Legal Updates

Ministry of Power issues "Tariff based Competitive-bidding Guidelines for Transmission Service"

The Ministry of Power ("**MoP**"), vide resolution dated 10.08.2021, issued the "Tariff based Competitive-bidding Guidelines for Transmission Service" ("**TBCB Guidelines**") under Section 63 of the Electricity Act, 2003 ("**EA 2003**"). The TBCB Guidelines shall apply for procurement of transmission services for transmission of electricity through tariff-based competitive bidding and for selection of the bidder who will acquire the special purpose vehicle for a new inter-state / intra-state transmission system and to build, own, operate and transfer the specified transmission system elements.

The TBCB Guidelines introduce two new entities i.e., the bid process coordinator that shall be responsible for conducting the bid process for procurement of required transmission services for each inter-state transmission project and the transmission service provider ("**TSP**") that shall be tasked with seeking transmission license from the Appropriate Commission. The TSP would take-up execution of the transmission project so as to complete commissioning and operationalization of the transmission system as per the specified schedule in the transmission service agreement. The TBCB Guidelines also propose a detailed 'Bidding Process' in order to facilitate procurement of transmission services.

In this vein, the MoP vide letter dated 06.08.2021 has also issued Revised Standard Bidding Documents for procurement of Inter-State Transmission Services through Tariff Based Competitive Bidding process.

Supreme Court holds that an award delivered by an emergency arbitrator is enforceable under Indian law

The Hon'ble Supreme Court, vide judgment dated 06.08.2021 in *Amazon.com NV Investment Holdings LLC v. Future Retail Limited*, has held that an award delivered by an emergency arbitrator under the Arbitration Rules of the Singapore International Arbitration Centre ("**SIAC Rules**") can be said to be an order under Section 17(1) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**").

The Court noted that when Section 17(1) of the 1996 Act uses the expression "*during the arbitral proceedings*", the said expression would be elastic enough, when read with the Section 21 of the 1996 Act, to include emergency arbitration proceedings, which only commence after receipt of notice of arbitration under the SIAC Rules. An emergency arbitrator's orders, if provided for under institutional rules, would be covered by the 1996 Act. The definition of "arbitration" in Section 2(1)(a) means any arbitration (whether or not administered by a permanent arbitral institution). When read with Sections 2(6) and 2(8), it becomes clear that even interim orders that are passed by emergency arbitrators under the rules of a permanent arbitral institution would, on a proper reading of Section 17(1), be included within its ambit.

As far as Section 17(1) is concerned, the "*arbitral tribunal*" would, when institutional rules apply, include an emergency arbitrator. Further, since Section 9(3) and Section 17 form part of one scheme, it is clear that an "*arbitral tribunal*" as defined under Section 2(1)(d) would not apply and the arbitral tribunal spoken of in Section 9(3) would be like the "*arbitral tribunal*" spoken of in Section 17(1) which would include an emergency arbitrator appointed under institutional rules. Further, a party cannot be heard to say, after it participates in an emergency award proceeding and having agreed to institutional rules made in that regard, that thereafter it will not be bound by an emergency arbitrator's ruling. Having agreed to paragraph 12 of Schedule 1 to the SIAC Rules, it cannot lie in the mouth of a party to ignore an emergency arbitrator's award by stating that it is a nullity when such party expressly agrees to the binding nature of such award from the date it is made and further undertakes to carry out the said interim order immediately and without delay. Section 17, as construed in the light of the other provisions of the Act, clearly leads to the position that such emergency award is made under the provisions of Section 17(1) and can be enforced under the provisions of Section 17(2).

With respect to the question whether an order passed under Section 17(2) of the 1996 Act by a learned Single Judge of the High Court in enforcement of the award of an emergency arbitrator is appealable, the Court held that no such appeal lies under Section 37 of the 1996 Act. The Court noted that though the legal fiction created under Section 17(2) for enforcement of interim orders is created only for the limited purpose of enforcement as a decree of the court, the same fiction cannot be extended to encompass appeals from such orders as this would go beyond the clear intention of the legislature. By making Section 17(1) the mirror image of Section 9(1) as to the interim measures that can be made, and by adding Section 17(2) as a consequence thereof, significantly, no change was made in Section 37(2)(b) to bring it in line with Order XLIII, Rule 1(r). The said section continued to provide appeals only from an order granting or refusing to grant any interim measure under Section 17. Thus, granting or refusing to grant any interim measure under Section 17 would only refer to the grant or non-grant of interim measures under Section 17(1)(i) and 17(1)(ii). The opening words of Section 17(2), viz. "*subject to any orders passed in appeal under Section 37…*" also demonstrates the legislature's understanding that orders that are passed in an appeal under Section 37 are relatable only to Section 17(1).

The Supreme Court therefore allowed the appeal filed by Amazon against order passed by a Division Bench of the Delhi High Court staying the order of the Ld. Single Judge which had upheld the award of the emergency arbitrator, directed attachment of properties, and restrained Future Retail Limited from going ahead with the Rs. 24,713 crore merger with Reliance Retail.

Supreme Court holds that foreign awards are enforceable against non-signatories to the arbitration agreement

The Supreme Court in *Gemini Bay Transcription Pvt. Ltd.* v. *Integrated Sales Service Ltd. & Anr.* (Civil Appeal No. 8345 and 8346 of 2018) vide order dated 10.08.2021 held that a foreign award can be binding on non-signatories to an arbitration agreement and can be thus enforced against them.While referring to Section 46 of the 1996 Act, the Supreme Court observed that the said provision does not speak of "parties" at all, but of "persons" who may, therefore, be non-signatories to the arbitration agreement.

Further, Section 35 of the 1996 Act speaks of "persons" in the context of an arbitral award being final and binding on the "parties" and "persons claiming under them", respectively. Section 35 would,

therefore, refer to only persons claiming under parties and is, therefore, more restrictive in its application than Section 46 which speaks of "persons" without any restriction. Thus, the Supreme Court held that a foreign award cannot be resisted on the sole ground that it was passed against a non-signatory to the arbitration agreement.

Calcutta High Court holds that an arbitration agreement governed by foreign law cannot be seen as excluding the application of Section 9 of the Arbitration and Conciliation Act, 1996 by implication

The Calcutta High Court, vide judgment dated 03.08.2021 in *Medima LLC v. Balasore Alloys Limited* (AP/267/2021) has opined on whether the 'Governing Law' clause contained in an agreement, for referring the disputes between the parties to arbitration before the International Chamber of Commerce excludes the operation of Section 9 of the 1996 Act and found application for interim protection under Section 9 of the 1996 Act, in respect of award of a London-seated arbitration, to be maintainable.

The Calcutta High Court noted that the caveat to the application of Section 9 to international commercial arbitrations with a place outside India and an arbitral award made in such place is '*an agreement to the contrary'* (under the proviso to Section 2(2) of the 1996 Act). Thus, with respect to an arbitration agreement governed by a foreign law and with a foreign seat, the agreement must indicate in clear and express terms that the parties intend to exclude the operation of Section 9 from the purview of the said arbitration agreement. An arbitration agreement which merely chooses the law governing the underlying agreement and the arbitration and the conduct thereof, without anything more, cannot be seen as excluding the application of Section 9 by implication.

The Court further noted that the expression "international commercial arbitration" used in the proviso to Section 2(2) of the 1996 Act would necessarily mean a foreign-seated arbitration which forms the substratum of Part II of the 1996 Act. Thus, the proviso to Section 2(2) would cover arbitration agreements regardless of whether 'seat' is used or 'international commercial arbitration' is not used. The language *".....and an arbitral award made or to be made....."* in Section 2(2) read with the proviso makes it clear that Section 9 would apply in a post-award scenario subject to the other conditions of the proviso being satisfied. Section 9 read with the proviso to Section 2(2) would require a purposive construction which would be in line with the intention of the framers for bringing in the proviso by the Arbitration and Conciliation (Amendment) Act, 2016. Otherwise, if suitable interim measures are not granted to a foreign award-holder and the award is made to pass the tests for enforcement under Part II, the award-holder may be denuded of its rights.

The Court therefore held that the petitioner was entitled to seek interim measures against the respondent award-debtor in the present case.

Insolvency and Bankruptcy Code (Amendment) Act, 2021 deemed to have come into force on 04.04.2021

The Insolvency and Bankruptcy Code (Amendment) Act, 2021 ("**IBC Amendment**"), which amends certain provisions of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"), has received the assent of the President of India on 11.08.2021. The IBC Amendment shall be deemed to have come into force on 04.04.2021. The salient features of the IBC Amendment are as follows, *inter alia*:

1. The Central Government may, by notification, specify minimum amount of default of higher value, which shall not be more than rupees one crore, for matters relating to the pre-packaged insolvency resolution process of corporate debtors under Chapter III-A of the IBC.
2. An application for initiating pre-packaged insolvency resolution process may be made in respect of a corporate debtor classified as a micro, small or medium enterprise ("**MSME**") under Section 7(1) of the MSME Development Act, 2006, subject to certain conditions.
3. The corporate debtor should file the aforesaid application within a definite time period not exceeding 90 days. The Adjudicating Authority shall, within a period of 14 days of the receipt of the application, admit or reject such application.
4. The pre-packaged insolvency resolution process shall commence from the date of admission of the application and shall be completed within a period of 120 days from the pre-packaged insolvency commencement date ("**Commencement Date**"). The resolution professional should submit the resolution plan, as approved by the committee of creditors ("**CoC**"), to the Adjudicating Authority within a period of 90 days from the Commencement Date.
5. The Adjudicating Authority shall, on the Commencement Date: (a) declare a moratorium; (b)appoint a resolution professional; and (c) cause a public announcement of the initiation of the pre-packaged insolvency resolution process to be made by the resolution professional immediately

after his appointment. The order of moratorium shall have effect from the date of such order till the date on which the pre-packaged insolvency resolution process period comes to an end.

6. During the pre-packaged insolvency resolution process period, the management of the affairs of the corporate debtor shall continue to vest in the board of directors or the partners of the corporate debtor.
7. The resolution professional shall, within 7 days of the Commencement Date, constitute a CoC, based on the list of claims confirmed under Section 54F(2)(a) of the IBC. The approval of the resolution plan by the CoC, shall be by a vote of not less than 66% of the voting shares, after considering its feasibility and viability, the manner of distribution proposed, and taking into account the order of priority amongst creditors as laid down in Section 53(1) of the IBC, including the priority and value of the security interest of a secured creditor.
8. The CoC, at any time after the Commencement Date but before the approval of resolution plan, may by a vote of not less than 66% of the voting shares, resolve to initiate a corporate insolvency resolution process ("**CIRP**") in respect of the corporate debtor, if such corporate debtor is eligible for CIRP under Chapter II of the IBC.

Electronic based offering of securities not to be construed as electronic mode

The Ministry of Corporate Affairs ("**MCA**") has notified the Companies (Specification of Definitions Details) Third Amendment Rules, 2021 and Companies (Registration of Foreign Companies) Amendment Rules, 2021 vide notifications dated 05.08.2021. The said amendments insert an explanation in the respective rules to the effect that electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under Section 18 of the Special Economic Zones Act, 2005 shall not be construed as 'electronic mode'.

Further, the MCA has, vide notification dated 05.08.2021, exempted foreign companies and companies incorporated outside India from the provisions of Sections 387 to 392 (both inclusive) of the Companies Act, 2013 ("**CA 2013**") in so far as they relate to offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under Section 18 of the Special Economic Zones Act, 2005.

MCA issues clarification on spending of CSR funds for COVID-19 vaccination

The MCA has, vide general circular dated 30.07.2021, clarified that spending of corporate social responsibility ("**CSR**") funds for COVID-19 is an eligible CSR activity. The MCA further clarified that spending of CSR funds for COVID-19 vaccination for persons other than the employees and their families is an eligible CSR activity under item no. (i) of Schedule VII of the CA 2013 relating to promotion of health care including preventive health care and item no. (xii) relating to disaster management. The companies may undertake the aforesaid activity subject to fulfilment of Companies (CSR Policy) Rules, 2014 and the circulars related to CSR issued by the MCA from time to time.

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