO tank container filled or intended to be filled with petroleum without prior approval from the Chief Controller of Explosives;
(ii) No petroleum to be imported by air except at airports authorized for this purpose by the Central Government from time to time. Any person intending to import petroleum by air will be required to obtain landing permit from the Director General of Civil Aviation;
(iii) Declaration and certificate to be furnished and licence to be produced before importing petroleum by air. This will not be applicable to importation of petroleum exempted under Sections 7, 8 and 9 of the Petroleum Act, 1934; and
(iv) No petroleum to be unloaded except with the permission of the Commissioner of Customs.

Supreme Court clarifies that bar under Section 9(3) of the Arbitration and Conciliation Act, 1996 would not operate once an application under Section 9(1) has been entertained and taken up for consideration by the court

The Hon'ble Supreme Court, vide judgment dated 14.09.2021 in *Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd.* (Civil Appeal No. 5700 of 2021) has held that the parties to an arbitration agreement are entitled to approach the appropriate court under Section 9(1) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") for interim measures before or during the arbitral proceedings, or at any time after the arbitral award is made and published, but before such award is enforced in accordance with Section 36 of the 1996 Act. A civil court of competent jurisdiction thus has the jurisdiction to admit, entertain and decide an application under Section 9(1) of the 1996 Act any time before the final arbitral award is enforced in accordance with Section 36 of the 1996 Act.

The Supreme Court opined that once an arbitral tribunal is constituted, the appropriate court could not entertain and / or take up for consideration and apply its mind to an application for interim measure, unless the court found that remedy under Section 17 of the 1996 Act was inefficacious, even though the application may have been filed before the constitution of the arbitral tribunal. However, such bar under Section 9(3) would not operate, once an application had been entertained and taken up for consideration by the appropriate court.

The Supreme Court added that if the application has already been taken up for consideration, and is in the process of consideration or has already been considered, the question of examining whether remedy under Section 17 is efficacious or not would not arise. The requirement to conduct such exercise arises only when the application is being entertained and/or is taken up for consideration. The Court reasoned that since the rationale for interim relief was requirement of urgent disposal of certain reliefs sought, it could, therefore, never have been the legislative intent that even after an application under Section 9 is finally heard, relief would have to be declined and the parties be remitted to their remedy under Section 17. The Supreme Court thus allowed the appeal only to the extent of clarifying that it would not be necessary for the Commercial Court in the present case to consider the efficacy of relief under Section 17, since the application under Section 9 had already been entertained and considered by the Commercial Court.

Supreme Court holds that a resolution plan cannot be withdrawn or modified once it is

The Supreme Court, vide judgment dated 13.09.2021 in *Ebix Singapore Private Limited* v. *Committee of Creditors of Educomp Solutions Ltd. and Anr.* (Civil Appeal No. 3224 of 2020), has held that as per the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), the withdrawal or modification of a successful resolution plan cannot be done by the National Company Law Tribunal ("**NCLT**") once the same has been submitted after following due process. The Court held that when a resolution plan is submitted, it becomes binding and irrevocable between the committee of creditors ("**CoC**") and resolution applicant.

It was observed by the Court that a resolution plan will be valid when it complies with the procedure under IBC and not by the consent of the parties. The mechanisms of the IBC provide sufficient guidance on the conduct of all participants in the process and the binding effect of the CoC-approved resolution plan is evidenced by the execution of a performance bank guarantee furnished by the successful resolution applicant. The bank guarantee is returned once the resolution plan is approved by the NCLT / Adjudicating Authority, thus making it binding. The procedure followed under Section 31 of IBC is regulated by the IBC itself and not by the Indian Contract Act, 1872.

successfully submitted as per the process determined under the IBC

It was added by the Supreme Court that the residual powers of the NCLT / Adjudicating Authority cannot be exercised to create procedural remedies which have substantive outcomes in the process under IBC. Under the IBC, withdrawal from corporate insolvency resolution proceedings ("**CIRP**") can be done by following the procedure under Section 12A of the IBC and Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. Giving unwarranted approval to such withdrawal would result in improper resolution to the corporate debtor or would delay the process of liquidation with depressed assets which would nullify the object of IBC. The Supreme Court further observed that in future, if the legislature were to recognise the concept of withdrawals or modifications to a resolution plan after it is submitted to the NCLT, it must specifically provide for an enabling provision under the IBC.

Supreme Court upholds NCLAT's decision expressing its incapability to condone the delay beyond the statutory period in an appeal against NCLT's Order

The Hon'ble Supreme Court, vide judgment dated 14.09.2021 in *National Spot Exchange Limited v. Mr. Anil Kohli, Resolution Professional* (Civil Appeal No. 6187 of 2019), has held that the National Company Law Appellate Tribunal ("**NCLAT**") cannot condone a delay beyond 15 days in an appeal filed against a decision of the NCLT as per Section 61(2) of the IBC.

Section 61(2) of the IBC provides that every appeal from the final order of NCLT to NCLAT must be filed within 30 days. A proviso to such section, however, provides for NCLAT to condone a delay of 15 days over the provided period of 30 days if it feels that there was sufficient cause for not filing the appeal within the limitation period of 30 days. The Apex Court observed that considering the statutory provisions which provide that delay beyond 15 days in preferring the appeal is uncondonable, the same cannot be condoned even in exercise of powers under Article 142 of the Constitution of India.

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