

VERITAS LEGAL
ADVOCATES & SOLICITORS

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COMPETITION

Enforcement Matters

NCLAT sets aside the CCI's order against sugar mills for bid-rigging on procedural grounds.

On 10 October 2023, the National Company Law Appellate Tribunal ("**NCLAT**") set aside the CCI's order which held sugar mills and their trade associations (collectively "**Appellants**") guilty of rigging bids for the procurement of ethanol.

The NCLAT, while accepting the Appellants' contentions and ultimately remanding the case back to the CCI for a fresh hearing inter-alia reasoned that the impugned CCI order did not adhere to principles of natural justice since (a) there was a delay of 13 months between the date of the conclusion of oral arguments and the pronouncement of the impugned order; (b) on account of this inordinate delay, the final order was signed and authenticated by only 3 members of the CCI even though 5 members heard the case on all dates; and (c) the CCI failed to provide the Appellants with an opportunity to present their oral arguments when considering a supplementary investigation report prepared by the Director General, investigation ("**DG**").

Supreme Court upholds the Madras High Court order allowing the CCI to investigate an alleged steel cartel

On 10 November 2023 the Supreme Court upheld a division bench order of the Madras High Court ("**MHC**") dated 19 October 2023. The MHC order rejected a writ petition filed by Agni Steels Private Limited ("**Agni Steels**") challenging an investigation into the alleged collusive conduct of steel manufacturers. Notably this investigation was instituted by the CCI at the behest of information shared by the Central Bureau of Investigation ("**CBI**") with the DG.

Agni Steels' contentions, in its writ

petition, related to the propriety of the inquiry initiated and the incidental summons issued to its officials because inter-alia the CCI did not pass an order explicitly setting out its prima facie opinion before the DG investigation commenced; and Agni Steels was not named in the original information shared by the CBI. In this regard, the MHC observed that the CCI deliberated the information shared by the CBI in a meeting and subsequently decided to register a suo moto case which consequently led to the initiation of the DG investigation. Accordingly, the MHC held that the initiation of the investigation was not in contravention of the provisions of the Competition Act. Further, the MHC while refusing to interfere with the investigation at this stage observed that the mere fact that the DG was investigating companies not mentioned in the original complaint did not necessarily imply that the investigation was being conducted in an arbitrary manner.

Gauhati HC dismisses Dalmia Cement's plea to halt CCI investigation

On 19 October 2023 a division bench of the Gauhati High Court ("**GHC**") upheld a single bench decision of the GHC which dismissed a writ petition filed by Dalmia Cement (Bharat) Ltd ("**Dalmia Cement**") that challenged the CCI's investigation into bid rigging allegations raised by the Oil and Natural Gas Corporation Limited in relation to its tenders floated for the purchase of oil well cement.

Notably, Dalmia Cement's primary contentions related to (a) the manner in which the investigation was being conducted and (b) that certain documents relied on by the CCI were not provided to Dalmia Cement in spite of repeated requests. Rejecting these contentions, the division bench inter-alia held that there was sufficient reason to justify the CCI's investigation and that information sought in furtherance of the same could not be

considered to be a fishing and roving inquiry. That being said, the GHC did however direct the CCI to provide Dalmia Cement with the complete set of documents that it relied upon to initiate the investigation subject to any confidentiality claims.

CCI dismisses complaint against tenders floated by Survey of India

On 30 November 2023, the CCI dismissed a complaint filed against Survey of India, Department of Science and Technology ("**Survey of India**") for allegedly imposing anti-competitive tender conditions. Consistent with past decisions, the CCI held that a procurer is within its rights to establish technical criteria, conditions, or provisions in the tender documentation based on its specific requirements. Further observing that, unless a procurer holds a position of dominance, the CCI will not be inclined to interfere in such matters.

CCI dismisses complaint against Lupin and Dr. Reddy's

On 30 November 2023, the CCI dismissed a complaint filed against Lupin and Dr. Reddy's Laboratories inter-alia alleging that the distribution and stockist onboarding policies of these companies were anti-competitive in nature and also resulted in an abuse of dominance. However, given the lack of substantiating evidence submitted by the informant in this case, the CCI rejected the allegations.

CCI dismisses complaint against Air India

On 15 December 2023, the CCI dismissed a complaint filed by a former Air India pilot which inter-alia objected to various aspects of Air India's integration with the Tata Group and Vistara (discussed in our July-September edition of *Versed*) on the grounds that it causes an adverse impact to his career and service record. However, given the lack of

substantiating evidence submitted by the informant in this case, the CCI concluded that the Informants' claims did not establish any competition law violations.

Merger Control

CCI approves Blackstone and TPG's acquisitions in Care Hospitals

On 20 September 2023, the CCI approved 2 secondary acquisitions of (a) a 72.49% stake in Quality Care India Limited ("**Care Hospital**") by BCP Asia II TopCo IV Pte. Ltd ("**BCP**"), an entity controlled by the Blackstone group; and (b) a 24.16% stake in Care Hospitals by Centella Mauritius Holdings Limited ("**Centella**"), which is an affiliate of the TPG group. Both these transactions had the same seller *viz.* Touch Healthcare Private Limited ("**Touch Healthcare**"), which is an entity owned and controlled by TPG. After analysing (a) the vertical overlap between a Blackstone portfolio entity and Care Hospital; (b) the TPG affiliate to affiliate transfer of shares between Centella and Touch Healthcare; and (c) the overall impact on the control of Care Hospitals after the exit of certain controlling TPG co-investors from Touch Healthcare's parent entity, the CCI concluded that the proposed transactions would not be likely to cause competition concerns in India.

CCI approves the rebalancing of shares between the two promoter groups of Indo Rama Synthetics

On 6 November 2023, the CCI approved a composite transaction relating to the rebalancing of shareholding amongst the two promoter groups of Indo Rama Synthetics (India) Limited ("**IRSL**") (i.e. the O. P Lohia Group and the A. Lohia Group). Pursuant to this transaction Mr. Alope Lohia ("**Mr. A. Lohia**") an IRSL promoter from the A. Lohia Group would first acquire an additional

20.51% equity stake in IRSL; and thereafter gift the acquired shares to Ms. Urmila Lohia ("**Ms. U Lohia**"), an IRSL promoter from the O. P. Lohia Group ("**Proposed Combination**"). Pursuant to the Proposed Combination the A. Lohia Group's shareholding in IRSL would decrease from 59.33% to ~39% whereas the O.P Lohia Group's shareholding in IRSL would increase from 15.51% to ~ 36%. Notably, the CCI observed that even though there would be no change in the nature of (contracted) rights between the two promoter groups, there would be a change in the nature of control that could be exercised by the promoter groups due to the change in their respective shareholdings in IRSL. After analysing effect of this change in control and a vertical relationship between IRSL and an entity controlled by the O. P. Lohia Group, the CCI concluded that the Proposed Combination would not be likely to have an appreciable adverse effect on competition ("**AAEC**") in India.

CCI approves Kedaara's intra-affiliate transfer of Lenskart shares

On 3 October 2023, the CCI approved the acquisition of a 1.74% minority stake in Lenskart Solutions Private Limited ("**Lenskart**") by Kedaara Capital Fund III LLP ("**Acquirer**") from Kedaara Capital Fund II LLP and Kedaara Norfolk Holdings Limited (collectively "**Sellers**") ("**Proposed Combination**"). Notably the Acquirer and Sellers were both affiliates under the common control /management of the Kedaara group. At the time of granting its approval the CCI, analysed horizontal overlaps relating to the sale of eyewear products between Lenskart and a Kedaara group portfolio entity and concluded that it would not be able to cause an AAEC in India.

CCI approves the re-balancing of Renault and Nissan's cross-shareholding

On 26 October 2023, the CCI approved

a transaction between Renault S.A ("**Renault**") and Nissan Motor Co. Limited ("**Nissan**") aimed at rebalancing (a) their cross shareholding in each other at a global level and (b) their respective shareholdings in their Indian joint ventures i.e. Renault Nissan Automotive India Private Limited and Renault Nissan Technology & Business Center India Private Limited (collectively "**JV Entities**"). Notably, at the time of granting its approval the CCI, inter-alia noted that the rebalancing exercise would not lead to any change in market concentrations and further observed that the products and services provided by the JV Entities to Nissan and Renault in India were solely captive in nature and as such there could be no competition concerns arising out of such relationships.

CCI approves the reorganisation of Honda shares and JIC's investment in Hitachi Astemo

On 10 October 2023, the CCI approved a transaction involving (a) a 20% investment by JICC-01 Limited partnership which is an entity ultimately owned and controlled by the Japan Investment Corporation ("**JIC**") in Hitachi Astemo Ltd. ("**HAL**"); (b) Honda Motor Co. Ltd.'s ("**HMCL**") acquisition of additional shares in HAL and (c) reorganisation of HMCL's shareholding in HAL's subsidiary ("**Proposed Combination**"). Notably, at the time of granting its approval the CCI analysed the impact of the vertical relationship between HAL group entities and HMCL which stemmed from an existing supply arrangement between the two entities. In this regard the CCI observed that, these pre-existing vertical linkages had been operational before the Proposed Combination and would have persisted even if the Proposed Combination had not occurred and as such there would be no change to the market dynamics in India.

CCI approves the acquisition of majority stake in Indira IVF by Zonnebaars

On 3 October 2023, the CCI approved the acquisition of a majority stake of up to 65.8% in Indira IVF Hospital Private Limited ("**Indira IVF**") by Zonnebaars Netherlands B.V. ("**Zonnebaars**"), an entity owned by the BPEA Fund VIII and managed by the EQT group ("**Proposed Combination**"). At the time of granting its approval, the CCI noted that Proposed Combination was slated to either take place through a primary structure whereby Zonnebaars would ultimately hold a 60% stake in Indira IVF or a fall-back structure pursuant to which Zonnebaars would ultimately acquire a 65.8% stake in Indira IVF. Further the CCI analysed (a) vertical overlaps relating to the manufacture and use of certain pharmaceutical products; and (b) horizontal overlaps relating medical specialities and procedures, being offered by Indira IVF and an EQT portfolio entities, eventually concluding that these overlaps would not be likely to cause AAEC in India.

CCI approves Mirae's minority acquisition in Shadowfax Technologies

On 14 November 2023, the CCI approved the acquisition of a minority stake in Shadowfax Technologies Private Limited ("**Shadowfax**") by Mirae Asset Late Stage Opportunity Fund ("**Mirae Late Stage**"). Further, contemporaneously with the acquisition of shares by Mirae Late Stage, certain Mirae group entities that were existing shareholders in Shadowfax would also acquire additional rights including the right to collectively appoint one director on the board of Shadowfax ("**Proposed Combination**"). At the time of approving the Proposed Combination, the CCI analysed vertical overlaps between Shadowfax and portfolio entities of the Mirae group relating to logistics services on the one hand, and

online sales and geospatial data and services on the other, eventually concluding that these overlaps would not be likely to cause an AAEC in India.

CCI approves AXA's exit from Bharti AXA Life Insurance and Bharti Management Services Limited

On 6 November 2023, the CCI approved two inter-connected transactions pursuant to which the Bharti Group would acquire sole control over Bharti AXA Life Insurance ("**BALIC**") and Bharti Management Services Limited ("**BMSL**") ("**Proposed Combination**"). Pursuant to this transaction, AXA India Holdings and its subsidiary ("**AXA**") would sell their stake of (a) 49% in BALIC to Bharti Life Ventures Private Limited and (b) 48.54% in BMSL to Bharti Enterprises Limited. Notably, at the time of granting its approval the CCI analysed a vertical overlap relating to the provision and distribution of life insurance products and services between BALIC and a Bharti group portfolio entity and concluded that it would not be likely to cause an AAEC in India.

Developments in the Legal Framework

CCI publishes draft Lesser Penalty Regulations for public comments

On 16 October 2023, the CCI published the draft CCI (Lesser Penalty) Regulations, 2023 ("**Draft Lesser Penalty Regulations**") for public comments, which is intended to replace the existing regulations and inter-alia provide a mechanism to implement the changes to the Indian leniency regime as contemplated in the Competition (Amendment) Act, 2023 ("**Amendment Act**"). Brief overview of some of the key provisions of the Draft Lesser Penalty Regulations are set out below:

Leniency Plus: In furtherance of the

leniency plus mechanism introduced through the Amendment Act, the Draft Lesser Penalty Regulations provide that if a cartel participant seeks leniency for its involvement in a known cartel and also provides information regarding another undisclosed cartel to the CCI then, (a) it stands to receive an additional reduction (i.e., in addition to the lesser penalty based on its priority status) of up to 30% on the penalty for the known cartel and (ii) it will be eligible for up to or equal to 100% penalty reduction in the newly disclosed cartel.

Timelines for making and withdrawing leniency applications:

Applications to avail the benefit of the leniency and leniency plus regime, can be made at any time, prior to the receipt of the DG report pertaining to the known cartel. Further, leniency and leniency plus applications can also be withdrawn at any time, prior to the receipt of the DG report pertaining to the known cartel. However, it may be noted that irrespective of the withdrawal of an application, the DG and/or the CCI will continue to have the right to utilize any information, evidence, or document submitted by the applicant, with the exception of admissions of guilt made in the application.

Grant and forfeiture of leniency benefits:

In order to gain the benefit of the leniency plus regime, the applicant is inter-alia required to (a) make vital, full and true disclosures about information/ evidence, which is sufficient for the CCI to establish the existence of the newly disclosed cartel; (b) provide details of the investigation with respect to the known cartel where in it has obtained a priority status; and (c) justify how the newly disclosed cartel is a new cartel arrangement (separate from the known cartel). However, applicants can stand to lose their leniency and leniency plus benefits in case of (a) non-compliance with the conditions upon which leniency/leniency plus was granted; (b) submission of false evidence or wilful omission of material information; and

(c) Disclosures that do not meet the criteria of 'vital disclosures'.

Treatment of cartel facilitators: The Amendment Act has broadened the scope of cartel provisions to include cartel facilitators, as such the benefits of the Draft Lesser Penalty Regulations will also extend to such cartel facilitators even if they are not involved in identical or similar trades but participate or intend to participate in furtherance of the cartel.

Treatment of confidential information:

The CCI is permitted to disclose details of the evidence submitted by the leniency/leniency plus applicant, after it has received the DG investigation report. However, such disclosures are to be in accordance with the provisions of the CCI General Regulations relating to confidentiality and confidentiality rings.

CCI publishes draft regulations on the determination of turnover for penalty calculations

On 22 December 2023, the CCI published the draft CCI (Determination of Turnover or Income) Regulations, 2023 (“**Draft Turnover Regulations**”) for public consultation. Pursuant to these regulations, the CCI intends to provide clarity on the 'turnover' (of an erring party) that would be considered for the purpose of calculating penalties under the Competition Act. As such, these Draft Penalty Regulations set out (i) the method for computation of turnover of an enterprise and an individual; (ii) the categories of income that can be excluded for the calculation of turnover/income; and (iii) documents to be relied on for the purposes of such calculations.

CCI publishes draft amendments to the General Regulations in relation to Interlocutory Applications

On 12 December 2023, the CCI published, draft amendments to the General Regulations, for public

comments. These proposed amendments, were introduced by the CCI with the intension of streamlining the process of monitoring and tracking the interlocutory applications received by the CCI on various grounds such as adjournments, seeking extension, cross examination, etc. As such, these draft regulations provide for (a) the manner in which such interlocutory applications should be registered and numbered; and (b) the fees payable at the time of filing an interlocutory application which ranges from INR 500 to INR 5000 depending on the nature of entity making such application.



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FINANCE

Regulatory Updates

New Scale-based regulatory regime for NBFCs

RBI issued the Master Direction- RBI (NBFC-Scale Based Regulation) Directions, 2023 ("**NBFC Directions**") on 19 October 2023 to streamline its earlier layered categorisation of NBFCs.

The NBFC Directions have sought to divide NBFCs into 4 categories based on their size, activity and perceived riskiness. Thus, Base Layer NBFCs shall include non-deposit taking NBFCs with assets size less than INR 1,000 crore, NBFCs Peer to Peer Lending Platforms, Non-Operative Financial Holding Company, NBFC-Account Aggregator and NBFCs not utilizing public funds or having any customer interface. Middle Layer NBFCs shall comprise of all deposit-taking NBFCs, non-deposit taking NBFCs with assets size of INR 1,000 crore & above, Housing Finance Companies, Infrastructure Debt Fund NBFCs, core investment companies etc. Upper Layer NBFCs shall be specifically identified by RBI, and RBI may move an Upper Layer NBFC in case of a notable increase in its potential systemic risk, to Top Layer NBFC.

The previous categorisation of NBFCs based on acceptance of deposits and the nature of activities continues to be in force. The NBFC Directions have introduced 4 layers of regulations to govern 4 NBFC categories and categorised NBFCs of the same group or having common promoters, basis their combined asset size.

Revised framework for large corporates (equity/debt listed) for mandatory issuance of debt securities

SEBI by its circular dated 19 October 2023 revised its existing mandate to large corporates regarding raising a

minimum 25% of their incremental borrowings in a financial year through issuance of debt securities.

Large corporates ("**LCs**") are listed entities (except for Scheduled Commercial Banks) which as on the last day of the financial year:

- have their specified securities or debt securities or non-convertible redeemable preference shares listed on a stock exchange; and
- have outstanding long-term borrowings of at least INR 1,000 crore, with some exclusions; and
- have a credit rating of "AA"/"AA+/"AAA" relating to unsupported/unstructured bank borrowing or plain vanilla bonds.

As per the circular, LC shall raise not less than 25% of its qualified borrowings through issuance of debt securities in the financial years subsequent to the financial year in which it is identified as an LC over a contiguous block of three years. The framework is applicable with effect from 1 April 2024 for LCs following April-March as their financial year and from 1 January 2024 for LCs following January-December as their financial year.

The circular also prescribes incentives such as reduction in annual listing fees to LCs having a surplus in requisite borrowings and disincentives to LCs having a deficit.

Amendment in scope of investment by an IIO under IFSCA framework

The International Financial Services Centres Authority ("**IFSCA**") (Investment by International Financial Services Centre Insurance Office) (Amendment) Regulations, 2023 notified on 25 October 2023 amends the IFSCA (Investment by International Financial Services Centre Insurance Office) Regulations, 2022 ("**Principal**

Regulations”). The Principal Regulations provides for a framework in accordance with which an IFSC Insurance Officer ("IIO") incorporated under IFSC or registered with IFSC, shall make investment of assets. The following amendments have been introduced:

- the IIO was earlier permitted to invest in India, through the foreign portfolio investment route. The terms 'foreign portfolio investment' have now been omitted thereby broadening the scope of investment routes, which will now be through an extant regulatory framework laid down by RBI or SEBI.
- IIOs investing its retained premium in domestic tariff area, have been exempted from the exposure limits to bonds, debt instruments, equity, immovable property and infrastructure assets, provided such investment is done to comply with IRDAI (Re-insurance) Regulations, 2018. The mode and manner of investments made by such IIOs shall continue to be in accordance with the Principal Regulations. This was introduced pursuant to IRDAI (Re-insurance) (Amendment) Regulations 2023, which inter alia, enable IIO to invest 100% of retained premium, emanating from insurers in India, in the domestic tariff area to be at par with foreign reinsurance branches.

Appointment of Whole-Time Directors in private sector banks and wholly owned subsidiaries of foreign banks

RBI *vide* notification dated 25 October 2023 directed the private sector banks and wholly owned subsidiaries of foreign banks to appoint at least 2 whole time directors ("WTDs") on their boards including the Managing Director and Chief Executive Officer. The bank's board can determine the strength of WTDs basis the operational scale, business complexity and other

pertinent considerations. The banks must submit request for WTD appointments under the Banking Regulation Act, 1949, within 4 months of the said notification, and banks lacking the relevant provisions in their articles of association for such WTD appointment should first seek RBI approval for required amendments.

Framework for compensation to customers for delayed updation/rectification of credit information

On 26 October 2023, RBI issued a circular with a compensation framework for delayed updation/rectification of credit information by the credit institutions ("CIs") and credit information companies ("CICs"). Key features are follows:

- Complainants are entitled to compensation of INR 100 per calendar day in case a complaint is not resolved (i.e. until a rectified credit information report has been sent to the complainant) within 30 calendar days from initial filing with a CI/CIC. However, this 30 days' period is an overall timeline and compensation would also be payable in the following scenarios: (a) CI shall pay compensation if it fails to send updated credit information to CICs by making appropriate edits or otherwise within 21 calendar days of being informed by the complainant or CIC; and (b) CIC shall pay compensation if it fails to resolve the complaint within 30 calendar days of being informed by the complainant or CI, despite the CI having furnished the updated credit information to the CIC within 21 calendar days as above.
- Rejection of a complaint must be accompanied by appropriate reason.
- Compensation for delay in resolution beyond 30 days from

filing of complaint, will be paid by defaulting CI/CIC (shared proportionately as per the circular).

- Compensation is to be credited within 5 working days of resolution of the complaint.

The compensation framework does not apply to specified complaints regarding computation of the credit score/credit score model, complaints pending in other fora etc.

RBI Directions to regulate Information Technology related practices of regulated entities

RBI has issued the Reserve Bank of India (Information Technology Governance, Risk, Controls and Assurance Practices) Directions, 2023 on 7 November 2023 (*effective from 1 April 2024*) focusing on information technology ("IT") governance including strategic alignment, risk management, resource management, performance management and business continuity/disaster recovery management. The key aspects of the said directions are:

- **Applicability:** These will apply to all commercial banks (except local area banks), NBFCs (excluding core investment companies), credit information companies and All India Financial Institutions (collectively, "REs").
- **Board approved policies:** REs shall put in place board approved strategies and policies related to IT, information assets, business continuity, information security, cyber security (including incident response and recovery management/ cyber crisis management).
- **Committees of Board:** REs shall establish IT Strategy Committee and IT Steering Committee focusing on, *inter alia*, overall strategy of the RE towards

accomplishment of its business objectives and business continuity and disaster recovery process respectively.

- **IT Services Management:** REs shall prepare a robust IT service management framework to support their information systems and infrastructure for operational resilience of their entire IT environment.
- **Data Migration Controls:** REs shall formulate a data migration policy specifying a systematic process for data migration, ensuring data integrity, completeness and consistency.
- **Audit Trails:** Every IT application which can access or affect critical or sensitive information, shall have necessary audit and system logging capability and should provide audit trails.

Framework for transfer of unclaimed amounts in respect of listed non-convertible securities

SEBI introduced a framework on 8 November 2023 (*effective from 1 March 2024*) to standardize the process to be followed by an entity to transfer unclaimed amounts to escrow account in relation to interest, dividend, redemption amount for listed non-convertible securities that has not been claimed within 30 days from its due date of payment. The issuer is now required to pay default interest @ 12% p.a. for any default in transferring such amounts to the escrow account within 7 days from the date of expiry of the said period of 30 days. The issuers are now required, to make certain information available on its website regarding such unclaimed amounts, and to formulate policies regarding the claim process for investors and for verification of claims by the issuer. Procedure to be followed by listed entities excluding companies, for transfer of unclaimed amount lying in the escrow account to the investor

protection and education fund and claim thereof by an investor is also detailed in this framework.

Increased risk weightage for credit - aimed at personal loans and digital lending

RBI has issued revised measures on 16 November 2023 regarding consumer credit exposure and bank-NBFC credit relations, with following key updates:

- **Consumer credit:** Increase in risk weight for consumer credit of commercial banks and NBFCs from 100% to 125%, excluding specific categories like housing loans, education loans, vehicle loans and loans secured by gold and gold jewellery. Further, credit card receivables for both scheduled commercial banks and NBFCs will also attract elevated risk weights of 150% and 125% respectively.
- **Bank credit to NBFCs:** Increase in risk weight of credit by scheduled commercial banks to NBFCs by 25 percentage points for exposures where the current risk weight based on the NBFC's external rating falls below 100%, with some exceptions.
- **Credit standards:** Regulated entities are mandated to implement board approved limits for various sub-segments under consumers credit, especially unsecured consumer credit exposures. All top-up loans against depreciating movable assets are to be classified as unsecured for credit evaluation, prudential limits and exposure purposes.

Regulation of investments in AIFs to address evergreening of loans

To curb the evergreening of loans and misuse of Alternative Investment Funds ("AIF") route, RBI has issued an advisory on 19 December 2023 to regulated entities ("REs") directing

them as follows:

- not to make investments in any scheme of AIFs which has a downstream investment directly or indirectly in a debtor company to which RE has or previously had a loan or investment exposure anytime in the preceding 12 months.
- liquidate their investments within 30 days from the date of downstream investment by the AIF (or date of the circular for existing investments), if REs are investors of such an AIF scheme. Failure to so liquidate within the prescribed time limit, would require the RE to make 100% provision on such investments.
- Any investment by REs in the subordinated units of any AIF scheme with a 'priority distribution model' shall be subject to full deduction from RE's capital funds.

Enabling Card-on-File Tokenisation through Card Issuing Banks

This RBI, through a directive dated 20 December 2023, granted card-issuing banks and institutions, the authority to provide card tokenization services to their customers. Card-on-File (CoF) token earlier could only be created through merchant's application or webpage. The new directive will allow debit and credit card holders to tokenize their cards for multiple merchant sites by going through a single process which is available through mobile banking and internet banking channels.

RBI issues Government Securities Lending Directions, 2023

RBI has issued the RBI (Government Securities Lending) Directions, 2023 on 27 December 2023 to enable the lending and borrowing of government securities ("G-Secs"). The key elements of the guidelines are:

- **GSL Transaction:** G-Secs may be lent by the owner to a borrower, for a fee, on collateral of other G-Secs, for a specified time.
- **Eligible securities:** G-Secs issued by the central government (including securities obtained through repo transaction) excluding treasury bills will be eligible for lending/borrowing. G-Secs issued by state/central government including treasury bills are eligible for placing as collateral in such lending/borrowing.
- **Eligible borrowers/ lenders:** Entities eligible to participate in repo transactions in G-Secs or otherwise approved by RBI are eligible as lenders. Entities that are eligible to undertake short sale transactions are eligible borrowers.
- **Tenor:** The minimum tenure of a GSL transaction would be 1 day while the maximum tenor shall be the maximum period prescribed to cover short sales as per the Directions on 'Secondary Market Transactions in Government Securities – Short Selling' dated 25 July 2018.

Modification to the regulatory regime for online bond platform providers

SEBI has, *vide* its circular dated 28 December 2023, modified the provisions of Chapter XXI of the master circular for issue and listing of non-convertible securities, securitised debt instruments, security receipts, municipal debt securities and commercial paper, which deals with the registration and regulatory framework for Online Bond Platform Providers ("OBPPs"). Below are some key changes introduced:

- **Products/ Securities/ Services offered:** SEBI has now permitted

OBPPs to provide such other products/ securities/ services (*in addition to the existing ones*) that are regulated by a financial sector regulator *viz.* SEBI, RBI, IRDAI or Pension Fund Regulatory and Development Authority. In addition to such products/ securities/ service being governed by the respective regulators, OBPPs are required to offer these under a different tab on its online bond platform or other website/ platform.

- **Disclosures on website:** Disclosure requirements of OBPPs have been updated based on the products/ securities/ services offered and the corresponding financial regulator having jurisdiction over the same.

MHP for transfer of loans exempted for transfer of receivables in factoring

RBI *vide* a notification dated 28 December 2023 amended Master Direction – Reserve Bank of India (Transfer of Loan Exposures) Directions, 2021, to exempt the minimum holding period requirement in case of transfer of receivables arising from factoring business provided the residual maturity of the receivables at the time of transfer is not more than 90 days and proper credit appraisal of the drawee has been conducted by the transferee in accordance with the aforementioned directions.

Penal Charges in Loan Accounts: Extension of Timeline

RBI *vide* notification dated 29 December 2023 has extended the timeline for REs for implementation of instructions for charging penal charges (instead of penal interest) on fresh loans and existing loans. As per the notification, REs shall ensure the implementation of instructions: (i) in case of fresh loans from 1 April 2024;

and (ii) in case of existing loans, on the next review/ renewal date falling on or after 1 April 2024, but not later than 30 June 2024.

Master Direction - Reserve Bank of India (Internal Ombudsman for Regulated Entities) Directions, 2023

In order to harmonize the Internal Ombudsman ("IO") mechanism applicable to various regulated entities to strengthen their grievance redressal mechanism, on 29 December 2023, RBI notified the Master Direction - Reserve Bank of India (Internal Ombudsman for Regulated Entities) Directions, 2023 ("**Directions**"). It integrates the erstwhile RBI ombudsman schemes. The Directions are applicable to banks, non-banking financial companies, credit information companies, non-bank system participants and any regulated entity specifying certain thresholds.

The Direction brings uniformity in matters such as timeline for escalation of complaints to the IO, exclusions from complaints escalated to the IO, temporary absence of the IO, minimum qualifications for appointing the IO, and updation of reporting formats. It also introduces the post of Deputy Internal Ombudsman (who will assist the IO) depending on volume of complaints.

Case Summaries

NCLT Hyderabad: AAI as a statutory body excluded from the scope of 'Corporate Person'

On 23 November 2023, in the matter of *M/s Akash Electrotek Engineers Pvt Ltd. vs. M/s NCC Limited and M/s Airport Authority of India*, the National Company Law Tribunal, Hyderabad ("**NCLT**"), dismissed a petition by an operational creditor seeking to initiate corporate insolvency resolution process ("**CIRP**") against M/s NCC Limited, and M/s Airport Authority of

India ("**AAI**"), for the alleged default in discharging the debt due in lieu of certain services provided.

The NCLT, held that AAI being a statutory body created under Airport Authority of India Act, 1944, did not qualify as a 'corporate person' under Section 3(7) of Insolvency and Bankruptcy Code ("**IBC**") and thus, proceedings under IBC could not be initiated against them. Further, referring to facts of the case, NCLT averred that CIRP proceedings under IBC could not be initiated (i) until dues had been crystallized; (ii) as a tool for recovery for non-payment of services rendered; and (iii) without specifying who actually is responsible for the debt incurred.

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INSURANCE

Regulatory Updates

Amendment of Arbitration Clause in General Insurance Policies

The Insurance Regulatory and Development Authority of India (“IRDAI”), has by way of a circular dated 27 October 2023, amended the arbitration clause in general insurance policies. The IRDAI has stated that all retail insurance policies shall not have an arbitration clause.

For insurance policies issued under the commercial lines of business, the IRDAI has stipulated an arbitration clause, which allows the parties to the contract to mutually agree and enter into a separate arbitration agreement to settle disputes in relation to the policy. Such agreement must be in compliance with the Arbitration and Conciliation Act, 1996. The circular also states that for all the existing policies, the existing arbitration clause shall be valid until a policy is renewed but provides the policyholder with the option to have it replaced with a new arbitration as set out in the circular.

Amendment to Master Guidelines on Anti-Money Laundering/Counter Financing of Terrorism, 2022

The IRDAI has by way of a circular dated 10 October 2023 amended the ‘Master Guidelines on Anti-Money Laundering/Counter Financing of Terrorism, 2022 (“Guidelines on AML/CFT 2022”). The amendments provide the following:

(i) In case there is a variance in client due diligence (“CDD”) or Anti-Money Laundering/Counter Financing of Terrorism (“AML/CFT”) standards specified by the IRDAI and the standards specified by regulators of the host country (of foreign branches/majority-owned subsidiaries), foreign branches/majority-owned subsidiaries of the regulated

entities shall adopt the more stringent requirements of the two (i.e., the standards specified by the IRDAI or the standards specified by the regulators of the host country).

- (ii) Financial groups should implement group-wide programmes against money laundering/terrorism financing (“ML/TF”) for all branches and majority owned subsidiaries of the financial group including: (a) policies and procedures for sharing information required for risk management; (b) the provision, at group-level compliance, audit, and/or AML/CFT functions, of customer, account, and transaction information from branches and subsidiaries when necessary; and (c) adequate safeguards on the confidentiality and use of information exchanged, including safeguards to prevent tipping-off.
- (iii) Insurers should conduct necessary CDD, including enhanced due diligence (“EDD”), if required, on policyholders, beneficiaries, legal heirs, and assignees.
- (iv) In the event that the insurer forms a suspicion of money laundering or terrorist financing and believes that conducting the CDD will tip-off the customer, they are directed not to pursue the CDD process. Instead, they must promptly file a suspicious transaction report (STR) with the Financial Intelligence Unit – India (FIU-IND).
- (v) Insurers should establish ongoing risk management procedures for identifying and applying EDD measures on an on-going basis to Politically Exposed Persons (PEPs) and their close relatives/associates.
- (vi) Insurers should undertake ML/TF risk assessment prior to the launch or use of products, practices and technologies and take appropriate measures to

- manage and mitigate the risks.
- (vii) Insurers should apply EDD measures, proportionate to the risks, to business relationships and transactions with natural and legal persons (including financial institutions) from countries for which this is called for by the Financial Action Task Force (FATF).

Participation in the Account Aggregator Framework as a Financial Information User

IRDAI has in the past issued several directions to insurers participating in the account aggregator framework (“**AA Framework**”). By way of a circular dated 3 November 2023, the IRDAI has now mandated Financial Information Users (as defined in the ‘Master Direction- Non-Banking Financial Company - Account Aggregator (Reserve Bank) Directions, 2016’ (“**Master Directions on NBFC-AA**”)) (“**FIU**”)¹ to comply with the technical specifications (Financial Information Type Schemas) published by Reserve Bank Information Technology Private Limited (“**ReBIT**”), as updated from time to time.

The circular provides that the FIUs shall not use or disclose the Financial Information² (as defined in the Master Directions on NBFC-AA) provided by

¹ Para 3(1)(xii) of the Master Directions on NBFC-AA, a “**Financial Information User**” means an entity registered with and regulated by any financial sector regulator.

² Para 3(1)(ix) of the Master Directions on NBFC-AA, “**Financial Information**” means information in respect of the following with financial information providers: (a) bank deposits including fixed deposit accounts, savings deposit accounts, recurring deposit accounts and current deposit accounts, (b) Deposits with NBFCs, (c) Structured Investment Product (SIP), (d) Commercial Paper (CP), (e) Certificates of Deposit (CD), (f) Government Securities (Tradable), (g) Equity Shares, (h) Bonds, (i) Debentures, (j) Mutual Fund Units, (k) Exchange Traded Funds, (l) Indian Depository Receipts, (m) CIS (Collective Investment Schemes) units, (n) Alternate Investment Funds (AIF) units, (o) Insurance Policies, (p) Balances

the ‘Financial Information Provider’ (as defined in the Master Directions on NBFC-AA) (“**FIP**”)³, except as specified in the consent artefact. FIUs in the insurance sector will now also have to prominently disclose the names of the account aggregators through which the information is obtained on their respective websites.

In addition to these measures, FIUs in the insurance sector are directed to ensure that their account aggregator-related applications are multi-lingual, adhere to specified codes of conduct, establish grievance redressal mechanisms for customers, and maintain compliance with the Insurance Act, 1938, the Insurance Regulatory and Development Act, 1999, along with the associated rules and regulations.

Circular on Discontinuation of filing of certain returns by Insurers and Insurance Brokers

The IRDAI has by way of circular dated 24 November 2023, clarified that pursuant to the notification of the IRDAI (Payment of Commission) Regulations, 2023 (“**Payment of Commission Regulations**”), the insurers and insurance brokers are not required to furnish the following returns and certificates:

(i) Returns by Insurance Brokers:

under the National Pension System (NPS), (q) Units of Infrastructure Investment Trusts, (r) Units of Real Estate Investment Trusts, (s) Goods and Services Tax (GST) Returns, viz. Form GSTR-1 and Form GSTR-3B, (t) Any other information as may be specified by the Bank for the purposes of these directions, from time to time.

³ Para 3(1)(xi) of the Master Directions on NBFC-AA, a “**Financial Information Provider**” means bank, banking company, non-banking financial company, asset management company, depository, depository participant, insurance company, insurance repository, Central Recordkeeping Agency⁴, Goods and Services Tax Network (GSTN) and such other entity as may be identified by the Bank for the purposes of these directions, from time to time.

Returns as per Clause 39(1)(d) of the IRDAI (Insurance Brokers) Regulations, 2018 (“**Insurance Brokers Regulations**”) with a certificate as per Annexure I-D of the Insurance Brokers Regulations confirming that the insurance broker has received the remuneration for direct insurance business as per the prescribed limits;

- (ii) Certification by Insurance Brokers: Certificate as per Schedule II - Form W of the Insurance Brokers Regulations endorsed by Principal Officer and CFO (or equivalent), related to the confirmation that the remuneration and other payments received from the insurer are within the specified limits as per Regulation 34(9) of the Insurance Brokers Regulations; and
- (iii) Certificate by Insurers engaging Insurance Brokers: Certificate as per Schedule II – Form W of the Insurance Brokers Regulations signed by the CEO and CFO of the insurer, separately for each broker, if the remuneration and other payments made to the broker exceed the stipulated limits as per Regulation 34(9) of the Insurance Brokers Regulations.

Exposure Draft on IRDAI (Expenses of Management, including Commission, of Insurers) Regulations, 2023

The IRDAI has by way of a circular dated 14 November 2023, released the IRDAI (Expenses of Management, including Commission, of Insurers) Regulations, 2023 (“**Draft EoM Regulations**”). The Draft EoM Regulations, once finalized and notified shall replace IRDAI (Expenses of Management of Insurers transacting General or Health Insurance Business) Regulations, 2023, IRDAI (Expenses of

Management of Insurers transacting Life Insurance Business) Regulations, 2023, and IRDAI (Payment of Commission) Regulations, 2023.

The Draft EoM Regulations maintain the proposed limits the expenses of management (“**EoM**”) to 30% of gross premium written in India for general insurers and 35% of gross premium written in India for standalone health insurers. Additionally, life insurers are limited to allocating no more than 5% of all single premiums received annually for policies offering immediate or deferred annuity towards EoM. Moreover, their spending on group pure risk policies is capped at 10% of total single premiums received during each year.

Also, the allowance for the group fund-based policies would be based on the average of assets under management (“**AUM**”) of the policies at the beginning and at the end of the financial year. For AUM up to Rs 10,000 crore, the allowable EoM will be 1%, whereas, for amounts more than Rs 10,000 crore, the allowable EoM will be 0.80%.

Exposure Draft on IRDAI (Registration and Operations of Foreign Reinsurers Branches & Lloyd’s India) Regulations, 2024

The IRDAI has, by way of a circular dated 12 December 2023 issued Draft IRDAI (Registration and Operations of Foreign Reinsurers Branches & Lloyd’s India) Regulations, 2024 (“**Draft Foreign Reinsurers and Lloyd’s India Regulations**”), which consolidate the IRDAI (Registration and Operations of Branch Offices of Foreign Reinsurers other than Lloyd’s) Regulations, 2015 and IRDAI (Lloyd’s India) Regulations, 2016.

The salient features of the Draft Foreign Reinsurers and Lloyd’s Regulations include: (i) unification of common provisions applicable to both branch offices of foreign reinsurers other than Lloyd’s and applicable to Lloyd’s India

in a single set of regulations; (ii) provisions in relation to amalgamation, merger and acquisition of parent entities of foreign reinsurance branches have been introduced, which, *inter alia*, provide: (a) a detailed list of the contents of the report to be submitted by the parent of the applicant entities, (b) the requirement for furnishing a notice of an intention to merge or amalgamate within 15 days of submission of the same to the home country regulator of the parent entity, (c) implementation of such amalgamation, merger and acquisition shall be only after final approval of the IRDAI; and (iii) substantive provisions such as eligibility, registrations, procedure for such registrations and the conditions relating to grant of approval have been retained in the Draft Foreign Reinsurers and Lloyd's India Regulations.

Exposure Drafts for IRDAI (Insurance Products) Regulations, 2023

The IRDAI has by way of a circular dated 12 December 2023 issued Draft IRDAI (Insurance Products) Regulations, 2023 ("**Draft Insurance Products Regulations**"), which consolidate the following regulations: (i) IRDAI (Micro Insurance) Regulations, 2015; (ii) IRDAI (Minimum Limits for Annuities and other benefits) Regulations, 2015; (iii) IRDAI (Acquisition of Surrender and Paid up values) Regulations, 2015; (iv) IRDAI (Health Insurance) Regulations, 2016; (v) IRDAI (Unit Linked Insurance Products) Regulations, 2019; and (vi) IRDAI (Non-Linked Insurance Products) Regulations, 2019.

The main objective of the Draft Insurance Products Regulations is to facilitate insurers to respond faster to the emerging market needs, promote ease of doing business, improve insurance penetration and protect the policyholders' interest by enabling insurers to adopt good governance while designing and pricing the

products.

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PROJECTS & INFRASTRUCTURE

Regulatory Updates

CERC removes difficulties in implementation of GNA Regulations

By its order dated 1 October 2023, Central Electricity Regulatory Authority ("**CERC**") has issued clarifications on a few issues for removal of difficulties in implementation of CERC (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 ("**GNA Regulations**"). The clarifications *inter alia*, pertain to payment of transmission charges for temporary general network access under advance and exigency application category, treatment of bank guarantees, and extension of timeline for application for grant of general network access by state transmission utilities.

Clarifications in relation to scheme for one-time settlement of contractual disputes

The National Highways Authority of India, on 3 October 2023, issued a policy circular to effectively implement the clarifications issued by the Department of Expenditure, Ministry of Finance ("**MoF**") regarding MOF's one-time settlement scheme 'Vivad se Vishwas II (Contractual Disputes)' for settlement of pending disputes ("**Scheme**").

Previously, as per the Scheme, the settlement amount that would be offered to contractors for arbitral awards passed on or before 31 January 2023, was 65% of the net amount awarded/ upheld by the court or 65% of the claim amount lodged by the contractor under the Scheme, whichever is lower. However, now the same has been corrected to 65% of the net amount awarded or 65% of the claim amount lodged by the contractor under the Scheme, whichever is lower. Further, the MoF has also clarified that for such arbitral awards or court orders

passed on or before 30 April 2023, the stipulated interest will not only be paid on the pending settlement amount (85% or 65% of the award, as applicable) but also on the interest accumulated till the date of award (to the extent of 85% or 65%, as applicable).

Revision in fee collected by government authorities on national highways, bridge, tunnel or bypass

Ministry Of Road Transport and Highways *vide* a notification dated 6 October 2023 amended the National Highways Fee (Determination of Rates and Collection) Rules, 2008, which regulates, *inter alia*, the fee collected by government authorities after expiry of concession period. Prior to the amendment, the fee collected by the government authorities post concession period was to be reduced to 40% of the fee collected during the concession period. With the said amendment getting effective, the fee collected by the government authorities post concession period shall remain same as the fee collected on the date of transfer of such section of the national highway, bridge, tunnel or bypass.

Penalties for violation of DCR norms under Solar PV power projects

The Ministry of New and Renewable Energy ("**MNRE**"), on 16 October 2023, taking note of the apprehensions raised in respect of the supply of solar PV modules under MNRE's schemes/ programs which are not fully compliant with the domestic content requirements ("**DCR**") prescribed by MNRE in 2018, once again reiterated that such DCR provisions as mandated shall be strictly complied with and any violation of such provisions shall invite actions set out in the 2018 memorandum. These include filing of criminal cases under section 420 of the Indian Penal Code 1860 and related sections, blacklisting of a developer for period of 10 years etc.

Amendments to the CERC (Sharing of inter-State Transmission Charges and Losses) Regulations, 2023

The Central Electricity Regulatory Commission has *vide* notifications dated 20 October 2023 and 26 October 2023 amended the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2023. Broadly, these amendments introduce the following principles:

- **Deemed COD:** The concept of 'Deemed Commercial Operation Date ("COD")' has been introduced, which represents the commercial operation date for a transmission system or its element.
- **Treatment of yearly transmission charges:** New rules have been introduced for the treatment of yearly transmission charges for inter-state transmission systems or elements approved or declared as 'Deemed COD'.

Extensions of directions to Imported Coal based plants under Section 11 of the Electricity Act, 2003

The Ministry of Power on 23 October 2023 extended the validity of directions issued to Imported Coal Based Plants under section 11 of the Electricity Act, 2003 up to 30 June 2024, mandating them to generate power to their full capacity and prescribing procedure to determine rates at which power is supplied. The extension has been issued in light of the surge in electricity demand, inadequate supply of domestic coal and reduced ability of hydrogenation.

Directions to Thermal Generating Stations for blending of imported coal

The Ministry of Power has issued an advisory dated 25 October 2023

revising the advisory dated 1 September 2023 regarding blending of imported coal. The new advisory directs that blending of imported coal @ 6% (by weight) minimum may be continued till March 2024 in order to ensure uninterrupted power supply across the country. Thermal generating companies may also review their stock and opt for blending as per requirements if the shortfall in domestic coal supply exceeds 6%.

Centre declares imposition of charges by states on generation of electricity as unconstitutional

The Ministry of Power has issued a circular dated 25 October 2023 noting that some State Governments have imposed additional charges on generation of electricity from various sources under the guise of development fee/ charges/ fund.

Citing constitutional provisions including Articles 286, 287, 288 and Schedule VII, the circular specifies that levying of taxes/ duties by any State on generation or inter-State supply of electricity under the guise of additional charges/ fee on generation of electricity from any source, i.e., thermal, hydro, wind, solar, nuclear is illegal and unconstitutional.

Procedure for Implementation of Uniform Renewable Energy Tariff notified

The Ministry of Power has, on 25 October 2023, issued to Grid India, the approved procedure for implementation of a uniform tariff for renewable energy ("URET"). The procedure establishes a framework for the implementation of a URET, including the categorization of central pools, eligibility criteria for entities, data submission, tariff calculation, and compliance measures to promote renewable energy adoption. The key elements are below:

- **Implementing agency:** Grid Controller of India Limited (“**Grid India**”), as the implementing agency, shall calculate and implement the URET, on a monthly basis for each category of central pool at which an intermediary procurer shall sell power to the end procurers.
- **Scope and Duration:** The procedure applies to central pools for different renewable energy sources, such as solar power, wind power, hydro power etc. as specified by the Central Government. Each central pool is established for 5 years, with capacity added during this period. After 5 years, no new capacity can be added, but existing capacity remains in the pool until expiration of the respective agreements.
- **Eligibility criteria and registration:** Eligibility criteria and registration requirements for the URET Central Pool participants including producers/generators, end producers and intermediary procurers has been detailed.
- **Legal Obligations:** Contractual obligations and change in law provisions between parties are governed by respective agreements, separate from URET.
- **Indemnity:** Grid India is to be indemnified against liabilities arising from actions taken under the procedures.
- **Method for Calculation:** Tariff calculation is based on scheduled energy to end procurer from the central pool.

Battery Waste Management (Amendment) Rules, 2023

On 25 October 2023, the Ministry of Environment, Forest and Climate Change notified the Battery Waste

Management (Amendment) Rules, 2023 to amend the Battery Waste Management Rules, 2022. The key amendments include:

- **Definition of battery:** Earlier, the definition of 'Battery' included new or refurbished cell/batter and its components. Battery components have now been excluded.
- **Responsibility of Producers:** The Extended Producer Responsibility (“**EPR**”) of the producers is expanded to include batteries that the producers put to self-use, in addition to batteries introduced by them in the market. Further, the producers are required to file annual returns in respect of pre-consumer waste battery generated in the preceding financial year, and an annual return regarding batteries manufactured, assembled, or imported in the preceding financial year.
- **Registration:** Every producer is required to obtain registration from the Central Pollution Control Board (“**CPCB**”), which shall now be valid until it is cancelled or withdrawn.
- **Recyclers and refurbishers:** The EPR certificates for recyclers and refurbishers shall be generated based on the weight of waste battery processed or refurbished.
- **Trading of EPR certificates:** One or more electronic trading platforms for sale and purchase of EPR certificates may be established through accredited agencies, which will be regulated by CPCB. CPCB shall fix the highest or lowest price for EPR certificates every 6 months, or as required, keeping in view the cost for collection and management of waste battery and environmental compensation regime in force.

Advisory to stated owned GENCOs to participate in CIRP for taking over of Stressed Thermal Power Assets

The Ministry of Power issued an advisory dated 1 November 2023 encouraging all state owned generation companies (“**GENCOs**”) to participate in the Corporate Insolvency Resolution Process (“**CIRP**”) for taking over stressed thermal power assets.

The major challenges faced by the stressed assets include inadequate capital investment, shortage of raw material and prolonged recovery of dues. Such participation of GENCOs will lead to resolution and revival of significant public investment and national resources in stressed power assets in a cost and time effective manner, avoid the gestation period of new projects, and enhance the nation’s power-generation capacity. The said takeover via CIRP route will provide a ‘clean slate’ to the acquirer.

Reappraisal of environmental clearances by State Expert Appraisal Committee / State Environment Impact Assessment Authority

Pursuant to the order of the National Green Tribunal passed in Jayant Kumar vs. Ministry of Environment, Forest & Climate Change (“**Ministry**”) & Ors., the Ministry issued an office memorandum, dated 28 April 2023, directing all valid environmental clearances (“**ECs**”), issued by the District Environment Impact Assessment Authority (“**DEIAA**”), to be reappraised through the State Expert Appraisal Committee / State Environment Impact Assessment Authority (“**SEIAA**”).

The Ministry has now issued a clarification *vide* its office memorandum dated 3 November 2023 stating that the ECs granted by the DEIAA which are valid as on date shall continue to be valid for 1 year from the date of issue of its earlier office memorandum dated 28 April 2023, unless the validity of the EC

granted lapses prior to 28 April 2024 or until SEIAA has invalidated an EC upon reappraisal.

Clarification on timeline for transfer of environmental clearances after transfer/ acquisition/ demerger

The Ministry of Environment, Forest & Climate Change (“**Ministry**”) has, *vide* office memorandum dated 3 November 2023 (“**Office Memorandum**”), clarified that subsequent to the transfer/ acquisition/ demerger/ change in name etc., of a project/ unit, having a valid environmental clearance (“**EC**”), from one legal entity to another, all the accumulated environmental obligations, shall be deemed to be transferred to the new entity from the date of such transfer/ acquisition/ demerger/ change in name etc. Accordingly, the transferor/ transferee shall apply for transfer of EC on PARIVESH, within 12 months of such transfer/acquisition/demerger/ change in name etc. of the company.

However, in case of delay in filing of the application beyond such period of 12 months, up to 24 months from the date of transfer/ acquisition/ demerger/ change in name etc, the delay shall be condoned at the level of the minister in charge of Ministry or chairman of State Level Expert Appraisal Committee, as the case may be. Delay in filing beyond such period of 24 months shall be considered as non-compliance of the condition of grant of the EC and action shall be initiated on the project proponent as per the existing rules.

Any project proponent who, as of the date of the Office Memorandum, has not applied for transfer of EC, in respect of a change in name/ownership of the company, even after 1 year from such change, is required to so apply within a period of 6 months from the date of the Office Memorandum and the same shall not be considered as a non-compliance of the EC.

Draft safety and procedural requirements for type approval of hydrogen power vehicles

The Government of India has hosted a draft for Safety and Procedural Requirements for Type Approval of Hydrogen Powered Vehicles (Liquid / Compressed Gaseous Hydrogen) for public comments on 6 November 2023. These standards are formulated by Automotive Industry Standards Committee to minimize human harm that may occur as a result of fire, burst or explosion related to the vehicle fuel system and / or from electric shock caused by the vehicle's high voltage system. Since on-road vehicle experience with liquefied hydrogen system is limited and safety requirements have not been comprehensively evaluated for feasibility and known failure conditions, the standard also presents optional requirements and test procedures for vehicles with liquefied hydrogen storage systems.

Engagement of personnel by contractors in EPC road projects

Clause 4.4 of the Standard Engineering Procurement and Construction (“EPC”) Agreement for national highways (road projects) puts the onus on the contractor to ensure that the personnel engaged by them or their sub-contractors, in the performance of their obligations under the agreement, shall at all times be appropriately and adequately qualified, skilled and experienced in their respective functions, in accordance with good industry practice.

In furtherance to the above, the National Highways Authority of India, issued a policy circular, dated 10 November 2023, providing the qualifications of the respective personnel considering good industry practices.

New conditions for assignment of forest land on lease to government and private entities

The Central Government on 29 November, notified certain terms and conditions, under the Van (Sanrakshan Evam Samvardhan) Adhiniyam, 1980, to be abided by the State Government or Union territory Administration while considering the proposals for assignment of forest land on lease to government or private entities. In case of existing mining leases having forest land in part or in full, no mining shall be allowed until the approval of the Central Government is obtained for the entire forest land falling in such mining lease. The user agency seeking assignment of forest land on lease for mining, shall also submit the approved mining plan and a mine closure plan, and for activities other than mining, a detailed project report or plan for activities shall be submitted along with the proposal. The validity of approval shall be valid for a period co-terminus with the period of mining lease granted or for the period specified by the Central Government. The State Government or Union territory Administration and the user agency shall monitor at least once a year, the compliance of conditions imposed for allowing non-forestry use of forest land and upload a copy of such monitoring report on PARIVESH portal.

New National Repowering & Life Extension Policy for Wind Power Projects, 2023

The Ministry of New and Renewable Energy (“MNRE”) has issued the new National Repowering and Life Extension Policy for Wind Power Projects, 2023, dated 7 December 2023. This policy *inter alia*, allows the replacement of aging turbines with more efficient ones before reaching the end of their design life, involving modifications to components like gearbox, blades, generator, and controller and aims to enhance energy yield by using modern technologies. A repowering/refurbishment project

should satisfy the specified criteria and the annual enhanced generation should be at least 1.5 times the old project. Repowering can be standalone or aggregated projects, extending power purchase agreements by up to 2 years. Developers can sell surplus power without mandatory fixed rates and without any right / obligation of the distribution companies over such surplus power, with a 24-month operational timeframe post-consent. Additional transmission augmentation will be provided to the developer for such projects.

CERC (Terms and Conditions of Tariff) (Third Amendment) Regulations, 2023

Central Electricity Regulatory Commission (“CERC”) on 15 December 2023 amended the Appendix II of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 which regulates the calculation of transmission system availability factor for a month. Pursuant to the amendment, the transmission elements shall be deemed to be available if an outage is caused by shut down of a transmission line due to its shifting or modification by projects of NHAI, Railways or Border Road Organization. Member Secretary of Regional Power Committee (“RPC”) may set a reasonable availability period provided designated inter-state transmission system customers remain unaffected by such shutdown.

The outages due to acts of god or grid incidents/disturbance not attributable to the transmission licensee which will be excluded from the total time of the element under period of consideration, shall now be declared by (a) Member Secretary, RPC, for maximum up to 1 month; (b) RPC, beyond 1 month and up to 3 months; and (c) CERC, beyond 3 months and for which the transmission licensee shall approach CERC along with reasons and mitigation steps.

Offshore Wind Energy Lease Rules, 2023 notified

On 19 December 2023, the Ministry of External Affairs notified the Offshore Wind Energy Lease Rules, 2023 (“Rules”) under the Territorial Waters, Continental Shelf, Exclusive Economic Zones, and Other Maritime Zones Act, 1976. Some of the key principles of the Rules are set out below:

- **Grant of lease:** The Central Government shall have the power to grant such lease within the exclusive economic zone to any person for an offshore wind energy project or an offshore wind transmission project (either, a “Lessee”). Prior to the granting of such lease, clearances from the Ministry of Defence, Ministry of Home Affairs, Ministry of External Affairs, Ministry of Environment, Forest and Climate Change, Department of Space and Ministry of Ports, Shipping and Waterways shall be obtained. The area covered under the lease shall range from 25 to 500 square kilometres.
- **Exclusive rights of lessee:** A Lessee will have the exclusive right to carry out activities related to offshore wind energy generation and transmission within the designated area, with a right to restrict boats, ferries, or ships within the designated area. However, activities such as fishing for livelihood and other activities for public benefit can be carried out, without interference to the wind farm.
- **Lease fee:** The Lessee shall be required to pay a lease fee of INR 1 lakh per square kilometre or part thereof per year in advance, along with a security deposit.
- **Lease period:** The lease will be valid for 3 years, for resource measurement and other related

study or survey activities, extendable by 2 more years if valid reasons are provided. However, if establishment of the wind energy capacity has not started at the end of the 5 year period, the lease shall expire. For the construction and operation of the offshore wind energy project, the lease will be extended up to 35 years, with further extensions on a case-by-case basis.

Case Summaries

Supreme Court settles key principles for captive generation plants

In the matter *Dakshin Gujarat Vij Company Limited vs. Gayatri Shakti Paper and Board Limited and another*, the Supreme Court of India interpreted various provisions of the Electricity Act, 2003 (“Act”) and Rule 3 of the Electricity Rules, 2005 (“Rules”) in relation to classification of captive generation plants (“CGPs”). The key findings of the judgment are as follows:

- **Import of the terms 'set up':** The court upheld the rationale in *Kadodara Power Pvt Ltd and Ors v. Gujarat Electricity Regulatory Commission & Anr* that 'Set up' defined in section 2(8) of the Act has been made equal to “construct, maintain or operate” by use of these words in section 9. A CGP does not lose its captive status due to transfer of its ownership, provided that the transferee complies with the eligibility requirements under Rule 3.
- **26% requirement to be met throughout the year:** The court disagreed with the *Tamil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission* and held that the minimum threshold of ownership, i.e. 26%, has to be met throughout

the year and not at the end of financial year alone.

- **Clarity on proportionality requirement:** While interpreting the second proviso to Rule 3(1)(a) where captive users are an ‘association of persons’, the Supreme Court elaborated on the unitary qualifying ratio in the proportionality principle. The court observed that the unitary qualifying ratio is the consumption requirement divided by the shareholding requirement, i.e. 51% divided by 26%. This means that the owner of every 1% shareholding of the CGP should have minimum consumption of 1.96% of the electricity generated by the CGP, with a variation of +10% being permissible. This does not take into account 100% of the electricity generated.
- **Company set up as SPV as an 'association of persons':** The Court held that Rule 3(1)(b) does not undo or override the eligibility criteria specified under Rule 3(1)(a) read with second proviso. It held that special purpose vehicles (“SPVs”) which own, operate and maintain CGPs are an “association of persons” in terms of the second proviso to Rule 3(1)(a) of the Rules. Companies, body corporates and other persons, who are shareholders and captive users of a CGP set up by a SPV, are required to comply with Rule 3(1)(a) of the Rules read with the second proviso of the Rules.

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