neeti niyaman
Regulatory & Policy Practice

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GATI - विधि
-LAW IN ACTION

Legal Updates

CERC approves Methodology of settlement of accounts for bilateral short term and collective transactions, for the period of Grid Disturbance

The Central Electricity Regulatory Commission ("**CERC**") has approved the "Methodology of settlement of accounts for bilateral short term and collective transactions, for the period of Grid Disturbance" ("**Methodology**") which shall be applicable to an Inter-State Generating Station ("**ISGS**") affected by any category of Grid Disturbance. The Methodology shall come into force from the date of coming into effect of CERC (Indian Electricity Grid Code) (Second amendment) i.e. 17.02.2014. The salient features of the Methodology are as follows, *inter alia*:

- A separate schedule called as "Schedule for period of GD" shall be made for settlement of accounts for under injection by the ISGS due to Grid Disturbance ("**GD**").
- "Schedule for period of GD" shall be arrived for purpose of settlement of deviation at accounts by modifying original schedule as per the following priority till the revised scheduled becomes equal to the actual injection:

  (i) Bilateral short term;
  (ii) Collective transactions;
  (iii) Medium Term Open Access;
  (iv) Long Term Access.

- Schedules among more than one transaction under bilateral short-term injections or on more than one exchange shall be revised on pro rata basis.
- No revision of schedule of corresponding buyer shall be carried out in such cases.
- The Deviation Settlement Mechanism ("**DSM**") account for the ISGS shall be issued for "Schedule for period of GD" and for other entities, it shall be based on their original schedule.

- The ISGS shall reimburse the amount received from corresponding buyer for the original schedule in excess of "Schedule for period of GD" to the DSM pool account at the rate of contract with the said buyer. Such ISGS shall provide a copy of contract with buyer(s) to concerned Regional Load Despatch Centre ("**RLDC**") and Regional Power Committee ("**RPC**").

- The ISGS shall reimburse the amount received for the corresponding transaction through power exchange for the original schedule in excess of "Schedule for period of GD" to DSM pool account. The concerned power exchange(s) shall provide the Area Clearing Price ("**ACP**") for the time blocks affected by GD.

Ministry of Power (MoP) issues a letter to CERC and SERCs regarding "Reduction in cost of power due to Pre-Payment in entire value chain of Power Sector"

Ministry of Power ("**MoP**") has issued a letter dated 15.09.2019 to CERC and all the State Electricity Regulatory Commissions stating that the Pre-Payment/Advance Payment mode for power purchase by the consumers or Distribution Companies ("**DISCOMs**") is already in place as an earlier Order dated 28.06.2019 regarding "Opening and Maintaining adequate Letter of Credit as Payment Security Mechanism under PPA by Distribution Licensee" was made effective from 01.08.2019. MoP in the said letter has further stated that in case of advance payment even for a day, there may be either no requirement or reduced requirement of working capital by the generating company or transmission company or DISCOMs (in case of prepayment by consumers) and that the present system of rebate in case of timely payment does not fully compensate against the reduced requirement of working capital.

In light of the same, discussions in Power Ministries Conference were held on 11.10.2019 and 12.10.2019 and the following has been decided:

- "*Appropriate Commission may determine the reduction of Generation Tariff/Transmission Tariff in case of full or part advance payments made by the DISCOMs/Procurers to the Generating Stations or Transmission Company. Similarly, the retail tariff for the consumers should also be reduced to this extent. Thus, the norms for determination of tariff may be revised accordingly.*

- *An appropriate rebate mechanism may be developed by the Appropriate Commission in case of those DISCOMs who opt for making Advance payments as per the Order of MoP.*

- *Appropriate Commission may also provide such suitable rebate or reduction in generation tariff for the power purchased from competitively bid generating projects. In such cases the Supplier and Procurer can mutually agree for such mechanism.*"

MoP has requested the Appropriate Commissions to take suitable action in this regard and submit an Action Taken Report ("**ATR**") to the Forum of Regulators ("**FOR**"). Thereafter, FOR is requested to send monthly ATR to MoP.

APTEL directs Pipeline Infrastructure Limited not to claim ship or pay charges from the shippers for EWPL

Appellate Tribunal for Electricity ("**APTEL**") in its judgment dated 15.11.2019 in *Appeal No. 39 of 2017 & IA Nos. 94, 95, 187 of 2017 Pipeline Infrastructure Limited v. Petroleum and Natural Gas Board* has directed Pipeline Infrastructure Limited ("**Appellant**") not to claim any penalty/compensation from the shippers for not conforming to the conditions of ship-or-pay of Gas Transportation Agreement. The Appellant challenged declaration dated 30.12.2016 made by the Respondent for Appellant's East-West Pipeline ("**EWPL**") capacity wherein the Appellant's declared capacity was revised without considering the changes in parameters which was pointed out repeatedly by the Appellant in its various communications. EWPL was originally laid based on the volume and pressure of a single source which started declining immediately after a year of operation. It became beyond the control of the shipper to maintain the contractual parameters, viz., inlet pressure and volume etc. APTEL observed that no other gas sources were available in the region for transportation through EWPL. The maximum achievable operational capacity of the pipeline got limited because the variable parameters like inlet pressure, source flow etc declined. Hence, Appellant did not have any other option but to enhance the capacity of the pipeline. APTEL further observed that supplying gas under contractual parameters at the entry points was the responsibility of the shipper and not of the transporter

(Appellant). The relevant regulations also allow the operator of the pipeline to redetermine the capacity of the pipeline considering the changes in the operational parameters.

Therefore, in regards to capacity determination of the EWPL for the years 2010-11 and 2011-12, the matter was remanded back to the Respondent directing it to consider the change in the operating parameters, viz., inlet pressure etc., while declaring the capacity of the pipeline for the years 2010-11 and 2011-12 and declare the capacities within 3 (three) months from the date of this order. APTEL also held that this order shouldn't be cited as a precedent as this matter stemmed from an unusual situation demanding a special approach to solve the issue.

Supreme Court strikes down Section 87 of the Arbitration and Conciliation Act, 1996

The Hon'ble Supreme Court in *Hindustan Construction Company Ltd. v. Union of India* has struck down Section 87 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"). The Section was inserted vide Arbitration and Conciliation (Amendment) Act, 2019 and made the 2015 Amendment non-applicable to court proceedings arising out of or in relation to arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**"). The bench held the provision to be "manifestly arbitrary" and observed that the retrospective resurrection of an automatic-stay not only turned the clock backwards contrary to the object of the Arbitration Act and 2015 Amendment Act but also resulted in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed. The Hon'ble Supreme Court observed that the introduction of Section 87 would cause delay in disposal of arbitration proceedings and an increase in the interference of Courts into arbitration matters, which would defeat the objective of the Arbitration Act.

Supreme Court holds that a Person Interested in Outcome of Arbitration cannot Appoint the Sole Arbitrator

The Hon'ble Supreme Court has held in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd.,* while dealing with an application under Section 11(6) read with Section 11(12)(a) of the Arbitration Act that a person who has an interest in the outcome or decision of the disputes must not have the power to appoint a sole arbitrator. Hon'ble Supreme Court relied on the decision in *TRF Limited v. Energo Engineering Projects Limited* to observe that a situation where both parties could nominate respective arbitrators was a completely different situation, for the reason that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party, but in cases where only one party has the right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Hence, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. Hon'ble Supreme Court further observed that appointment can be made by a Court if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed.

Supreme Court upholds constitutional validity of IBC

The Hon'ble Supreme Court, while setting aside the order passed by the Ld. National Company Law Appellate Tribunal ("**NCLAT**") on 04.07.2019 has vide this judgment upheld the constitutional validity of the Insolvency and Bankruptcy Code, 2016 ("**IBC**"). This matter dealt with the Corporate Insolvency Resolution Process ("**CIRP**") of Essar Steel and the resolution plan submitted by ArcelorMittal worth Rs. 42,000 Crore. The key takeaways from the decision are as follows:

- The Resolution Professional ("**RP**") is responsible for managing the affairs of the Corporate Debtor but also to appoint and convene meetings of the Committee of Creditors ("**CoC**"). The RP also has to collect, collate and finally admit claims of all creditors which are then examined. However, the role of the RP is not adjudicatory but administrative in nature.

- The CoC is responsible for the resolution of insolvency and whether or not to accept the resolution plan. The CoC has to consider the feasibility and viability of resolution plan including the manner of distribution of funds.

- Powers exercised by NCLT has to be within the parameters set out in Section 30(2) of the IBC whereas the powers exercised by NCLAT are set out in Section 32 read with Section 61(3) of

the IBC. The NCLT has to examine the resolution plan and the reasons given by the CoC for approving the same. The NCLT only has to see if the parameters in Section 30(2) have been met by the CoC and then accept the resolution plan.

- The amended Regulation 38 does not say that the secured and unsecured or financial and operational creditors have to be paid the same amounts. As long as the provisions of the IBC and Regulations are met, the CoC can negotiate with the Resolution Applicant to get beneficial terms which can involve difference in distribution of amounts between different creditors.

- The word 'mandatorily' in Section 12 of the IBC which provides that CIRP must be completed within 330 days has been struck down as being unconstitutional in the face of Article 14 and Article 19(1)(g).

- Section 30(2)(b) is a beneficial provision in favour of OCs and dissenting FCs which provides a minimum amount to be payable that was not earlier payable and hence was held to be valid.

NCLAT observes that limited liability partnership will fall within the meaning of 'Corporate Debtor'

NCLAT in ***K. Paramasivam v. The Karur Vysya Bank Ltd.*** has held that a limited liability partnership will fall within the meaning of 'Corporate Debtor' under Section 3(8) of the IBC. The Appellant was the promoter of the Corporate Debtor. The Appellant contended that the Respondent had given loans to three entities and the Corporate Debtor had extended Corporate Guarantees for these loans. The Appellant contended that the Section 7 application filed by the Respondent was not maintainable against a 'partnership firm' or a 'proprietary concern' (borrowers herein) and thus was not maintainable against the Corporate Debtor. The Appellant also contested that the it does not fall within the definition of 'Corporate Guarantor' or 'Personal Guarantor'.

NCLAT whilst dismissing the Appeal relied upon the definition of 'Corporate Person' as given in Section 3(7) of the IBC and Section 5(8) of the IBC, which defines financial debt. NCLAT observed that since the Corporate Debtor had taken a guarantee in respect of a Financial Debt, it shall qualify to be a Financial Creditor and therefore application under Section 7 application will be maintainable.

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