Legal Updates

Ministry of Power introduces guidelines for transparent bidding of Fly Ash to the end users by the power plants

The Ministry of Power ("**MoP**"), vide its letter dated 22.09.2021, has issued an advisory to thermal power plants ("**TPPs**") for auction of fly ash to the end users. The letter was issued to the Chief Managing Directors and Managing Directors of all coal and lignite based TPPs as well as Principal Secretaries / Secretaries (Power/Energy) of all State Governments and Union Territories and the Chairperson, Central Electricity Authority ("**CEA**"). The revised guidelines, *inter alia*, stipulate the following:

1. Fly ash to be mandatorily auctioned through a transparent bidding process.
2. Un-utilized quantity of fly ash remained after bidding can be considered to be given free of cost on first come first served basis to the user agency willing to bear transportation cost.
3. The TPPs have to bear the cost of transportation of unutilised fly ash to be provided free to eligible projects.
4. The end users shall be obligated to source the fly ash from the nearest TPP to reduce transportation cost. The MoP shall issue appropriate directions in case of refusal by any TPPs.
5. The transportation cost to be borne as per provisions of Ministry of Environment, Forest and Climate Change notification by the TPPs and shall be discovered on competitive bidding basis. TPPs shall prepare a panel of transportation agencies every year based on competitive bidding for transportation in slabs of 50km. There shall be no gap between the expiry of one panel and the finalization of the fresh panel.
6. Fly ash will be offered on competitive demand basis to the end users who offer the highest price and seek minimum support for transportation cost.
7. The TPPs may offer fly ash subject to their technical restrictions and precautions.

Ministry of Power invites comments from certain stakeholders on the "Draft Electricity (Rights of Consumers) Amendment Rules, 2021"

The MoP, vide notification dated 30.09.2021, has issued the Draft Electricity (Rights of Consumers) Amendment Rules, 2021 ("**Draft Electricity Rules**"). The MoP has invited comments from certain stakeholders including the Ministry of New & Renewable Energy ("**MNRE**"), the CEA, the Central Electricity Regulatory Commission ("**CERC**") and all State Electricity Regulatory Commissions ("**SERCs**") on the Draft Electricity Rules by 21.10.2021. The MoP, vide the Draft Electricity Rules, proposes to make following amendments to the Electricity (Rights of Consumers) Rules, 2020:

1. The distribution licensees ("**DISCOMs**") serving in the metros and the large cities shall ensure 24x7 uninterrupted power supply to all the consumers, in order to curtail the requirement of the diesel generating ("**DG**") sets. The SERCs shall give trajectory of System Average Interruption Frequency Index and System Average Interruption Duration Index for the cities.

2. The Draft Electricity Rules propose for a separate reliability charge for the DISCOMs to arrange required funds for investment in the infrastructure for ensuring the reliability of supply to the consumers. The SERCs are required to devise a provision of penalty in case the standards laid down are not met by the DISCOMs.

3. The Draft Electricity Rules direct the consumers to shift to cleaner technology such as renewable energy ("**RE**") with battery storage in place of DG sets for essential back up power within five years from the date of the publication of the Draft Electricity Rules or as per the timelines given by the SERCs considering the reliability of supply by the DISCOMs.

4. The DISCOMS shall simplify the process of granting temporary connections to the consumers for construction activities or any temporary usage, etc. through a prepayment meter only. Such connections shall be provided on an urgent basis within 48 hours to avoid any use of DG sets.

Ministry of Power redesigns REC mechanism removing floor and forbearance price limits

The MoP and the MNRE, on 29.09.2021, have given their assent to amendments in the existing renewable energy certificate ("**REC**") mechanism to allow determination of REC prices by market conditions. The amendments seek to align the 'mechanism' with the emerging changes in the power scenario and also to promote new renewable technologies.

The amendments aim to provide flexibility to the market players, additional avenues, rationalization and also address issues in respect of the REC validity period. The salient features of changes proposed in the revamped REC mechanism are:

1. Validity of REC would be perpetual i.e., till it is sold.

2. Floor and forbearance prices are not required to be specified.

3. The CERC to place a monitoring and surveillance mechanism to curb hoarding of RECs.

4. The RE generator will be eligible for issuance of RECs for the term of power purchase agreement as per the prevailing guidelines. The existing RE projects that are eligible for RECs would continue to get RECs for 25 years.

5. A technology multiplier is proposed to be introduced for promotion of new and high priced RE technologies, which can be allocated in various baskets specific to technologies depending on maturity.

6. RECs can be issued to obligated entities (including distribution licensees and open access consumers) which purchase RE power beyond their renewable purchase obligation compliance notified by the Central Government.

7. No REC to be issued to the beneficiary of subsidies / concessions or waiver of any other charges.

8. The Forum of Regulators to define concessional charges uniformly for denying the RECs.

9. The amendment proposes to allow traders and bilateral transactions in REC mechanism.

The changes proposed in the amended REC mechanism will be implemented by the CERC through regulatory process.

APTEL upholds imposition of penal interest on LPS; states that it is not interest over interest

The Appellate Tribunal for Electricity ("**APTEL**"), vide order dated 20.09.2021 in Appeal No. 386 of 2019 titled *Maharashtra State Electricity Distribution Company Ltd. v. Maharashtra Electricity Regulatory Commission and Anr*., upheld the imposition of penal interest at the rate of 1.25% on the late payment surcharge ("**LPS**") to be paid by the DISCOM to the wind power generator ("**WPG**") in terms of the wind energy purchase agreement. The appellant pleaded that in law, there was no principle of imposition of interest over interest and yet the Maharashtra Electricity Regulatory Commission ("**MERC**") has practically awarded penalty interest of 1.25% on the LPS which itself is a penalty. The MERC reasoned that the claim of LPS merges with the principal amount. Once such claim is submitted, interest on the submitted claim can be awarded. The WPG also argued that upon passing of a decree, a claim for interest becomes merged with the principal sum as part of the decretal amount, and the court has power to award interest on the decretal amount.

The APTEL held that penal interest can accrue at 1.25% per month on LPS and the same does not fall foul of Section 3 of the Interest Act, 1978 and it is not "interest upon interest". Moreover, such levy is also not over the amount of arrears after it has been repaid. Instead, it is in accord with the long-established practice of awarding future interest on the "principal sum adjudged".

Supreme Court dismisses Adani appeal against authorisation to State-run Gujarat Gas to lay and maintain gas distribution network in Ahmedabad

The Supreme Court, vide judgment dated 28.09.2021 in *Adani Gas Limited* v. *Union of India & Ors.* in *Civil Appeal No. 6008-6009 of 2021,* dismissed a plea by Adani Gas Ltd. ("**Adani**"), excluding it from supplying gas distribution rights in three areas of Ahmedabad District and granting the same to state-owned Gujarat Gas Ltd. ("**Gujarat Gas**").

The Supreme Court held that the "deemed authorization" status as claimed by Adani under proviso to Section 16 of the Petroleum and Natural Gas Regulatory Board Act, 2006 ("**PNGRB Act**") is subject to other provisions of Chapter IV, including Section 17 and, further, that only entities granted authorization by the Central Government, fell in that category. As a sequitur, it was held that entities which had received authorization from States, had to seek authorization afresh under the regime put in place by the PNGRB Act, in terms of Section 17(2), and in compliance with the conditions spelt out under the PNGRB (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations, 2008 ("**CGD Regulations**").

The Court further held that Regulation 18 of the CGD Regulations which pertains to '*entities not authorized by the Central Government for laying, building, operating or expanding CGD network before the appointed day*' is neither arbitrary, nor ultra vires and is compatible with the overall objectives of the PNGRB Act.

The Court further held that Adani's claim was precluded by the principle of approbate-reprobate, as it accepted authorization granted by PNGRB (including exclusion of disputed areas), furnished the performance bond, and even participated in the auction for the excluded areas, and only thereafter challenged authorization when its bid was unsuccessful. Hence, exclusion of Adani from the disputed areas was held to be justified in the overall facts and circumstances.

Supreme Court clarifies that consolidating proceedings into a composite tribunal where disputes arise out of separate agreements is inappropriate

The Supreme Court, vide judgment dated 22.09.2021 in *DLF Home Developers Limited versus Rajapura Homes Private Limited & Anr* (Civil Appeal No. 17 of 2020), observed that existence of an arbitration agreement would not prevent the court from declining a prayer for reference if the dispute in question does not correlate to the said agreement. However, while considering two arbitration petitions, the Supreme Court noted that two agreements, though interconnected, are still separate agreements and therefore should not be subjected to a composite arbitration. Nevertheless, to avoid wastage of time and resources, the Supreme Court allowed the two petitions and referred the dispute to a sole arbitrator. The Court observed that the arbitrator would be at liberty to wind up the proceedings and petitioners can seek recourse to a separate forum which is laid down for in one of the agreements. The Supreme Court, referring to *Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1,* held that instead of merely delivering a purported dispute at the doors of the chosen arbitrator, the court(s) are obliged to apply their mind to the core preliminary issues, albeit, within the framework of the Arbitration and Conciliation Act, 1996.

TRAI designates the Telecommunication

The Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) (Third Amendment) Regulations, 2021 notified on 11.06.2021 by the Telecom and Regulatory Authority of India ("TRAI") envisioned that the operationalization and oversight of the framework for conditional access system ("CAS") and subscriber management system ("SMS") are to be carried out

Engineering Centre, Department of Telecommunication, Government of India, as a testing and certification agency under the Interconnection Regulations

through a testing and certification agency. In light of the same, TRAI has, vide order dated 20.09.2021, designated the Telecommunication Engineering Centre, Department of Telecommunication, Government of India as a testing and certification agency which will carry out the following functions, viz.:

1. overall administration, coordination and execution of testing and certification of CAS and SMS as per the requirements specified in Schedule IX to the Telecommunication (Broadcasting and Cable) Services Interconnection (Addressable Systems) Regulations, 2017 ("Interconnection Regulations"), as amended;

2. notify and maintain test schedules and test procedures ("TSTP") in relation to the requirements specified under Schedule IX;

3. empanel / declare the list of accredited testing labs that fulfil the requirements for carrying out the testing as per the defined TSTP;

4. provide certifications for all products tested and certified by the accrediting testing labs; and

5. maintain the version and deployment details of CAS and SMS deployed in India.

Supreme Court holds that power-of-attorney having authorisation of financial creditor can file application under Section 7 of the IBC

The Supreme Court, vide judgment dated 30.09.2021 in *Rajendra Narottamdas Sheth & Anr. Versus Chandra Prakash Jain & Anr.* (Civil Appeal No. 4222 of 2020), has held that the power-of-attorney ("**POA**") holder of a financial creditor, who has been given authorisation, can file an application under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**") on its behalf.

The Supreme Court rejected the appellant's submission that the person who filed the application under Section 7 of the IBC is not the "authorised representative" of the financial creditor but a "POA holder". The Court held that the application cannot be rejected merely on the ground that no separate specific authorisation letter has been issued by the financial creditor in favour of the POA holder since the POA has been granted pursuant to a resolution passed by the bank's board of directors for instituting such application on its behalf.

On the issue of limitation, the Supreme Court held that at the time of filing an application under Section 7 of the IBC, the onus is on the financial creditor to *prima facie* demonstrate that the debt and default is not time-barred. The Court further held that if the financial creditor furnishes the required information relating to the acknowledgement of debt by the corporate debtor, with such acknowledgement having taken place within the initial period of three years from the date of default, a fresh period of limitation shall commence from the date of such acknowledgment. The Supreme Court concluded that it is no more *res integra* that Section 18 of the Limitation Act, 1963 is applicable to applications filed under Section 7 of the IBC.

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

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.

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

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.

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