March 19, 2021

Legal Updates

Supreme Court ends the extension of limitation granted due to COVID-19

The Supreme Court vide its order dated 08.03.2021 in *Suo Moto W.P. (C) No. 3 of 2020*, noting the changing scenario relating to the COVID-19 pandemic, directed that the extension of limitation shall come to an end and issued the following directions for future course of action:

(a) In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

(b) In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.

(c) The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996 ("**1996 Act**"), Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

The Supreme Court had vide order dated 27.03.2020 extended the period of limitation prescribed under general or special laws whether compoundable or not w.e.f. 15.03.2020 till further orders on account of the COVID-19 pandemic and the difficulties arising out of it.

Ministry of Power issues scheme for division and demerger of CTU and PGCIL & notifies CTUIL

The Ministry of Power ("**MoP**") vide its notification dated 09.03.2021 has issued the Division and Demerger of the Central Transmission Utility and Power Grid Corporation of India Limited Transfer Scheme, 2021 ("**Scheme**"). The Scheme provides for the division of Power Grid Corporation of India Limited ("**PGCIL**"), which has been notified as the Central Transmission Utility ("**CTU**") under Section 38(1) of the Electricity Act, 2003 ("**Electricity Act**") into two entities - one for undertaking and discharging the functions of CTU under the Act and functions assigned under regulations / directions by Central Commission / Authority and any other directions / functions assigned by Central Government; and another for undertaking the remaining activities and functions of a 'Transmission Licensee'. The effective date of division under the Scheme shall be 01.04.2021.

The Scheme mentions that on and from the effective date of division, the undertakings of PGCIL as existing before the said date shall stand divided into Part A Undertakings (undertakings with respect to discharge of functions of CTU, along with the functions assigned under regulations / directions by Central Electricity Regulatory Commission ("**CERC**") / Authority and also any other directions / functions assigned by the Central Government, and Part B Undertakings (all remaining undertakings other than those provided in Part A). Part A Undertakings shall stand transferred to Central Transmission Utility of India Limited ("**CTUIL**").

Further, all proceedings, of whatever nature, by or against PGCIL, as on the effective date of division shall not abate or discontinue or otherwise in any way prejudicially be affected by reason of this Scheme and the proceedings shall be continued, prosecuted, and enforced by or against the CTUIL or PGCIL, as the case may be.

MoP has vide a separate notification dated 09.03.2021 notified CTUIL as the 'Central Transmission Utility', within the meaning of Section 2(10) of the Electricity Act, to undertake and discharge all functions of CTU pursuant to the provisions of the Electricity Act or any regulations or directions of the CERC or Authority or any other directions or functions prescribed by the Central Government in that regard.

Further, PGCIL, which was declared as CTU vide gazette notification dated 27.11.2003, shall continue to be a deemed transmission licensee under the Electricity Act and discharge functions incidental and connected therewith and would also undertake functions as directed by the Central Government or Authority in that regard. This notification too shall be effective from 01.04.2021.

AP HC suspends direction of POSOCO seeking compliance with direction of MoP to open LC for scheduling power

The Andhra Pradesh High Court ("**AP HC**") in *SPDCAPL and Anr. v. UoI and Ors., W.P. No. 15950/2019* has suspended the operation of letter dated 10.10.2019 ("**Impugned Communication**") issued by Power System Operation Corporation Ltd. ("**POSOCO**") directing compliance with MoP's order dated 28.06.2019, whereby MoP had directed National Load Despatch Centre ("**NLDC**") and Regional Load Despatch Centre ("**RLDC**") to despatch power only after opening of letter of credit ("**LC**") by the distribution companies ("**DISCOMS**"). POSOCO vide the Impugned Communication further directed that in the event of failure to comply with the direction, the State Load Despatch Centre ("**SLDC**") should not allow power transactions through Short Term Open Access and through power exchange.

The petitioners have filed the writ petition before the AP HC challenging the Impugned Communication as being arbitrary and contrary to the provisions of the Electricity Act and an application praying for suspension of the Impugned Communication thereby allowing the petitioners to operate through the power exchange and secure power through open access pending disposal of the writ petition.

The AP HC while allowing the application observed that the action of the MoP, POSOCO and Ministry of New and Renewable Energy appears to be an extra statutory remedy and suggestive of coercion. The AP HC opined that though Section 28(3) and Section 33(1) of the Electricity Act refer to achieving maximum economy and efficiency in operation of power system, the language used in the said provisions does not suggest that they enable the load despatch centres to oversee performance in terms of the power purchase agreements ("**PPA**"). The power under Section 29 and Section 33 of the Electricity Act does not extend to issuance of directions by RLDC and SLDC insisting the petitioners to issue LC. The actions would be tantamount to a direct interference with the contractual terms under the PPAs and without jurisdiction considering that an adjudicatory mechanism in the form of Section

86(1)(f) is provided under the Electricity Act to adjudicate upon disputes between the distribution licensees and the generating companies. The AP HC also observed that if the Impugned Communication materializes, it will cause suffering to the public at large and favour the private power producers at the expense of the public interest.

Arbitration and Conciliation (Amendment) Act, 2021 notified

The Ministry of Law and Justice has, vide notification dated 11.03.2021, notified the Arbitration and Conciliation (Amendment) Act, 2021 ("**2021 Amendment Act**") which shall be effective from 04.11.2020. It replaces the Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated by the President of India on 04.11.2020.

The 2021 Amendment Act has inserted a proviso to Section 36(3) of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") whereby the court shall stay the arbitral award unconditionally pending disposal of the challenge under Section 34 of the 1996 Act provided that the court is satisfied that a *prima facie* case is made out that either (i) the arbitration agreement or contract which is the basis of the award; or (ii) the making of the award, was induced or effected by fraud or corruption. This amendment to Section 36 of the 1996 Act will have retrospective effect and apply to all cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings began prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.

Additionally, the 2021 Amendment Act has substituted Section 43J of the 1996 Act that hitherto stated that the qualifications, experience and norms for accreditation of arbitrators will be as specified in the Eighth Schedule to the 1996 Act. The new / amended Section 43J states that the qualifications, experience and norms for accreditation of arbitrators shall be specified by the regulations. Correspondingly, the 2021 Amendment Act has also done away with the Eighth Schedule to the 1996 Act.

Period of limitation for filing application under Section 11 of the 1996 Act shall be governed by Article 137 of the First Schedule of Limitation Act

The Supreme Court in *BSNL & Anr v. M/s Nortel Networks India Pvt. Ltd., Civil Appeal No. 843-844 of 2021* reiterated that the period of limitation under the Limitation Act, 1963 ("**Limitation Act**") will apply while appointing an arbitrator under Section 11 of the 1996 Act. The Supreme Court further held that the courts in India have jurisdiction to refuse to make reference to Section 11 of the 1996 Act where the claim is ex-facie time barred.

M/s Nortel Networks India Pvt. Ltd. ("**Nortel**") had after a period of over 5 ½ years issued a notice and invoked the arbitration clause requesting for appointment of an independent arbitrator to adjudicate their claim. BSNL contended that the notice invoking arbitration was barred by time as per Section 43 of the 1996 Act. Nortel thereafter filed an application under Section 11 of the 1996 Act before the Kerala High Court and vide order dated 13.10.2020, the Kerala High Court referred the disputes to arbitration. Further, vide order dated 14.01.2021, the Kerala High Court dismissed the review petition filed by BSNL.

The Supreme Court after considering the prevailing law and the facts of the case held that (i) the period of limitation for filing an application under Section 11 of the 1996 Act would be governed by Article 137 of the First Schedule of the Limitation Act and the same shall begin from the date when there is failure to appoint the arbitrator (on this account the Supreme Court has suggested that the Parliament should amend Section 11 of the 1996 Act to provide for period of limitation under the statute itself); and (ii) in rare and exceptional cases, where the claims are *ex facie* time-barred and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference to Section 11 of the 1996 Act.

The Delhi High Court rules on legal status of emergency arbitrator

The Delhi High Court in its judgment dated 18.03.2021 in *Amazon.com NV Investment Holdings LLC v. Future Coupons Pvt. Ltd.* has ruled on the legal status of emergency arbitrator and held that the emergency arbitrator is a sole arbitrator appointed by the arbitration institution to consider the emergency interim relief application in cases where the parties have agreed to arbitrate according to the rules of that arbitration institution which contain provisions relating to emergency arbitration. The status of the emergency arbitrator is based on party autonomy as the law gives complete freedom to the parties to choose an arbitrator or an arbitral institution. The powers of the emergency arbitrator are

the same of those of an arbitral tribunal to decide interim measures. The order / award of the emergency arbitrator is binding on all the parties. However, they do not bind the subsequently constituted arbitral tribunal and the arbitral tribunal is empowered to reconsider, modify, terminate or annul the order / award of the emergency arbitrator.

The important characteristics of an emergency arbitration are that: (i) the emergency arbitrator has power to deal only with emergency interim relief application; (ii) the emergency arbitrator has to decide the emergency interim relief application within a fixed time frame of about 15 days; (iii) the emergency arbitrator cannot continue after formation of the arbitral tribunal; (iv) the emergency arbitrator's order / award can be reviewed / altered by the arbitral tribunal; (v) the emergency arbitrator's order / award can be challenged where seat of arbitration is located; and (vi) ordinarily the emergency arbitrator will not be a part of the arbitral tribunal.

In light of the above and after considering various provisions of the 1996 Act including Sections 2(1)(d), 2(6), 2(8) and 19(2) of the 1996 Act, the Delhi High Court held that the emergency arbitrator is an arbitral tribunal for all intents and purposes and that an order of the emergency arbitrator is an order under Section 17(1) of the 1996 Act and enforceable as an order of the court under Section 17(2) of the 1996 Act.

Supreme Court observes that Sections 11(7) and 37 of the 1996 Act may be required to be amended so that the orders made under Sections 8 and 11 of the 1996 Act are brought on par qua appealability

The Hon'ble Supreme Court has observed in its judgment dated 08.03.2021 in *Pravin Electricals Pvt. Ltd. v. Galaxy Infra and Engineering Pvt. Ltd.* that the Parliament may need to have a re-look at Sections 11(7) and 37 (Appealable Orders) of the 1996 Act so that orders made under Sections 8 (Power to refer parties to arbitration where there is an arbitration agreement) and 11 (Appointment of arbitrators) are brought on par qua appealability as well.

The Supreme Court observed that when the Parliament enacted amendments to the 1996 Act in 2015 pursuant to the 246th Law Commission Report on Arbitration ("**Law Commission Report**"), it followed the scheme of the Law Commission Report qua Sections 8 and 37 of the 1996 Act by enacting the words "*…..unless it finds that prima facie no valid arbitration agreement exists……*" in Section 8(1) and the insertion of sub-clause (a) in Section 37(1) providing an appeal in an order made under Section 8, which refuses to refer parties to arbitration.

However, so far as Sections 11(6) and 11(6A) of the 1996 Act were concerned, what was recommended by the Law Commission Report was not incorporated. Section 11(6A) merely confines examination of the court to the existence of an arbitration agreement. Section 11(7) was retained, by which no appeal could be filed under an order made under Section 11(6) read with Section 11(6A), whether the court's determination led to a finding that the arbitration agreement existed or did not exist on the facts of a given case. Concomitantly, no amendment was made to Section 37(1), as recommended by the Law Commission Report.

The Supreme Court noted that by a process of judicial interpretation, the judgment of the Supreme Court in *Vidya Drolia v. Durga Trading Corporation, (2019) 20 SCC 406* had now read the "prima facie test" into Section 11(6A) of the 1996 Act so as to bring the provisions of Sections 8(1) and 11(6) read with 11(6A) on par. However, whereas in cases decided under Section 8 of the 1996 Act, a refusal to refer parties to arbitration is appealable under Section 37(1)(a), a similar refusal to refer parties to arbitration under Section 11(6) read with Sections 6(A) and 7 is not appealable. Therefore, in order to remove such anomaly / inconsistency in the existing provisions of the 1996 Act, the Supreme Court observed that Sections 11(7) and 37 of the Arbitration Act may be required to be amended so that orders made under Sections 8 and 11 of the Arbitration Act are brought on par qua appealability as well.

MCA notifies amendments to Schedule V of the Companies Act, 2013

The Ministry of Corporate Affairs ("**MCA**") has, vide notification dated 18.03.2021, amended Sections I, II and III of Schedule V of the Companies Act, 2013 to include 'other directors' within the ambit of Schedule V for the purpose of payment of remuneration to other directors. 'Other directors' shall mean a non-executive director or an independent director.

MCA notifies amendments to Sections 149(9) and 197(5) of the Companies Act, 2013 with effect from 18.03.2021

The MCA has, vide notification dated 18.03.2021, appointed 18.03.2021 as the date on which the provisions of Sections 32 and 40 of the Companies (Amendment) Act, 2020 ("**Amendment Act**") shall come into force. Section 32 of the Amendment Act amends Section 149(9) of the Companies Act, 2013 to provide that if a company has no profits or its profits are inadequate, an independent director may receive remuneration, exclusive of any fees payable under Section 197(5) of the Companies Act, 2013, in accordance with the provisions of Schedule V. Section 40 of the Amendment Act amends Section 197(3) of the Companies Act, 2013 to include 'independent director' within its ambit in order to give effect to the amendment to Section 149(9) of the Companies Act, 2013.

A-142, Neeti Bagh
New Delhi – 110 049, India
T: +91 11 4579 2925 F: +91 11 4659 2925
E: mail@neetiniyaman.co
W: www.neetiniyaman.com

Office No. 51, 4th Floor, Nawab Building,
327, Dr. D.N. Road,
Opp. Thomas Cook, Flora Fountain
Mumbai – 400 023, India
T: +91 22 4973 9114