

**VERITAS LEGAL**  
ADVOCATES & SOLICITORS

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## CONTENTS

COMPETITION	3
FINANCE	9
INSURANCE	14
PROJECTS & INFRASTRUCTURE	19

# COMPETITION

## Enforcement Matters

### Supreme Court holds that the Competition Act is applicable to Coal India Limited

On 15 June 2023, the Supreme Court rejected an appeal filed by Coal India Limited ("**CIL**") which primarily contended that CIL and its subsidiaries could not be bound by the provisions of the Competition Act since it was a statutory monopoly, set up under the Coal Mines (Nationalisation) Act, 1973 ("**Nationalisation Act**").

The Supreme Court acknowledged that CIL was a statutory monopoly tasked with the power and duty to distribute coal. The court also noted that CIL had a duty to follow the directive principles of state policy which require material resources to be distributed in a way that serves the 'common good'. In this regard the Supreme Court observed that the concept of 'common good' is dynamic in nature and the Parliament was best suited to determine how 'common good' is to be served. Thereafter the Supreme Court, while relying on the principle that when Parliament enacts laws it is deemed to be aware of all the existing laws, found that Parliament was aware of the Nationalisation Act at the time of enacting the Competition Act.

On the corner stone of this understanding, the Supreme Court observed that the Competition Act's departure from the erstwhile law (which sought to protect government entities from its reach) indicated the Parliament's intention to bring state monopolies, government companies and public sector units within the purview of the Competition Act. The court further substantiated this observation by touching upon certain provisions of the Competition Act including the definition of 'enterprise' which expressly includes government departments; and the factors used to assess 'dominance' which includes

acquiring market position by virtue of a statute. As such, whilst deciding on the applicability of the Competition Act to CIL, the Supreme Court held that if Parliament intended to include state monopolies under the anvil of the new economic regime, such inclusion cannot be flawed on the ground that it takes away from the 'common good' the monopoly was earlier subserving. Accordingly, the Supreme Court found that there was no reason to hold a state monopoly, being run through the medium of a government company, outside the purview of the Competition Act.

### Delhi HC quashes CCI's investigation into ICAI's conduct

On 2 May 2023, the Delhi High Court ("**Delhi HC**") quashed the CCI's order directing its investigative arm, the Director General Investigation ("**DG**"), to investigate the Institute of Chartered Accountants of India ("**ICAI**") on account of certain alleged abusive conduct relating to the way Continuing Professional Education ("**CPE**") programs were being organized and conducted by the ICAI.

The Delhi HC noted that the ICAI was set up pursuant to the provisions of the Chartered Accountants Act, 1949 and was *inter alia* charged with the responsibility of regulation and maintenance of the status and standards of professional qualifications. As such, the ICAI performed both regulatory and non-regulatory activities. In this regard, while acknowledging that the provisions of the Competition Act would apply to the ICAI in so far as the non-regulatory activities of ICAI are concerned, the Delhi HC further observed that ICAI could also be considered a statutory authority under the provisions of the Competition Act and that decisions relating to the CPE programmes were made in furtherance of such regulatory responsibilities. To this end, the Delhi HC held that decisions in exercise of regulatory powers can only be

restrained by the provisions of the statute that confer such powers and cannot not be the subject matter of review by the CCI. Further stating that, the CCI's scope of examination should be *"confined to only those areas of economic activities, which have a bearing on the market that engages entities involved in trade and commerce"*.

### **Calcutta High Court refuses to stay an inquiry into steel cartel**

On 18 May 2023, the Calcutta High Court ("**Calcutta HC**") refused to stay an inquiry relating to the conduct of steel manufactures. Notably, these anti-trust proceedings were initiated pursuant to an order of the Madras High Court ("**Madras HC**") that instructed the DG to investigate collusive conduct relating to the pricing and supply of steel. While taking note of averments in relation to deviations from the inquiry process set out in the Competition Act, the Calcutta HC observed that the process for investigation was compressed and subsumed on account of the Madras HC's order. Further, it was held that the preliminary stages of investigation do not involve an adjudicatory process of determining the rights and obligations of parties involved and is merely a fact-finding exercise. Consequently, holding that there are no immediate threats or civil consequences to such parties since the findings can be challenged at a later stage. Additionally, the Calcutta HC noted that it was necessary to continue the probe as the ramifications of manipulating the supply and price of steel extended to the general public, including end-users, consumers, and home buyers. Thus, there existed no pressing or compelling reason to interfere with the ongoing investigation.

### **NCLAT reduces the penalty imposed on Geep Industries**

Geep Industries Private Limited ("**Geep**") had filed an appeal before the National Company Law Appellate

Tribunal ("**NCLAT**") challenging the CCI's order dated 30 August 2018 which imposed a penalty of INR 96.41 million (~USD 1.17 million) on Geep for participating in a bilateral ancillary cartel for the sale of dry cell batteries in India. The NCLAT, while upholding the CCI's findings on merits, reduced the penalty imposed from 4% to 1% of Geep's turnover for each year of continuance of the cartel activity.

The NCLAT, while reducing the penalty, reasoned that the quantum of penalty imposed should act as a deterrent to regulate anti-competitive activity, however, this should be seen in the context of extenuating circumstances. Based on the facts of this case, the NCLAT considered the following mitigating factors (a) Geep's small market share and minimal market presence; (b) Geep's inability to actually influence price in the market; (c) Geep's inability, on account of its minimal market presence, to contest provisions of a Product Supply Agreement whereby it agreed to follow the market prices set by the primary cartel; and (d) the large penalty imposed on Geep would be fatal for its business and would lead to its exit from the market. However, it is pertinent to note that the NCLAT did not modify the penalty imposed on the office bearers of Geep, holding that they were responsible for entering into the anti-competitive agreements and they should have had knowledge and understanding of the law in relation to behaviour of corporate entities in a market.

### **NCLAT upholds CCI's order in the SBI bid-rigging case**

On 23 May 2023, the NCLAT upheld the CCI's findings of bid rigging and cartelisation in the tender floated by SBI Infra Management Solution (P) Ltd. ("**SBI**") for the supply and installation of signages across India. Consequently, the NCLAT dismissed the appeal filed on behalf of one of the cartel participants and its director, Mr. Manish

Jodhavat. Whilst coming to its conclusion, the NCLAT observed that even though some of the emails used as evidence to establish Mr. Jodhavat's involvement in the anti-competitive activity were not addressed or sent to him, such emails could still be used as evidence to corroborate Mr. Jodhavat's involvement in the anti-competitive activity. In this regard, the NCLAT placed reliance on the CCI's reasoning that an agreement under the Competition Act can include an arrangement or understanding or action in concert whether or not formal or in writing; and that in absence of direct evidence of coordination, evidence should be assessed on the basis of preponderance of probabilities.

## Merger Control

### CCI fines Bank of Baroda for gun-jumping

On 20 June 2023, the CCI imposed a gun-jumping penalty of INR 500,000 (~USD 6,100) on Bank of Baroda ("**B.O.B**") in relation to its acquisition of 21% of IndiaFirst Life Insurance Company Limited ("**IFLIC**") from the Union Bank of India ("**Proposed Combination**").

B.O.B, in its submissions, averred that the belated notification of the Proposed Combination was on account of its erroneous interpretation of Section 6(4) of the Competition Act, which under specific circumstances, allows for a post-completion notification of transactions to the CCI. B.O.B also contended that this was its first instance of contravention; there was no mala fide intention to evade compliance with the law; and that B.O.B had fully cooperated with the CCI by actively engaging in meetings and diligently complying with all prescribed timelines for re-filing the transaction notice.

While the CCI did consider B.O.B's averments as mitigating factors at the

time of deciding quantum of penalty, the CCI held that by consummating the Proposed Combination prior to CCI's approval, albeit due to an erroneous interpretation of the law, B.O.B had contravened the provisions of the Competition Act and was accordingly liable to be penalised.

### Merger of Credit Suisse Group AG with UBS Group AG

On 18 May 2023, the CCI approved the proposed merger of Credit Suisse Group AG ("**Credit Suisse**") with UBS Group AG ("**UBS**") ("**Proposed Combination**"). The Proposed Combination was structured as an absorption merger pursuant to which all of Credit Suisse's assets, liabilities and contracts would be transferred to UBS; thus making it the surviving legal entity. The CCI assessed the overlaps between the parties in the market for brokerage services in India and observed that the combined and incremental market share of the parties was in the range of 0-5% and there were several other well-established players in the market. Accordingly, the CCI approved the Proposed Combination since it was unlikely to cause an appreciable adverse effect to competition in India ("**AAEC**").

### Sanjay Chamria acquires certain stake in Jaguar and Magma HDI

On 3 May 2023, the CCI approved the acquisition of 51.11% of Jaguar Advisory Services ("**Jaguar**") by Sanjay Chamria ("**SC**") from Poonawalla Fincorp and HDI Global SE. This also led to an indirect acquisition of 5.44% of Magma HDI General Insurance Company Limited ("**Magma HDI**") by SC ("**Proposed Combination**"). While undertaking its analysis, the CCI *inter alia* assessed the vertical and complimentary overlaps between (a) Magma HDI which was involved in the provision of general/non-insurance services, including motor insurance services and (b) the SC group which included SC, his immediate family

members and certain enterprises in which SC and his family directly/indirectly held shares/voting interests (“**SC Group**”). Noting that there were overlaps between the SC Group and Magma HDI, *qua* the distribution of motor insurance policies; the CCI held that the Proposed Combination will not cause an AAEC due to the presence of well-established and deep-rooted players that pose sufficient competitive constraints within the relevant market(s).

### **Jamnalal Sons Private Limited acquires 5.51% in Mukand Sumi Special Steel Limited**

On 12 April 2023, the CCI approved the acquisition of an additional 5.51% of Mukand Sumi Special Steel Limited (“**MSSSL**”) by Jamnalal Sons Private Limited (“**JSPL**”) (“**Proposed Combination**”). Notably, the selling entity and JSPL were both ultimately controlled by the Bajaj group of companies. Pursuant to the Proposed Combination, JSPL’s shareholding would increase from 44.2% to 49.71% without acquisition of any additional or special rights. The CCI observed that there were no overlaps between MSSSL and JSPL and further observing that the minimal overlaps between MSSSL and the selling entity (which was part of the same group as JSPL) would not affect the competition landscape to raise any concerns.

## **Developments in the Legal Framework**

### **Provisions of the Competition Amendment Act, 2023 have been brought into effect**

Certain provisions of the Competition (Amendment) Act, 2023 (“**Amendment Act**”) were brought into force with effect from 18 May 2023. A brief overview of some of these key changes are set out below:

**Horizontal Agreements:** The existing provisions of the Competition Act, relating to anti-competitive horizontal agreements, have been expanded to include any entity that participates or intends to participate in the furtherance of such agreements. Thus, addressing the limited scope of anti-competitive collusion (as presently set out in the Competition Act) and widening it to also include facilitators of such activities.

**Vertical Agreements:** The scope of vertical restraints has been expanded to include agreements between enterprises that are not at different stages or levels of the production chain but are in the nature of commercial arrangements discussed under Section 3(4) of the Competition Act. Additionally, the Amendment Act also makes an exclusion for agreements between enterprises and end consumers from the purview of vertical restraints.

**Cognisance of Matters:** The CCI has been barred from entertaining any matter in relation to anti-competitive agreements or abuse of dominance violations unless the information relating to the same has been filed within three years from the date of the cause of action. That said, the CCI has the discretion to take up matters after the three-year time period lapses, if it is satisfied that there was sufficient cause for the delay. Further, the CCI cannot conduct inquiries into anti-competitive agreements or abuse of dominance violations that are based on facts or issues that have already been decided by the CCI in a previous order.

**DG’s Powers of Investigation:** The DG’s powers to investigate contraventions have been widened to allow it to examine ‘agents’ of the party being investigated which include such entity’s bankers, legal advisors, and auditors. The Amendment Act also sets out how documents in the DG’s custody are to be handled and the process that must be adopted while conducting search & seizure operations.

Meghalaya; Nagaland; Sikkim; Tripura, and Andaman and Nicobar Islands.

**Penalty Provisions:** The maximum penalty that can be imposed for the omission of material information and submission of false statements has been increased from INR 10 million (~USD 121,000) to INR 50 million (~USD 600,000).

**25% of Penalty to be Deposited:** Parties who want to appeal a decision of the CCI before the National Company Law Appellate Tribunal will now be required to deposit 25% of the penalty amount ordered by the CCI as a condition to such appeal being entertained.

**Enacting Regulations:** To increase transparency during the process of framing and implementing regulations, the CCI is now required to publish the proposed draft regulations on its website and invite public comments. Thereafter, on or before the date of notifying such regulations, the CCI is also required to provide a general statement responding to such public comments.

### **CCI Confirms the Establishment of Three Regional Offices**

The CCI, currently headed out of New Delhi, confirmed the establishment of 3 regional offices each having the following jurisdictions:

**Mumbai, Western Regional Office:** The jurisdiction of the Mumbai office extends to Maharashtra; Gujarat; Goa; Dadra and Nagar Haveli; and Daman and Diu.

**Chennai, Southern Regional Office:** The jurisdiction of the Chennai office extends to Andhra Pradesh; Telangana; Karnataka; Kerala; Tamil Nadu; Lakshadweep; and Puducherry.

**Kolkata, Eastern Regional Office:** The jurisdiction of the Kolkata office extends to Bihar; Jharkhand; Odisha; West Bengal; Chhattisgarh; Arunachal Pradesh; Assam; Manipur; Mizoram;

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# FINANCE

## Regulatory Updates

### RBI Framework for Acceptance of Green Deposits

The RBI has introduced guidelines on 11 April 2023 (effective from 1 June 2023) to encourage regulated entities (viz., scheduled commercial banks excluding regional rural banks, local area banks and payments banks and all registered deposit taking non-banking financial companies including housing finance companies) (“REs”) to offer green deposits to help augment the flow of credit to green activities/projects and to protect depositors’ interest.

‘Green deposit’ as per these guidelines, means an INR denominated interest-bearing cumulative/non-cumulative deposit, received by the RE for a fixed period, and the proceeds of which are earmarked for being allocated towards ‘green finance’. Lending to and/or investing in specific sectors identified under the guidelines (such as renewable energy, energy efficiency and clean transportation) have been considered as ‘green finance’ until finalisation of an official Indian green taxonomy. Some key features of the framework are as follows:

- The tenor, size, interest rate and other terms and conditions (as applicable to the REs) in the Master Direction - Reserve Bank of India (Interest Rate on Deposits) Directions, 2016 dated 3 March 2016, Master Direction - Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 2016 dated 25 August 2016 and Master Direction - Non-Banking Financial Company - Housing Finance Company (Reserve Bank) Directions, 2021 dated 17 February 2021, as amended from time to time, shall apply to green deposits *mutatis mutandis*;
- Adoption by the REs of board-

approved policy on green deposits covering details of issuance and allocation and board-approved Financing Framework covering eligible activities/projects, process for project evaluation, reporting, third-party verification/assurance etc. The policy and framework are required to be published on the website of the REs;

- Annual third-party verification/assurance with respect to allocation of funds and impact assessment by REs basis impact indicators with the help of external firms;
- Review report to be placed before an RE’s board within 3 months of end of financial year, with details of amounts raised, list of green activities/projects with amounts allocated to them, third-party verification/ assurance report and impact assessment report; and
- Disclosures by REs in financial statements regarding portfolio-level use of green deposits as per format.

### Draft Circular on Fair Lending Practices – Penal Charges in Loan Accounts

The RBI has released a draft circular dated 12 April 2023, with directions to ensure penal interest imposed by regulated entities (“REs”) is fair and not used as a revenue enhancement tool. However, credit cards under product specific directions would be exempted from such directions.

Some of the key instructions include the following: (a) REs shall not introduce any additional component to rate of interest; (b) Penalty charged for default/non-compliance with loan agreements shall be treated as ‘penal charges’ and not ‘penal interest’; (c) Capitalisation of penal charges accrued has been disallowed. However, change in credit risk premium included in rate of interest as per contracted terms based on change in the borrower’s credit risk

profile is permissible; (d) Quantum of penal charges should be proportional to defaults beyond a threshold (determined by REs in a non-discriminatory manner); (e) Clear disclosure by REs to customers on penal charges in addition to publication on their website; and (f) REs shall have a Board approved policy on penal charges or similar charges on loans.

### **LEI requirement for listed non-convertible securities, securitized debt instruments and security receipts**

SEBI *vide* its circular dated 3 May 2023 has mandated issuers who have listed and/or propose to list non-convertible securities, securitized debt instruments and security receipts (“**Listed Instruments**”) to obtain and report the legal entity identifier (“**LEI**”) code. The requirements are summarized below:

- Issuer having any outstanding Listed Instruments as on 31 August 2023 - LEI code to be reported or obtained and reported on or before 1 September 2023.
- Issuers proposing to issue and list any Listed Instruments on or after 1 September 2023 - LEI code to be reported at the time of allotment of International Securities Identification Numbering (ISIN).

The reporting database for non-convertible securities is the centralized database of corporate bonds and for securitized debt instruments and security receipts is the depositories.

### **Amendment to the Master Direction on KYC – Instructions on Wire Transfer**

The RBI has amended the Master Direction on know your customer (“**KYC**”) requirements on 4 May 2023, introducing the requirement of accompaniment of: (a) cross-border wire transfers; (b) domestic wire transfers where the originator is an

account holder of the ordering regulated entity (“**RE**”); and (c) domestic wire transfers of INR 50,000 and above where the originator is not an account holder of the ordering RE, with specified originator and beneficiary information. Transfers between financial institutions and certain transactions carried out using credit cards, debit cards and prepaid payment instruments are exempted.

The amendment also imposes obligations on originator, intermediary and beneficiary REs, and Money Transfer Service Schemes providers, including in respect of wire transfers having the required originator and beneficiary information, taking reasonable measures to identify transfers lacking required originator/beneficiary information and reporting suspicious transactions. In addition to such requirements, REs have further obligation with respect to unregulated entities, name screening and record management requirements.

### **Additional disclosure requirements for Issuers of transition bonds**

SEBI has, *vide* its circular dated 4 May 2023, notified with immediate effect, additional disclosure requirements for issuers of transition bonds to facilitate transparency and informed decision making amongst investors. Transition bonds are a category of green debt securities under the SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 which comprise of funds raised for transitioning to a more sustainable form of operations.

Under the circular, an issuer desirous of issuing transition bonds is required to make additional disclosures such as: (a) Use of a denotation ‘GB-T’ in the offer document, on the cover page and in type of instrument field in the term sheet; (b) Disclosure of transition plan in the offer document, containing details of interim targets/milestones of emission reduction along with an indicative timeline for achieving the

targets, brief of the project implementation strategy, details of usage of technology for project implementation and mechanism to oversee utilization of funds etc; (c) Disclosure in the centralized database for corporate bonds/debentures by filling the denotation, i.e., GB-T under 'Type of Instrument'; (d) Disclosure to stock exchanges, of revision in the transition plan with explanation; and (e) Disclosure of transition plan and progress in the annual report of issuer.

### **Cessation of US Dollar LIBOR and MIFOR**

RBI *vide* its notification dated 12 May 2023 notified banks and financial institutions to implement systems for a complete transition from London Interbank Offered Rate (“**LIBOR**”) with effect from 1 July 2023. Read with the notification dated 8 July 2021, RBI has announced that after 30 June 2023, the remaining five US dollar LIBOR settings and the LIBOR reliant - Mumbai Interbank Forward Outright Rate (“**MIFOR**”) benchmark, will no longer be published. Synthetic LIBOR settings may continue to be published temporarily but cannot be used in new financial contracts.

Banks and financial institutions have been advised not to enter into new transactions using US dollar LIBOR or MIFOR and to promptly insert fallback clauses in remaining legacy contracts referencing LIBOR/MIFOR. Going forward, widely accepted alternative reference rates should be adopted by institutions.

### **RBI Framework for Compromise Settlement and Technical Write-offs**

RBI, *vide* circular dated 8 June 2023 to all regulated entities (“**REs**”), has issued a comprehensive unified framework governing compromise settlements and technical write-offs (“**Settlement Framework**”). The Settlement Framework is applicable to all REs to which the circular is

addressed and is without prejudice to the Prudential Framework for Resolution of Stressed Assets dated 7 June 2019 (“**June 7 Circular**”) or any other guidelines applicable to the REs on resolution of stressed assets.

The Settlement Framework *inter alia* sets out the following requirements:

- REs should have board approved policies on compromise settlements and technical write-offs, which need to lay down the process to be followed, with specific guidance on the necessary conditions precedent such as minimum ageing, deterioration in collateral value etc.
- Board approved policies to cover delegation powers for sanction of compromise settlements and technical write-offs.
- There shall be a reporting mechanism to the next higher authority, at least on quarterly basis, for compromise settlements and technical write offs approved by a particular authority. Approval by an MD & CEO / board level committee, should be reported to the board.
- Compromise settlements where the time for payment of settlement amount exceeds 3 months will be considered as restructuring under the June 7 Circular.
- Except farm credits exposures, REs will have a cooling period of at least 12 months before assuming fresh exposures to borrowers subject to compromise settlement. Cooling period for technical write-offs will be as per board approved policies.
- REs may undertake compromise settlements or technical write-offs in respect of wilful defaulter / fraud accounts without prejudice to the criminal proceeding underway against such debtors.

## Mandatory issuance of units of AIFs in dematerialized form

SEBI has issued a circular on 21 June 2023 stipulating specific requirements in connection with dematerialization of units of alternative investment funds (“AIFs”). This is pursuant to the SEBI (Alternative Investment Funds) (Second Amendment) Regulations, 2023, notified on 15 June 2023, which introduced the requirement of issuance of units by AIFs in dematerialized form subject to conditions specified by SEBI from time to time. The timelines for dematerialization are as follows:

- **Schemes of AIFs with corpus ≥ INR 5 billion:** Dematerialization of all the units issued latest by 31 October 2023 and issuance of units shall be only in dematerialized form from 1 November 2023 onwards.
- **Schemes of AIFs with corpus < INR 5 billion:** Dematerialization of all the units issued latest by 30 April 2024 and issuance of units only in dematerialized form from 1 May 2024 onwards.

## Key outcomes of SEBI’s board meeting dated 28 June 2023

In its recent board meeting on 28 June 2023, SEBI approved key decisions to strengthen the securities market and improve investor experience, including the following:

- **Listing of subsequent issue of non-convertible debt securities:** SEBI has approved the amendment to the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, requiring listed entities with outstanding listed non-convertible debentures (“NCDs”) as of 31 December 2023 to list subsequent issuances of NCDs at the stock exchange(s), starting from 1 January 2024, with certain exceptions.
- **Voluntary listing of unlisted**

**NCDs:** An entity with listed debt securities but having unlisted NCDs outstanding on 31 December 2023 can list them voluntarily.

- **Voluntary delisting of non-convertible debt securities:** Entities can delist listed debt securities, subject to certain requirements including approval from all holders of debt securities, suitable disclosures to stock exchanges etc. Entities having privately placed, listed debt securities with less than 200 security holders can opt for such delisting.
- **Strengthening SEBI Complaint Redress System (SCORES):** SEBI approved the proposal to revamp SCORES by: (a) reducing timelines for complaint resolution, introducing auto-routing of complaints to concerned regulated entities and auto-escalation for non-adherence to prescribed timelines; (b) recognising designated bodies for monitoring and handling of investor grievances against the respective regulated entities; (c) providing two levels of review (first review by the designated body and then by SEBI); (d) linking SCORES with the Online Dispute resolution platform; and (e) creation of new portal for market intelligence inputs.

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# INSURANCE

## Regulatory Updates

### Committee on Regulatory Sandbox for Inviting Applications and Guidelines on Operational Issues pertaining to the Regulatory Sandbox

The Insurance Regulatory and Development Authority of India ("IRDAI") has *vide* notification dated 31 March 2023, made the process of filing applications perpetual. The IRDAI has also increased the experimentation period from 6 months to 36 months and included a provision to review rejected applications. A Committee on Regulatory Sandbox has been established with participation from business and academia to screen proposals, assess test design for the hypothesis, and suggest applications for testing.

The IRDAI has also issued guidelines regarding operational issues pertaining to the regulatory sandbox on 31 March 2023. These guidelines on operational issues pertaining to the Regulatory Sandbox lay down the process to be followed for implementing any innovation in the insurance program through regulatory sandbox and, *inter alia*, provide that any application for innovation has to be filed by the applicant in association with an insurer and the applicant has to demonstrate to the IRDAI that his application will help in increasing insurance penetration or provide enhanced services to policyholders. The applicant also needs to take a prior written consent of the customer, regarding their willingness to participate in the proposal, despite the outcome being uncertain. The decision of the chairperson of the IRDAI will be final on whether the said proposal is innovative.

The proposal will come to an end if within the given time limit it achieves the parameters prescribed by the IRDAI. An applicant will not offer the services or products post the

completion of the experiment period if the necessary amendments to the regulation/guideline/circulars are not in place.

### Guidance Note on Board Policy of the Insurer on the Commission Structure

Given the crucial role of insurance agents and intermediaries, the IRDAI has stated that it is imperative to have a clear and transparent board policy on their commission structure to ensure fairness. Thus, via a circular dated 31 March 2023, the IRDAI has issued a guidance note on the board policy of the insurer with respect to the commission structure for intermediaries, wherein the board policy is required to include the following key elements: (i) clear objective and principles that underpin the commission structure, (ii) address fairness and reasonableness, such that the intermediaries are compensated fairly for their work, regardless of their size or bargaining power, (iii) incorporate good distribution practice of intermediaries, (iv) establish a standard review process for the commission structure, (v) outline the governance and oversight mechanism for market conduct, such that the intermediaries adhere to high standards of behaviour and ethical practices, and (vi) regular reporting to the board of directors and senior management on the performance and compliance of the commission structure.

### Payment of Commission Regulations

With effect from 1 April 2023, the IRDAI has notified the IRDAI (Payment of Commission) Regulations, 2023.

Every insurer is required to have a written policy for payment of commission that needs to be approved by the board and reviewed periodically. The commission paid under life insurance and general insurance products, including health insurance

products cannot exceed their respective 'Expense of Management' limits as specified.

### **Expenses of Management of Insurers Transacting General or Health Insurance Business Regulations**

With effect from 1 April 2023, the IRDAI has notified the IRDAI (Expenses of Management of Insurers transacting General or Health Insurance business) Regulations, 2023.

It is mandated that (i) no general insurer shall incur expenses of management of more than 30% and (ii) no health insurer shall incur expenses of management expenses in excess of 35%; of the gross premium written in India in a financial year. An additional allowance of 10% of the gross premium income written outside India will be given to an insurer having their principal place in India with branch offices outside India, or having an international financial service centre (IFSC) insurance office (IIO). If an insurer reports gross direct premium sourced directly from the rural sector, Pradhan Mantri Jan Arogya Yojana (PMJAY), Pradhan Mantri Fasal Bim Yojana (PMFBY) or any such scheme further notified, they will be allowed an additional allowance that will not exceed 15% of the incremental premium over the previous year, sourced from the rural sector, PMJAY, PMFBY, or any other such schemes notified by IRDAI. Additional allowance towards insurtech and insurance awareness will be allowed to the extent of 5% of the allowable expenses of management.

Every insurer also needs to have a board approved policy and a board approved business plan on an annual basis in relation to expenses of management.

At the end of each financial year the insurers have to prepare a return of expenses of management.

### **Expenses of Management of Insurers Transacting Life Insurance Business Regulations**

With effect from 1 April 2023, the IRDAI has notified the IRDAI (Expenses of Management of Insurers transacting life insurance business) Regulations, 2023.

It is mandated that no life insurer shall spend more than (i) the amount of commission paid to insurance agents, intermediaries, or insurance intermediaries in respect of their business transacted in the financial year as permitted by IRDAI, (ii) commission and expenses reimbursed on inward reinsurance and (iii) operating expenses of life insurance business. A detailed categorisation of the cap of expenses of management for different types of amounts has been provided.

An insurer with their principal place of business in India and branch offices outside of India or having an international service centre insurance (IFSC) insurance office (IIO) will receive an additional allowance of 5% of the gross premium income written outside of India, during the year. An additional allowance, not exceeding 15% of the incremental premium over the previous financial year, will be given to an insurer if they report gross direct premium that was obtained directly from the rural sector, the Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY), or any other further-notified scheme by the IRDAI. Additional funding for insurance awareness and insurtech will be permitted up to 5% of the allowable expenses of management. Every insurer also needs to have a board approved policy and a board approved business plan on an annual basis in relation to expenses of management. Further, at the end of each financial year the insurers have to prepare a return of expenses of management.

## Master Circular on Registration of Indian Insurance Company, 2023

The IRDAI (Registration of Indian Insurance Companies) Regulations, 2022 were notified on 8 December 2022 (“**Registration Regulations**”) with the object of simplifying the process of registration and providing share transfer requirements of Indian insurance companies. On 24 April 2023 IRDAI issued the Master Circular on Registration of Indian Insurance Company 2023 (“**Master Circular**”) which repealed the IRDAI (Investment by Private Equity Funds in Indian Insurance Companies) Guidelines, 2017, IRDAI (Listed Indian Insurance Companies) Guidelines, 2016, Circular dated 22 July 2020 on ‘Transfer of Shares of the Insurance Companies’ and the Circular dated 27 September 2018 on ‘Details of Equity Holding Pattern of Insurance Companies’ while also introducing various forms under the Registration Regulations and providing certain clarifications. The Master Circular introduced Form IRDAI/R1 (No Objection Certificate), Form IRDAI/R2 (Application for Registration), Form IRDAI/R4 (Issuance of Duplicate Certificate) and Form IRDAI/ToS (Application seeking Approval for Transfer of Shares) and also clarified provisions pertaining to registration of insurer, transfer of shares and lock-in period and directorship.

## Exposure Draft on IRDAI (Insurance Advertisements and Disclosure) (First Amendment) Regulations, 2023

*Vide* draft IRDAI (Insurance Advertisements and Disclosure) (First Amendment) Regulations, 2023 and draft circular on ‘Procedure for approving and maintaining Advertisements’ (“**Draft Circular**”), the IRDAI has proposed to amend the IRDAI (Insurance Advertisements and Disclosure) Regulations, 2021 in line with the principle-based approach in order to assign higher responsibility on

senior management while designing and approving the advertisements for the consumption of the customers. The procedure of approval of advertisements is currently based on the approved ‘File and Use’ applications as well as by compliance with the relevant advertisement regulations and circulars issued by IRDAI. The Draft Circular modifies the existing procedure of filing advertisements. It lays out that each insurer shall form an advertisement committee which will be responsible for reviewing and reporting to the product management committee and further empowers the product management committee to examine, approve and have the final authority to approve or reject advertisements after examining recommendations of the advertisement committee.

## Guidelines on Remuneration of Directors and Key Managerial Persons of Insurers

IRDAI has issued the IRDAI (Remuneration of Non-Executive Directors of Insurers) Guidelines, 2023 which provide that Insurers are required to have a remuneration policy for non-executive directors. These guidelines provide the maximum remuneration for each non-executive director, the sitting fees payable to non-executive directors and the age limit and tenure for non-executive directors.

The IRDAI has also issued the IRDAI (Remuneration of Key Managerial Persons of Insurers) Guidelines, 2023 which, *inter alia*, provide the parameters to be taken into account for determination of performance assessment of KMPs, manner of determining the fixed pay and variable pay, the claw back mechanism and age and tenure of the managing director/chief executive officer/whole time director. Appointment/reappointment/modification in remuneration of the managing director/chief executive officer/whole time director requires prior approval of

the IRDAI.

### **Surrogacy Act, 2012 and ART Act, 2021 and the relevant Rules thereunder**

*Vide* circular dated 10 May 2023 on Surrogacy Act, 2012 and Assisted Reproductive Technology Act, 2021 and the relevant rules thereunder ("**ART Act**") ("**Surrogacy and ART Circular**"), reference was drawn by IRDAI to the Surrogacy Act, 2012 and ART Act, wherein all insurers were directed to comply with certain provisions of the said acts with immediate effect and ensure suitable products are made available. Pursuant to this Surrogacy and ART Circular, all insurers are required to provide insurance coverage and design their insurance policies to provide financial protection to surrogate mothers and oocyte donors for the periods prescribed under the said acts and rules. Further, by way of a circular dated 26 June 2023 the IRDAI has also clarified what "insurance" would constitute for the purposes of the Surrogacy Act, 2012 and ART Act.

### **IRDAI Information and Cyber Security Guidelines, 2023 and Circular on Reporting of Cyber Security Incident**

IRDAI guidelines of 7 April 2017 on Information and Cyber Security for Insurers were revised to include applicability of the same to all insurance intermediaries on 2 September 2022. IRDAI Information and Cyber Security Guidelines, 2023 ("**Cyber Security Guidelines**") have been revised to enable the insurance industry to strengthen cyber security defenses as well as related governance mechanisms to deal with such emerging cyber threats. All brokers, corporate agents, web aggregators, TPAs, IMFs, Insurance Repositories, ISNPs, Corporate Surveyors, MISPs, CSCs and Insurance Information Bureau of India (IIB) shall adhere to the Cyber Security Guidelines. It has also

been clarified that all entities that have completed their security audit for the financial year 2022-2023 shall ensure compliance with the Cyber Security Guidelines from the next financial year.

The Cyber Security Guidelines have mandated regulated entities to report cyber incidents to CERT-In within six hours of the same coming to their notice with a copy to IRDAI and other connected regulators. All entities regulated by the IRDAI are required to submit available details of the cyber security incident to the IRDAI in the prescribed format within 24 hours of intimation of the incident.

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# PROJECTS & INFRASTRUCTURE

## Regulatory Updates

### Addendum to the Dredging Guidelines for Major Ports

The Ministry of Ports, Shipping and Waterways (“**MoPSW**”) has, on 16 March 2023, issued an addendum to the Dredging Guidelines for Major Ports 2021 (“**Addendum**”). The Addendum became publicly available on MoPSW’s website on 15 May 2023.

The Addendum lays down the following factors for suitable incorporation in the bidding process while framing dredging contracts:

- Data on type of soil, characteristics, approximate quantity of dredged material, disposal sites to be made available by authorities in bid documents, for assessment by bidders of price for dredging and dredging material;
- Final quantity of dredging material may vary from estimate and can be verified basis third party survey;
- Environmental clearance should be obtained with option for onshore/offshore disposal of dredging material based on beneficial use and sustainability;
- Option to submit quotes in two parts separately for execution of dredging work and for estimated value of dredged material; and
- Provision of dumping yard for temporary storage of dredged material. The Addendum also specifies that the lowest net cost, i.e., dredging cost less the value of dredged material quotes, could be considered as a bid evaluation parameter.

### Guidelines to promote development of pumped storage projects

The Ministry of Power has issued guidelines to promote the development of pumped storage projects (“**PSPs**”) in the country, on 10 April 2023. The following are some of the important features of these guidelines:

- **Allotment of project sites:** The state governments may allot project sites: (a) on nomination basis, to central / state public sector undertakings and/or their joint ventures; (b) by allotment through a two-step competitive bidding process; (c) allotment through tariff based competitive bidding to developers; or (d) self-identified off stream PSPs.
- **Timelines for starting construction:** Construction work should commence within 2 years from allotment of the PSPs, failing which such allotment shall be cancelled. Relaxation of 1 year may be granted to where delay is attributable to pending environmental/forest clearance, if applications are submitted to the concerned authorities within the timelines agreed at the time of awarding of the project.
- **No upfront premium:** The state governments shall ensure that no upfront premium is charged for the project allocation.
- **Financial Viability:** The Central Government may notify a benchmark tariff for storage for investment decisions of developers. Financial institutions should consider PSPs at par with other renewable energy projects for granting long term loans.
- **Taxes and Duties:** In addition to tax benefits, electricity duty and cross subsidy surcharge shall not be applicable on pumping power for charging of PSPs.
- **Green Finance:** PSPs may be supported through concessional climate finance along with deployment of funds through sovereign green bonds for PSPs utilizing renewable energy for charging.

## Airports Authority of India (Ground Handling Services) Amendment Regulations, 2023

The Airports Authority of India on 20 April 2023, issued the Airports Authority of India (Ground Handling Services) Amendment Regulations, 2023 to further amend the Airports Authority of India (Ground Handling Services) Regulations, 2018. Key amendments include:

- Airport operators can now appoint as the ground handling agency ("GHA"): (a) itself or its joint venture or its 100% owned subsidiary only if a transparent bidding process has been carried out and no bidder is selected or found suitable; (b) a subsidiary or joint venture of a public sector undertaking and if there is no subsidiary or joint venture of a public sector undertaking, a GHA shall be selected through a bidding process.
- No GHA or any person(s) controlling such GHA shall have significant influence in any other GHA operating as such at the same airport. In case a GHA has such significant influence or acquires such significant influence pursuant to an acquisition from a public sector enterprise, then: (a) the two GHAs shall be deemed to be a single GHA at the relevant airport; (b) airport operator shall promptly appoint another GHA through a transparent bidding process; and (c) such GHA/person(s) controlling the GHA shall reorganize or restructure their ground handling business to ensure that on completion of 24 months of acquisition of significant influence, only one of the two GHAs operates at the relevant airport. Further, on expiry of such 24 months, the GHA (of the two involved GHAs) with the shorter outstanding concession period, shall be deemed to have

surrendered its concession at the relevant airport.

## Scheme for Pooling of Tariff of plants with expired PPAs

The Ministry of Power on 20 April 2023, notified a scheme for pooling of tariff for thermal power plants whose power purchase agreements ("PPAs") have expired ("**Scheme**").

As per the Scheme, a central sector generating company ("**Genco**") wise common pool ("**Pool**") will be created of thermal generating stations (coal and gas-based) with expired PPAs. A single window system shall be created through which the states or distribution companies ("**DISCOMs**") shall submit their willingness for power allocation within 15 days from the formation of Pool. The Scheme stipulates a minimum 5 year requisition period for power from the Pool. The allocation of power from the Pool to the willing States/DISCOMs shall be subject to the signing of a new PPA of minimum 5 years with the Pool and ensuring compliance with the financial terms of the PPA signed.

As per the Scheme, the total capacity charge of the Pool will be calculated by adding the charging capacities of each station in the Pool in accordance with the tariff regulations of Central Electricity Regulatory Commission. A Genco shall declare the station-wise monthly Energy Charge Rate ("**ECR**"). The states/DISCOMs shall be billed a uniform energy charge computed based on station-wise weighted average pooled monthly ECR and final implementation schedule.

## Clarifications by MNRE on time-extensions to solar PV and solar PV-wind hybrid power projects

The Ministry of New and Renewable Energy ("**MNRE**") has notified certain clarifications on 1 May 2023, in respect of time extensions to be granted to specified solar PV and solar PV-wind

hybrid power projects under its earlier notifications dated 29 December 2022 and 25 January 2023.

It has been clarified that the Renewable Energy Implementing Agencies (Solar Energy Corporation of India, National Hydroelectric Power Corporation & National Thermal Power Corporation) will be required to examine extension requests on a case-to-case basis, and grant extensions of timelines only to developers who have diligently taken steps to complete the projects but have been unable to complete the same on account of reasons beyond their control. Projects that have not progressed beyond the award stage on account of a developer not having taken implementation efforts will not qualify for an extension and may face project cancellation.

### **Extension of Covid-19 relief measures to Contractors/Developers of Road Sector**

By a circular dated 4 May 2023, the Ministry of Road Transport & Highways has further extended the following COVID-19 relief measures to contractors/developers of the road sector for a period of 1 year from 1 April 2023 to 31 March 2024:

- Extension of relaxation in Schedule H/G (i.e. project completion schedules) till 31 March 2024 to improve liquidity of available funds;
- Arrangement regarding direct payment to approved sub-contractors through escrow account till earlier of 31 March 2024 or completion of work by sub-contractor; and
- Reduction of performance security/retention money: Except contracts under dispute proceedings, the performance security will be 3% of the contract value. All tenders issued/contracts concluded till 31 March 2024 are required to provide for reduced performance security and for abnormally low bids, additional performance security should be

realized in line with the latest guidelines of the Department of Expenditure, Ministry of Finance.

The circular also provides that retention money (which is part of the performance security till construction period) should be released continuously in proportion to the work executed and no reduction of retention money should be made from contractor's bills raised till 31 March 2024. Furthermore, for HAM/BOT contracts, performance guarantee may be released on a pro-rata basis as per contract terms, provided the concessionaire is not in breach.

### **Harit Sagar Guidelines**

The Ministry of Ports, Shipping and Waterways, on 11 May 2023 released the "Harit Sagar" Green Port Guidelines - 2023 ("**Guidelines**") which lay down a broad framework for Major Ports to take initiatives to reduce carbon intensity and develop an environment friendly ecosystem. This is a part of India's commitment in COP 26 towards climate action, where it has pledged to reduce the emission intensity per unit GDP by 45% by year 2030 from 2005 level.

The principles of the Guidelines include: (a) ensuring sustainability in port development and operation; (b) employing an ecosystem aligning to 'Working with Nature' concept; (c) maximizing use of clean / green energy; (d) minimizing carbon and other harmful emissions and waste; (e) conducting appropriate environmental impact assessments; (f) stimulating continuous improvement in the port environment; and (g) promoting monitoring and environmental reporting.

As per the Guidelines, focus areas that contain potential to contribute towards improving sustainability in the ecosystem of ports include increase in green cover, electrification of port equipment, retrofitting of port craft, implementation of projects to achieve

the targets set for the ports / port crafts in the “National Green Hydrogen Mission”, increase in share of renewable energy in ports, conservation measures, waste management etc.

### **Directions to RE developers to comply with CEA Connectivity Regulations by 30 September 2023**

The Central Electricity Authority (“CEA”), vide its notification dated 12 May 2023 has issued directions to renewable energy (“RE”) developers.

The CEA has directed RE developers who have applied for connectivity till 30 April 2023 to ensure compliance with the requirement under the CEA (Technical Standards for connectivity to the Grid) Amendment Regulations, 2019 of supplying dynamically varying reactive power support to maintain power factor within specified limits, by 30 September 2023. Failure to comply would result in the RE plants being disconnected. RE developers who have applied for connectivity after 30 April 2023, must comply with requirements stipulated in the CEA (Technical Standards for Connectivity to the Grid) Regulations, 2007 and their subsequent amendments.

### **Amendment of Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2022**

The Ministry of Power has notified amendments to the Electricity (Promoting Renewable Energy through Green Energy Open Access) Rules, 2022 on 23 May 2023.

Firstly, the term “entity” has been amended to mean any consumer who has contracted demand or sanctioned load of Hundred kW or more either through single connection or through multiple connections aggregating Hundred KW or more located in same electricity division of a distribution licensee, except or captive consumers.

For captive consumers, there is no load limitation. The amendment enables aforementioned consumers to take power through green energy open access.

Secondly, offshore wind projects commissioned up to December 2032 and supplying electricity to open access consumers will be exempt from additional surcharges.

### **Waiver of ISTS charges for Offshore Wind, Green Hydrogen & Green Ammonia Projects**

By an order dated 29 May 2023, the Ministry of Power has waived the interstate transmission (“ISTS”) charges for offshore wind, green hydrogen and green ammonia projects, for a period of 25 years, to facilitate the implementation and expansion of these projects.

**Offshore Wind Projects:** Offshore wind projects commissioned on or before 31 December 2032, either through a power purchase agreement or on a merchant basis, will be exempted from ISTS charges for a period of 25 years from commissioning. Further, with regards to any offshore wind projects commissioned after 31 December 2032, the trajectory for ISTS charges as follows:

- 1 January to 31 December 2033 - 25% of applicable ISTS charges
- 1 January to 31 December 2034 - 50% of applicable ISTS charges
- 1 January to 31 December 2035 - 75% of applicable ISTS charges
- From 1 January 2036 - 100% of applicable ISTS charges.

**Green Hydrogen and Green Ammonia Projects:** Green hydrogen and green ammonia projects commissioned on or before 31 December 2030, and utilizing renewable energy from sources such as solar, wind, large hydro commissioned after 8 March 2019, energy storage systems, or a hybrid combination of these technologies, will be exempted from ISTS charges for 25

years from commissioning. For such projects commissioned after 31 December 2030, the trajectory for ISTS charges as follows:

- 1 January to 31 December 2031 - 25% of applicable ISTS charges
- 1 January to 31 December 2032 - 50% of applicable ISTS charges
- 1 January to 31 December 2033 - 75% of applicable ISTS charges
- From 1 January 2034 - 100% of applicable ISTS charges.

The waiver has been granted for ISTS charges and not ISTS losses.

### **New Dispute Resolution Mechanism for unforeseen disputes between RE Developers/ EPC Contractors and RE Implementation Agencies**

The MNRE *vide* order dated 7 June 2023 has revised the existing dispute resolution mechanism between renewable energy developers/EPC contractors and Renewable Energy Implementing Agencies designated by MNRE (“**REIAs**”). The order provides for the set-up of a three-member Dispute Resolution Committee (“**DRC**”) consisting of eminent persons of impeccable integrity and below age of 70 years. The DRC mechanism will extend to all renewable energy schemes / programmes / projects being implemented through/ by REIA as well as contracts between REIA and the EPC contractor executing renewable energy project owned by REIA, provided REIA undertakes to abide by the decision coming out of this mechanism. The DRC will be an appellate authority for decisions of the REIA (which is required to give speaking orders) for all contractual and non-contractual disputes.

In addition to the applicable fee for application to DRC, the order specifies timelines for application and process for resolution of disputes pertaining to: (a) requests for extension of time for force majeure; (b) requests for extension of time not covered under contract; and (c) any other cause.

### **Cap on extension of commission date to solar and wind projects with waiver of ISTS charges on transmission of electricity**

The Ministry of Power has by its order dated 9 June 2023, amended paragraph 3.1 (vii) of the order of the ministry dated 30 November 2021 regarding waiver of ISTS charges on transmission of electricity generated from specified solar and wind sources to projects which are granted an extension of time for commissioning by MNRE. The amendment provides that any extension in the date of commissioning shall only be for a period of 6 months at a time and shall not be provided more than twice.

### **Guidelines for tariff based competitive bidding process for grid connected RE projects with energy storage systems**

The Ministry of Power, on 9 June 2023, has issued guidelines for tariff based competitive bidding process for procurement of firm and dispatchable power from grid connected renewable energy (“**RE**”) power projects with energy storage systems (“**ESS**”) (“**Guidelines**”).

Some key features of the Guidelines are as follows: (a) The Guidelines apply to distribution licensees, authorized representative(s) or intermediary procurers for long term procurement of firm and dispatchable power from RE power projects with ESS through tariff-based competitive bidding; (b) 100% of annual energy offered by the generator should correspond to RE power with allowance to source up to 5% of the RE power from green market sources or bilateral agreements; (c) the bidder/developer shall either set up storage capacity itself or tie up with ESS developers to meet the project parameters; (d) The successful bidder and procurer must enter into a PPA for a general period of 20 years and up to 25 years; and (e) The supply of power shall generally commence within a

period of 24 months from execution of the PPA (if the project size is not more than 1000 MW) and 30 months from execution of the PPA (if the project size is more than 1000 MW).

### Carbon Credit Trading Scheme, 2023

The Central Government in consultation with the Bureau of Energy Efficiency (“**Bureau**”) has notified the Carbon Credit Trading Scheme, 2023 (“**Scheme**”) on 28 June 2023 that introduces a domestic framework to regulate the Indian carbon market (“**Market**”). “Carbon Credit” is defined as the value assigned to the reduction or removal or avoidance of greenhouse gas emission and is equivalent to one ton of carbon dioxide equivalent.

The Scheme provides for setting up of a National Steering Committee and identifies other agencies for discharge of specified functions. The Bureau shall be the administrator for the Market and the Grid Controller of India Limited shall act as the registry for the Market. Further, the Central Electricity Regulatory Commission shall be the regulator for the trading activities under the Market. The Scheme also provides for agencies which shall be accredited by the Bureau to carry out verification activities under the Scheme.

Obligated entities successful in reducing their carbon emission will be issued carbon credit certificates, subject to the recommendation of the National Steering Committee. Entities failing to achieve their target reductions will be directed to purchase carbon credits certificate from the Market. The Scheme also sets out detailed procedure for operationalizing the Market.

### Amendment to Electricity Rules

The Ministry of Power has notified the Electricity (Amendment) Rules, 2023 (“**Amendment Rules**”) on 30 June 2023, to amend the Electricity Rules, 2005. Brief overview of the Amendment

Rules, is as follows:

- **Captive Generating Plant of an affiliate company:** A new requirement has been introduced by which if a captive generating plant is set up by an affiliate company, a captive user is required to hold at least 51% of the ownership in such affiliate company.
- **Energy storage system:** A captive user is now permitted to use electricity directly or through an energy storage system.
- **Subsidiary of existing captive user:** Consumption by a subsidiary of a company which is an existing captive user is also admissible as captive consumption by captive user.
- **License period:** License period of licensees under Section 14 of the Electricity Act, 2003 (“**Act**”) shall be: (a) the period specified under the license granted; (b) for deemed licensees, 25 years from the date of the Act coming into force; and (c) automatically renewed for 25 years or lesser period requested by licensee, unless revoked. However, this does not apply to license granted to transmission developers selected through tariff-based bidding under Section 63 of the Act.

## Case Summaries

### Supreme Court upholds sanctity of contract terms over regulatory powers

In Haryana Power Purchase Centre vs. Sasan Power Ltd. & Ors, the Supreme Court of India (“**SC**”) on 6 April 2023, held that the Appellate Tribunal of Electricity (“**APTEL**”) or any other regulatory commission or appellate tribunal cannot utilize their regulatory powers to rewrite the terms of a contract entered into by parties.

In the present case, disputes arose between Sasan Power Limited (“**SPL**”), the developer of an ultra-mega power project (“**UMPP**”) and the power procurers (appellants here), regarding claims of 'change in law' under the power purchase agreement dated 7 August 2007 (“**PPA**”). The 'change in law' claims were with respect to: (a) increase in costs due to an inaccurate water intake study report provided in the bid documents, based on a subsequent study conducted by SPL through the same agency which had conducted the original study; and (b) levy of customs duty on mining equipment imported for a captive coal mine for use in the UMPP based on an office memorandum by the Joint Secretary, Ministry of Power.

While APTEL rejected the change in law claim, it sent the matter back to the Central Electricity Regulatory Commission (“**CERC**”) observing that procurers cannot escape liability by way of disclaimers in the bid documents requiring bidders to conduct independent inquiries on matters affecting their bids. APTEL also held that duty exemptions would apply to the project including the coal mining equipment.

The SC agreed that there was no change in law (as ruled by both the CERC and thereafter, APTEL), but held that APTEL exceeded its jurisdiction by going beyond the express terms of the contract despite having concluded that there was no change in law. Further, a 'change in law' under the PPA was only after a court, tribunal or government agency being a final authority had declared it so and that a memorandum from an official in a ministry was not to be considered a final authority.

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