SAGUS SPEAKS

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This Newsletter covers key Regulatory & Policy Updates, Government Notifications and Judicial Pronouncements.

REGULATORY & POLICY UPDATES

SEBI extends the timelines for implementation of provisions of circular on redressal of investor grievances through the SCORES platform and for creating linkage with Online Dispute Resolution platform.

The Securities and Exchange Board of India ("SEBI") through its circular dated 01.12.2023 ("New SCORES Circular")[1] has extended the timelines for implementation of its circular dated 20.09.2023 ("SCORES Circular") relating to the processing of investor grievances by (a) listed companies, (b) registered intermediaries, or (c) market infrastructure institutions (collectively, "Entities") and the framework for monitoring and handling of investor complaints by Designated Bodies (as specified under Schedule II of the SCORES Circular) which was due to come into force with effect from 04.12.2023. The effective date for implementation of the SCORES Circular has now been extended to 01.04.2024.

However, the Entities shall continue to submit action taken reports on the SCORES platform within 21 calendar days from date of receipt of the complaint, as set out under the SCORES Circular.

SEBI issued a circular specifying the process required to be followed by AIFs for dematerialising/ crediting existing units when investors have not provided the account details to the AIF.

SEBI through its circular dated 21.06.2023 had mandated all schemes of Alternate Investment Funds ("AIFs") to dematerialise their units within the specified timelines.

SEBI issued another circular on 11.12.2023[2] prescribing the process to be followed by AIFs for dematerialising/ crediting

[1] SEBI Circular dated 01.12.2023

[2] SEBI Circular dated 11.12.2023

the issued units when investors do not provide the demat account details to AIF's.

The procedure to be followed by various stakeholders is briefly set out below:

i. The managers of AIF's will regularly reach out to existing investors to obtain their demat account details to credit the issued units in their respective demat accounts. This will be done by implementing the standards formulated by the pilot Standard Setting Form for AIF's along with two depositories, in consultation with SEBI.
ii. Units already issued by schemes of AIFs to investors who have not provided their demat account details will be credited to a separate demat account opened by the AIF called the Aggregate Escrow Demat Account ("Escrow Account"). New units to be issued in demat form will also be allotted to such investors and credited into the Escrow Account.
iii. Units held in the Escrow Account shall be transferred to the respective investor's demat account within 5 working days from when the investors provide the demat account details to AIF.
iv. Schemes of AIFs with a corpus of over INR 500 crores shall credit the units already issued to existing investors (who were on-boarded prior to 01.11.2023) that have not provided their demat account details to the Escrow Account latest by 31.01.2024. The units issued to investors that have provided the details of their demat accounts will be credited into the respective demat accounts at the earliest but not later than 31.01.2024.
v. Schemes of AIFs with a corpus of less than INR 500 crores shall credit the units already issued to existing investors, who have not provided their demat account details by 30.04.2024, to the Escrow Account latest by 10.05.2024. The units issued to investors who have provided the details of their demat accounts will be credited into the respective demat account at the earliest but not later than 10.05.2024.
vi. Units of AIFs held in the Escrow Account can be redeemed and the proceeds will be distributed to the respective investors' bank accounts with a full audit trail.
vii. Managers of AIFs are required to maintain investor-wise 'know your customer', i.e., KYC details for the units held in the Escrow Account including name, PAN and bank account details with the audit trail of the transactions. This is to be reported to the depositories and custodians on a monthly basis.

The circular further directs depositories to amend their byelaws, rules, and regulations to implement these provisions.

[3] RBI Circular 2023-24/88

RBI increased the limit for processing of e-mandates for recurring transactions.

The Reserve Bank of India ("RBI") issued a circular dated 12.12.2023[3] increasing the limit for processing of e-mandates for recurring transactions. The circular shall come into effect immediately.

Earlier, RBI had issued a circular dated 16.06.2022 wherein it had issued relaxation with respect to Additional Factor of Authentication for processing of e-mandates/ standing instructions of cards, prepaid payment instruments, and unified payments interface for subsequent recurring transactions with values up to INR 15,000.

Pursuant to the Statement on Development and Regulatory Policies released on 08.12.2023, the aforesaid limit has been increased by the RBI from INR 15,000 to INR 1,00,000 per transaction for the following categories of transactions: (a) subscription to mutual funds, (b) payment of insurance premiums and (c) credit card bill payments.

GOVERNMENT NOTIFICATIONS

MNRE issued National Repowering and Life Extension Policy for Wind Power Projects, 2023

The Ministry of New and Renewable Energy ("MNRE") by its circular dated 07.12.2023 has replaced its 'Policy for repowering of the Wind Power Projects' issued in 2016 with the National Repowering and Life Extension Policy for Wind Power Projects, 2023[4] ("Revised Policy") to facilitate the repowering and refurbishment of old wind turbines. The Revised Policy has been issued with an objective to optimize the utilization of wind energy resources by maximizing energy yield per square kilometer in the project area by employing the latest onshore wind turbine technologies.

The highlights of the Revised Policy are as follows:

i. The Revised Policy enables the repowering or replacing of old turbines with more efficient turbines, even before the end of their design life, through modifications in components with a view to optimize the utilization of wind energy resources.

ii. The following wind turbines are eligible under the Revised Policy for repowering/ refurbishment: (a) wind turbines not in compliance with the quality control order issued by MNRE; (b) wind turbines which have completed their design life with the relevant applicable standards; (c) wind turbines of rated capacity below 2 MW; and (d) wind turbines which have been installed for 15 years or more, based on commercial/ voluntary considerations.

[4] Revised Policy on Wind Power Projects

iii. A repowering/refurbishing project shall be one which satisfies one of the eligibility conditions specified in (ii) above and which results in enhancement of annual energy generation by such turbine by at least 1.5 times the actual generation prior to such repowering/refurbishing.

iv. Repowering projects have been categorized into two types: (a) Standalone project consisting of either a single turbine or a group of turbines owned by a single entity; and (b) Aggregation project comprising a group of turbines owned by multiple owners who share a common infrastructure. The Revised Policy provides the modalities involved in standalone and aggregation projects.

v. In the event the project owner chooses to extend the life of the wind turbines, any refurbishment undertaken for life extension purposes will be classified as a standalone project. The existing tenure under the PPAs may be extended by repowering/ refurbishment for a maximum period of 2 years.

vi. The incumbent DISCOM's will have no obligation to purchase or right over additional power following the repowering. Developers can sell extra power as desired.

vii. A wind farm/ turbine undergoing repowering/ refurbishment shall be exempted from supplying power under its PPAs during the period of such repowering/refurbishment, subject to (a) recommendation of the Wind Repowering Committee, in this regard; and (b) such exemption period shall not exceed 2 years excluding any force majeure events from the date of consent issued by the relevant nodal agency.

viii. The DISCOMs/ PPA owners will be given at least a year's advance notice, so they are able to tie-up for alternate sources of power for the intervening period.

ix. The repowering/ refurbishment projects would be implemented through the respective state nodal agency/ organization involved in promotion of wind energy in the state or the central nodal agency appointed by the central government.

JUDICIAL PRONOUNCEMENTS

Non-Signatories to an arbitration agreement can also be bound by it in accordance with the 'Group of Companies' Doctrine.

A five judge Constitution Bench of the Supreme Court ("Constitution Bench") in its judgment dated 06.12.2023 in the matter of ***Cox and Kings Limited v. SAP India Pvt Limited***[5] has upheld the doctrine of 'Group of Companies' holding that an arbitration agreement can also bind non-signatories subject to certain conditions.

This petition arose from a reference made a by a three-judge bench of the Supreme Court in *Cox and Kings Limited v. SAP India Private Limited*, where the bench had questioned the interpretation of the 'Group of Companies' doctrine as set out in *Chloro Control India (P) Limited v. Severn Trent Water Purification Inc*[6] *("Chloro Controls").*

The following issues were subject to adjudication by the Constitution Bench in this petition: (i) whether the 'Group of Companies' doctrine should be read into Section 8 of the Arbitration and Conciliation Act ("A&C Act") (in light of the expression 'claiming though or under' in such section) or whether it can exist independent of any statutory provision, (ii) whether the 'Group of Companies' doctrine should continue to be invoked on the basis of the principle of 'single economic reality', (iii) whether the 'Group of Companies' doctrine be construed as a means of interpreting implied consent or intent to arbitrate between the parties, and (iv) whether the principles of alter ego/or piercing the corporate veil can alone justify pressing the 'Group of Companies' doctrine into operation even in the absence of implied consent.

After detailed deliberations, the Constitution Bench concluded that:

i. The 'Group of Companies' doctrine is intrinsically found on the principle of the mutual intent of parties to a commercial bargain. The basis for application of the 'Group of Companies' doctrine rests on maintaining the corporate separateness of group companies while determining the common intention of the parties to bind a non-signatory party to the arbitration agreement. The requirement of a written arbitration agreement under Section 7 does not exclude the possibility of binding non-signatory parties. The definition of "parties" under Section 2(1)(h) read with Section 7 of the A&C Act includes both signatory as well as non-signatory parties, and the conduct of the non-signatory parties could be an indicator of their consent to be bound by the arbitration agreement. Under the A&C Act, the concept of a "party" is distinct and different from the concept of "persons claiming through or under" a party to the arbitration agreement.

ii. The principle of alter ego or piercing the corporate veil cannot be the basis for the application of the 'Group of Companies' doctrine. The Court observed that the principle of alter ego disregards the corporate separateness and intentions of the parties in view of the overriding considerations of equity and good faith. In contrast, the 'Group of Companies' doctrine facilitates the identification of intention of the parties to determine the true parties to the arbitration agreement without disturbing the legal personality of the entity in question. Therefore, the principle of alter ego or piercing the corporate veil

[5] [Arbitration Petition (Civil) No. 38 of 2020]

[6][(2013) 1 SCC 641]

cannot be the basis for application of the 'Group of Companies' doctrine.

iii. The 'Group of Companies' doctrine has an independent existence as a principle of law which stems from a harmonious reading of Section 2(1)(h) along with Section 7 of the A&C Act.

iv. In order to apply the 'Group of Companies' doctrine, the courts or tribunals, as the case may be, have to consider all the cumulative factors laid down in *ONGC v. Discovery Enterprises Pvt. Ltd.*[7], i.e., (i) mutual intent of the parties, (ii) relationship of a non-signatory to a party which is a signatory to the agreement, (iii) commonality of the subject-matter, (iv) composite nature of the transaction; and (v) performance of the contract. Resultantly, the principle of single economic unit cannot be the sole basis for invoking the doctrine.

v. The approach of the court in *Chloro Controls* to the extent that it traced the 'Group of Companies' doctrine to the phrase "claiming through or under" is erroneous and against the well-established principles of contract law and corporate law. The persons "claiming through or under" can only assert a right in a derivative capacity.

vi. At the referral stage, the referral court should leave it for the arbitral tribunal to decide whether the non-signatory is bound by the arbitration agreement.

Delhi High Court held that an arbitral tribunal does not have the jurisdiction to create security on a property over which a charge is already created and registered in favour of a third party.

The High Court of Delhi in its judgment dated 20.11.2023 in the matter of ***Asset Reconstruction Company India Limited v. ATS Infrastructure Limited and Ors***[8] held that an arbitral tribunal has no powers to affect the rights and remedies of third-party secured creditors while determining disputes pending before it.

In the instant case, Asset Reconstruction Company India Limited ("ARCIL") sought the setting aside of an interim order passed by an arbitrator in proceedings to which ARCIL was not a party. The arbitrator through its order had directed security over certain properties to be created in favour of the Dalmia Group (a party to the arbitration proceedings in question). However, there was a pre-existing charge on such properties already in favour of ARCIL, which was not brought to the notice of the arbitrator. It was ARCIL's case that the order of the arbitrator directly interfered with the contractual rights and entitlements of ARCIL.

The Court observed that security and charge created in favour of ARCIL was duly registered as per Section 77 of the Companies Act, 2013 and there was no document evidencing creation and registration of charge in favour of the Dalmia Group, and that the Dalmia Group had deemed knowledge of the charge created on the said properties in favour of ARCIL pursuant to Section 80 of the Companies Act, 2013. The Court noted that such deemed knowledge would put the registered charge holder, i.e., ARCIL in the instant case, in a preferential position as compared to all other unsecured creditors.

Consequently, the Court modified the interim order passed by the arbitral tribunal by excluding the relevant properties upon which the charge had already been created in favour of ARCIL, from the scope of the impugned order.

Delhi High Court held that modification of an award of the arbitral tribunal is not permissible under Section 34 of the A&C Act.

The High Court of Delhi in its judgement dated 30.11.2023 in the matter of ***Anil Kumar Gupta v. Municipal Corporation of Delhi & Anr***[9] held that the court while exercising its powers under Section 34 of the A&C Act cannot reduce the rate of interest awarded by the arbitral tribunal as it amounts to modification of the arbitral award.

The present appeal arose after a learned Single Judge through an order dated 12.12.2018, while partly allowing a petition filed under Section 34 of the A&C Act, reduced the rate of interest awarded in favour of Anil Kumar Gupta by the arbitral tribunal from 18% to 12%. Further, after the disposal of the petition under Section 34 of the A&C Act, Municipal Corporation of Delhi ("MCD") filed an application dated 08.08.2019 for modification of the earlier order dated 12.12.2018. The application for further modification was admitted and through an order dated 08.08.2019, arbitral award was once again modified, and the interest awarded to Anil Kumar Gupta thereunder was set aside.

Aggrieved by the aforementioned, Anil Kumar Gupta preferred an appeal under Section 37 of the A&C Act.

The Court while adjudicating on the order dated 08.08.2019 observed that the application by MCD was styled as being one of 'modification'. However, once a petition under Section 34 of the A&C Act had been finally disposed of, the only recourse available was to file a petition for review. The Court held that the order dated 08.08.2019 could not possibly be construed as being representative of the learned Single Judge exercising its review power, as it was not in accordance with procedure and hence liable to be set aside.

[7] (2022) 8 SCC 42
[8] Arb. A. (Comm.) No. 07 of 2022.
[9] FAO(OS) (COMM) 315/2019

Further in respect of variation of terms of an arbitral award, the Court referred to the principles set out in *National Highways Authority of India v. M. Hakeem & Anr*[10] where it was held that modification of an award does not fall within the ambit of 'setting aside' of an arbitral award under Section 34 of the A&C Act.

The Court further held that while considering a petition under Section 34 of the A&C Act, a court could only set aside an arbitral award as opposed to providing a variation or modulation of the operative directions of the arbitral tribunal.

Delhi High Court held that an arbitral tribunal must *prima facie* assess the relevance or admissibility of evidence before allowing an application under Section 27 of the A&C Act.

The High Court of Delhi in its judgment dated 01.12.2023 in the matter of ***Steel Authority of India Limited v. Uniper Global Commodities***[11] held that the arbitral tribunal must consider the relevance of the evidence before asking the parties to seek the assistance of a court under Section 27 of the A&C Act, and that the court exercising its power under Section 27 of the A&C Act cannot form an opinion on the relevance or the admissibility of the evidence for which its assistance is being sought.

The Court held that the arbitral tribunal was required to form an opinion/exercise discretion in permitting the witness to be examined by the petitioner. An application filed before the arbitral tribunal under Section 27 of the A&C Act cannot be allowed mechanically by the arbitral tribunal; it must scrutinize, at least on a prima facie basis, that there is relevancy of the witness sought to be produced.

Further, it observed that it is not for this Court for the first time to determine the relevancy or materiality of evidence sought to be produced by a party. The powers of this Court under Section 27 are not adjudicatory powers when read with Section 5 and Section 19 of the A&C Act. The adjudication has to be done by the arbitral tribunal, which is the chosen forum by the parties.

The Court further noted that ordinarily an order passed by the arbitral tribunal granting permission to an applicant to apply to the Court for seeking assistance in taking evidence, is not liable to be disturbed since this Court while exercising powers under Section 27 of the A&C Act is not hearing an appeal over the decision of the arbitral tribunal. However, the order passed by the arbitral tribunal in the instant case is a non-speaking order, based on a misconception of law that the arbitral tribunal is not required to examine, even prima-facie, into the relevance or materiality of the evidence sought to be produced, before allowing the application under Section 27 of A&C Act.

Accordingly, the Court dismissed the petition and directed the arbitral tribunal to consider the relevancy of the evidence before allowing Steel Authority of India to seek the court's assistance.

CERC allowed a condonation of delay application in a matter relating to delay in applying for accreditation and renewable energy certificates after expiry of the reaccreditation.

The Central Electricity Regulatory Commission ("CERC") in in the matter of ***Dhanashree Agro Products Private Limited vs. Grid Controller of India Ltd. and Anr***[12], has passed an order condoning the delay by Dhanashree Agro Products Private Limited ("DAPPL") in applying for revalidation of accreditation and registration for issuance of Renewable Energy Certificates ("RECs").

CERC noted that the condonation of delay was allowed on the grounds that the procedure for revalidation of accreditation and registration under the Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022 ("REC Regulations 2022") was not specified by the Grid Controller. The CERC further observed that delay in submission of the application is procedural in nature, and as the main objective of the REC Regulations is to promote the generation of renewable energy and a procedural law cannot be an impediment in achieving the objective of a such law.

CERC further observed that as per the principle laid down for the grant of RECs, if DAPPL is engaged in the generation of electricity from renewable energy sources, it shall be eligible for issuance of RECs subject to meeting the eligibility criteria. Accordingly, CERC in exercise of its Power to Relax under Regulation 15 of the REC Regulations, 2010 and under Regulation 18 of REC Regulations, 2022 granted a condonation of delay and enabled the issuance of RECs to Dhanshree Agro.

MERC allowed a change in law petition due to Ministry of Finance notification dated 30.09.2021 which increased the GST on Supply and Civil Works/Service Contracts.

The Maharashtra Electricity Regulatory Commission ("MERC") in its order dated 28.11.2022 in the matter of ***Tata Power Green Energy Ltd v. The Tata Power Company Limited – Distribution***[13] held that the increase in the Goods

[10] (2021) 9 SCC 1
[11] O.M.P. (E) (COMM.) No. 22 of 2023
[12] Petition No. 59/MP/2023
[13] Case No. 34 of 2023

and Service Tax ("GST") on supply and service contracts by the Ministry of Finance ("MOF") through its Notification No. 8/2021-Central Tax (Rate) dated 30.09.2021 ("Notification") is an event of 'Change in Law', entitling Tata Power Green Energy ("TPGEL") for compensation as well as carrying cost.

MERC noted that as per the Notification, GST was increased on the supply and civil works/ service contracts from 8.9% to 13.8%. Moreover, Article 12 of the PPA dated 04.12.2020 executed between TPGEL and The Tata Power Company Limited ("TPC-D") provides a restitutory relief in case a 'Change in Law' event has occurred after the bid submission date, wherein such event has an adverse financial impact on the project developer. Therefore, the Notification (which was issued subsequent to bid submission and after the letter of award was issued on 20.08.2020) has led to an increase in the GST on supply and civil works/ service contracts and hence qualifies as a Change in Law event under the PPA. In view of the above, MERC ruled that TPGEL is eligible to claim 'Change in Law' compensation on this account.

Furthermore, with respect to the issue of carrying cost, MERC noted that it is a well-settled principle that compensation on account of Change in Law provisions has to be granted along with carrying cost so as to restore the affected party to the same economic position if such a Change in Law event had not occurred. Accordingly, MERC allowed a levy of carrying cost at the rate of 1.25% plus SBI MCLR per annum on the total compensation amount from the date of actual payment until date of its order.

NCLT Kolkata held that debt arising out of foreign seated arbitral award should not be classified as 'financial debt' unless the criteria in Section 5(8) are met.

The National Company Law Tribunal, Kolkata ("NCLT Kolkata") in its judgement dated 30.11.2023, in ***Rishima SA Investments LLC (Mauritius) v. Avishek Gupta***[14] held that a debt arising out of foreign seated arbitral award cannot be classified as 'financial debt' where it does not meet the criteria specified in Section 5(8) of IBC.

In the instant case, Rishima SA Investments LLC made an investment into Sarga Hotel Private Limited and following certain disputes between the parties with respect to the returns due on such investment, Rishima SA Investments initiated arbitration in Singapore against Sarga Hotel. An award was passed in favour of Rishima SA Investments which it sought to enforce in India by filing a petition in the Delhi High Court. In the meanwhile, a corporate insolvency resolution process was initiated against Sarga Hotel. The resolution professional rejected the claim submitted by Rishima SA Investments (of the arbitral award amount) which it sought to be classified as financial debt and was directed to submit its claim in capacity as 'other creditor' on account of being a decree holder of a foreign seated arbitration. Further, the resolution professional had only admitted Re. 1 of its claimed amount, relying on *Essar Steel Ltd v. Satish Kumar Gupta*[15].

NCLT Kolkata held that since Rishima SA Investments did not provide loans or any other financial accommodation, and in its capacity as a decree holder, it could not be classified as a financial creditor.

Furthermore, NCLT Kolkata distinguished the judgement in *Essar Steel Ltd v. Satish Kumar Gupta*[16] and noted that in the instant case the claim had reached finality, unlike in the Essar Steel case where the claims of certain creditors were subject to disputes and accordingly such claims were admitted at a notional value of Re. 1 by the resolution professional. Further, relying on *United Spirits Limited vs. Mr. Kondisetty Kumar Dushyantha and Others*[17], NCLT Kolkata held that since the claim of Rishima SA Investments had attained finality, the resolution professional should have admitted the claim in full.

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[14] [I.A. (IB) No. 1131/KB/2022 In Company Petition (IB) No. 302/KB/2021]
[15] (2020) 8 SCC 531
[16] (2020) 8 SCC 531
[17] [I.A. 307 of 2021 in CP. (IB) No. 147/BB/2018]

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