Sagus Speaks

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This newsletter covers key regulatory updates, government notifications and judicial pronouncements.

REGULATORY UPDATES

SEBI mandates obtaining and reporting of Legal Entity Identifier for issuers of non-convertible securities, securitized debt instruments and security receipts.

The Securities and Exchange Board of India ("SEBI") *vide* its notification dated 03.05.2023[1], has mandated issuers (I) having outstanding listed non-convertible securities as on 31.08.2023, to report or obtain and report the Legal Entity Identifier ("LEI") code in the Centralized Database of corporate bonds, on or before 01.09.2023, and (ii) having outstanding listed securitized debt instruments and security receipts as on 31.08.2023, to report or obtain and report the LEI code to the Depository(ies), on or before 01.09.2023. This circular shall come into force with immediate effect.

In furtherance to the said circular, depositories are required to:

[1] Circular No.: SEBI/HO/DDHS/DDHS_Div1/P/CIR/2023/64

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(i) for outstanding instruments, map the LEI code to existing ISINs by 30.09.2023; and
(ii) for future issuances, map the LEI code provided with the ISIN at the time of activation of the ISIN.

LEI is a unique 20-character code used globally to identify legal entities participating in financial transactions, for uniquely identifying every legal entity, in any jurisdiction, that is party to a financial transaction. Currently, directions issued by the Reserve Bank of India dated 21.04.2022, *inter alia*, mandate non-individual borrowers having aggregate exposure of above Rs. 25 Cores, to obtain LEI code.

RBI notifies formalization of Informal Micro Enterprises with Udyam Assist Certificate for availing Priority Sector Lending Benefit.

The Reserve Bank of India ("RBI") *vide* its notification dated 09.05.2023[2], has notified that Informal Micro Enterprises with an Udyam Assist Certificate ("UAC") issued on the Udyam Assist Platform ("UAP") shall be treated as "*Micro Enterprises*" for the purposes of availing Priority Sector Lending ("PSL") benefits as issued from time to time by the RBI and the Government of India. Informal Micro Enterprises are those enterprises which are outside the purview of the Central Goods and Services Tax Act, 2017.

This notification is aimed at facilitating grant of financial assistance by lenders to Micro Small Medium Enterprises ("MSMEs"). This is because prior to the launch of Udyam Assist, all lenders (i.e., banks, non-banking financial companies, etc.) were required to obtain 'Udyam Registration Certificate' from their borrowers, for classification of such borrowers as MSMEs for the purposes of their PSL targets. This requirement caused hardship to many rural enterprises, which were unable to get registered on the Udyam Registration Portal due to lack of mandatory required documents such as Permanent Account Number/ Goods and Services Tax Identification Number, etc. Hence, lenders were unwilling to extend credit to such enterprises, and as a result such enterprises were unable to avail the benefits of Government schemes or programmes specifically under the PSL guidelines.

Further, the Ministry of the Micro, Small and Medium Enterprises *vide* its notification dated 20.03.2023 specified that the UAC issued to Informal Micro Enterprises shall be treated at par with Udyam Registration Certificate for the purpose of availing PSL benefits. Therefore, in furtherance to the aforementioned notification, RBI has also now clarified that the Udyam Assist Certificate shall be treated as Micro Enterprises under MSME for the purposes of PSL classification.

GOVERNMENT NOTIFICATIONS

MCA notifies Companies (Removal of Names of Companies from Register of Companies) Second Amendment Rules, 2023.

The Ministry of Corporate Affairs ("MCA") *vide* its notification dated 10.05.2023, has issued the Companies (Removal of Names of Companies from Register of Companies) Second Amendment Rules, 2023 ("Second Amendment Rules").

Under the Second Amendment Rules, the MCA has amended Rule 4(1) of the Companies (Removal of Names of Companies from Register of Companies), 2016 ("Removal Rules 2016") to provide that a company is required to file its financial statements (under Section 137) and annual returns (under Section 92) up to the end of the financial year in which the company ceased to carry its business operations, prior to filing an application with the Registrar of Companies ("RoC") for removal of its name from the register.

Further, the Second Amendment Rules also provides that in the event a company intends to file an application after the RoC has initiated action under Section 248(1) of the Companies Act, 2013 ("Companies Act") for removal of the name of the company from the register, such company shall file all pending financial statements (under Section 137 of the Companies Act) and all pending annual returns (under Section 92 of the Companies Act), before filing the application.

The Second Amendment Rules also provide that after the ROC has issued a notice for publication in relation to a company under Section 248(5) pursuant to Section 248(1) of the Companies Act, such company will not be allowed to file an application under Rule 4 of the Removal Rules 2016.

MoF notifies Chartered Accounts, Company Secretaries and Cost and Works Accountants, within the definition of "person carrying on designated business or profession" under Prevention of Money Laundering Act, 2002.

The Ministry of Finance ("MoF") on 03.05.2023 has issued notification in exercise of its power under Section

[2] RBI/2023-24/27 FIDD.MSME & NFS.BC.No.09/06.02.31/2023-24

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2(1)(sa)(vi) of the Prevention of Money Laundering Act, 2002 ("PMLA")[3] which has the effect of bringing chartered accountants, company secretaries and cost and works accountants, practicing individually or through a firm (jointly referred to as "relevant persons") within the definition of "person carrying on designated business or profession" under PMLA, if they, in the course of their profession, carry out financial transactions in relation to the following activities, on behalf of their clients:

(i) buying and selling of any immovable property;
(ii) managing of client money, securities or other assets;
(iii) management of bank, savings or securities accounts;
(iv) organization of contribution for the creation, operation or management of the companies;
(v) creation, operation or management of companies, limited liability partnership or trusts and buying and selling of business entities.

As the term "reporting entity" has been defined under Section 2(1)(wa) of PMLA as "a banking company, financial institution, intermediary or a *person carrying on a designated business or profession*", relevant persons in respect of the financial transactions mentioned above would also be considered as reporting entity and the PML (Maintenance Of Records) Rules 2005, would be applicable on such relevant persons.

MoF notifies activities when carried out by a person will fall within the purview of "person carrying on designated business or profession" under Section 2(1)(sa)(vi) of the PMLA.

On 09.05.2023,[4] the MoF issued another notification in exercise of its power under Section 2(1)(sa)(vi) of the PMLA notifying that if a person carries out the following activities in the course of business on behalf of or for another person, such person shall be treated as "person carrying on designated business or profession":

(i) Acting as formation agent of companies and limited liability partnerships ("LLP");
(ii) Acting as directors/ secretary of a company, partner of a firm or similar position in relation to other companies and LLPs;
(iii) providing a registered office business address or accommodation, correspondence or administrative address for a company or LLP or a trust
(iv) Acting as or arranging for another person to act as a trustee of an express trust or performing equivalent function for another type of trust; and
(v) Acting as or arranging for another person to act as a nominee shareholder for another person.

Further, the MoF *vide* the instant notification has clarified that the following activities would not be considered as an activity under Section 2(1)(sa)(vi) of PMLA:

(i) An activity conducted as a part of lease agreement, sub-lease, tenancy or any arrangement for use of land or building or space and the consideration is subject to deduction of income-tax in accordance with Section 194 of the Income Tax Act, 1961;
(ii) An activity conducted by an employee on behalf of employer in the course of or in relation to his employment;
(iii) An activity carried out by an advocate or relevant persons in practice, who is engaged in formation of company for filing a declaration under Section 7(1)(b) of Companies Act, 2013; or
(iv) Any activity of a person which falls within the definition of the term 'intermediary' under Section 2(1)(n) of the PMLA.

JUDICIAL PRONOUNCEMENTS

Supreme Court held that an arbitration agreement in an unstamped/ inadequately stamped contract is invalid unless the contract is duly stamped and validated.

The Supreme Court *vide* its judgement dated 25.04.2023 in the matter of ***N.N. Global Mercantile Pvt. Ltd. v. M/s Indo Unique Flame Ltd. & Ors.***[5] held, by 3:2 majority, that an instrument, containing an arbitration agreement and being exigible to stamp duty, if unstamped or insufficiently stamped is not enforceable in law within the meaning of Section 2(h) of the Indian Contract Act, 1872 ("Contract Act"). The Court observed that under the provisions of the Indian Stamp Act, 1899 ("Stamp Act") an unstamped or insufficiently stamped agreement cannot be acted upon as such agreement does not exist in the eyes of the law.

The Supreme Court observed that if an instrument which is chargeable to a stamp duty under Section 3 read with Schedule I of the Stamp Act, is unstamped or inadequately stamped, it would render the arbitration agreement contained in such instrument as being non-existent in law

[3] CG-DL-E-03052023-245631
[4] CG-DL-E-09052023-245764
[5] Civil Appeal No. 3802-3802 of 2020

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under the provisions of Section 33 of the Stamp Act and the bar provided under Section 35 of the Stamp Act, unless the instrument is validated under the Stamp Act by paying the requisite stamp duty.

The minority view in the said matter was that the deficiency in payment of stamp duty on a contract or instrument is a curable defect and such deficiency would not render the arbitration agreement void for the purpose of referring a dispute under such contract to arbitration. It was also noted that a decision on stamp duty by a court at a pre-reference stage would stall the resolution process, leading to procedural complexity and delay in litigation before the courts.

This judgment has settled the controversy that arose after the insertion of Section 11(6A) of the Arbitration and Conciliation Act, 1996 ("A&C Act"). Prior to insertion of Section 11(6A) of the A&C Act, a division bench of the Supreme Court had held that an arbitration clause contained in an unstamped or inadequately stamped instrument cannot be enforced. However, after insertion of Section 11(6A) in the A&C Act, which restricts the scope of judicial intervention to examine the existence of arbitration agreement, there were divergent views of Supreme Court on legal existence and enforceability of an arbitration agreement contained in an unstamped or insufficiently stamped instrument.

This issue was referred by a 3 Judge Bench of Supreme Court to the Constitution Bench in the case of *N.N. Global Mercantile Pvt. Ltd. v. Indo Unique Flame Ltd. and Ors*[6]. In the instant case, the Supreme Court relying on its judgments in the cases of *Duro Felguera, S.A. v. Gangavaram Port Ltd.*[7], *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*[8] and *Vidya Drolia v. Durga Trading Corpn.*[9] has held that Section 11(6A) of A&C Act cannot be understood as merely predicating literal existence of the arbitration agreement but also requires the courts to ascertain existence of agreement in law. Pertinently, Section 11(6A) has been omitted by the Arbitration and Conciliation (Amendment) Act, 2019 (No. 33 of 2019). However, the amendment omitting Section 11(6A) has not yet been brought into force.

Bombay High Court held that mere signing of the arbitral award at a particular place cannot be the determining factor for ascertaining the place of arbitration and consequently territorial jurisdiction of the courts to entertain application under Section 34 of A&C Act.

The Bombay High Court *vide* its judgement dated 26.04.2023 in the matter of ***Gurumahima Heights Co-operative Housing Society Ltd v. M/s Admirecon Infrastructure Pvt. Ltd.***[10] held that for ascertaining the place of arbitration, mere signing of the arbitral award at a place cannot be the determining factor.

The Court observed that the parties are free to choose the place of arbitration under Section 20 of the A&C Act, and in case of a failure to do so, the arbitral tribunal shall determine the place of arbitration considering the circumstances of the case and convenience of the parties. In the event the arbitral tribunal does not determine the place of arbitration; the Court must consider the overall circumstances to determine the place of arbitration.

Accordingly, the Court denied the argument of the Respondent that because the arbitral award was signed at Mumbai, the place of arbitration would be Mumbai. The Court took into consideration various circumstances such as, the fact that majority of the arbitral proceedings took place in Navi Mumbai, the society in respect of which the concerned contract was entered into is also located in Navi Mumbai and that the Respondent itself filed the Petition under Section 9 of the A&C Act in the jurisdiction of Navi Mumbai. Accordingly, the Court held that the place of arbitration would be Navi Mumbai and the courts of Navi Mumbai would have jurisdiction to entertain an application under Section 34 of A&C Act.

Bombay High Court held that a defect in a board resolution authorizing a person to take legal action is a procedural and curable defect that cannot take away substantive rights of a party.

The Bombay High Court *vide* its judgement dated 02.05.2023 in the matter of ***Palmview Investments Overseas Ltd. v. Ravi Arya, Adult Indian Inhabitant***[11] held that any defect in the board resolution (authorizing a person to initiate legal proceedings) cannot be a ground for rejection of the claims and termination of the arbitral proceedings. The Court opined that a defective board resolution authorizing a person to take legal action on behalf of a company is merely a procedural and curable defect, and the substantive rights of a party cannot be rejected merely on a procedural irregularity.

[6] (2021) 4 SCC 379
[7] (2017) 9 SCC 729
[8] (2019) 9 SCC 209
[9] (2021) 2 SCC 1
[10] IA No. 3305 of 2022 in Comm. Arb. Petition No. 130 of 2022
[11] Commercial Appeal (L) No. 36947 of 2022

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CERC allowed loss of Plant Availability Factor due to gas shortage as deemed availability.

The Central Electricity Regulatory Commission ("CERC") *vide* its order dated 29.04.2023 in ***North Eastern Power Corporation Ltd. v. Assam Power Distribution Company Ltd. & Ors.***[12] exercised its power to relax and allowed loss of Plant Availability Factor ("PAF") due to gas shortage as deemed availability from 01.07.2016 to 31.03.2017.

In this case, during the period from July 2016 to March 2017, North Eastern Power Corporation Ltd. ("NEPCL") could not achieve the Normative Target Availability ("NTA") of its station due to inadequate gas supply to it by Oil India Ltd. ("OIL"). NEPCL therefore sought compensation for loss of Capacity Charge on account of inadequate availability of fuel gas under Regulation 54 (*Power to Relax*) of the CERC (Terms and Condition of Tariff) Regulations, 2014 ("Tariff Regulations"). On the claim being rejected by CERC, NEPCL filed an appeal against the said order before the Appellate Tribunal for Electricity ("APTEL") which remanded the matter back to CERC.

The CERC thereafter noticed that the power to relax must be strictly construed and is to be exercised judiciously and cautiously only when undue hardship is caused by the application of the rules or regulations. In the instant case, OIL was the sole supplier of gas to NEPCL, and NEPCL had no provisions either for alternative arrangement of gas from any other source or the arrangement for storage of gas. Hence, NEPCL had to agree to the terms and conditions stipulated by OIL, including a compensation clause in the bilateral fuel supply agreement, for a short supply of gas @ 80% of the contracted quantum. The CERC further observed that low Normative Annual PAF during the months of July 2016 to March 2017 was not attributable to any operational problems at the NEPCL's gas plant but was mainly due to low supply of gas by OIL to the NEPCL's gas plant. Considering these facts, the CERC observed that this was a fit case for relaxation by invoking the power vested under Regulation 54 of Tariff Regulations. In this regard, the CERC, accordingly, exercised its power to relax and allowed loss of PAF due to gas shortage as deemed availability during the period 1.7.2016 to 31.3.2017. The CERC further held that the annual PAF would be restricted to 72%. However, loss of PAF beyond 28% due to reasons other than gas shortage was not allowed.

KERC observed that the MoU/ Supplementary MoU shall be enforceable until the expiry of 10 years from the date of COD and not until the Accreditation Certificate is valid.

The Karnataka Electricity Regulatory Commission ("KERC") *vide* its order dated 02.05.2023 in the matter of ***Tados Wind Energy Pvt. Ltd. v. Hubli Electricity Supply Company Ltd.***[13] observed that the Memorandum of Understanding ("MoU")/ Supplementary Memorandum of Understanding ("SMoU") shall be in force until the expiry of 10 years from the Commercial Operation Date ("COD") as per the terms and conditions agreed between the parties and not until the validity of the Accreditation Certificate ("AC").

The KERC concurred with the contention of Hubli Electricity Supply Company Ltd. ("HESCOM") that Tados Wind Energy Pvt. Ltd. ("TWEPL") should not be given the choice of extending the terms of the MoUs/ SMoUs merely by obtaining the renewed AC beyond the term of 10 years as stipulated in the MoUs/SMoUs. Accordingly, the KERC held that TWEPL could not act on the basis of the AC beyond the period of MoUs/ SMoUs, and TWEPL was not entitled to inject energy beyond the stipulated period.

KERC observed that the transmission line constructed by a transmission licensee cannot be equated with the dedicated transmission line of a generator.

The KERC *vide* its order dated 02.05.2023 in the matter of ***Hemavathy Power and Light Pvt. Ltd. v. Karnataka Power Transmission Corporation Ltd.***[14] held that dedicated transmission line of a generator cannot be equated with the transmission line constructed by a transmission licensee, even if the dedicated transmission line is entrusted for maintenance by power purchaser under a PPA executed by a Distribution Licensee.

In the instant case, Hemavathy Power and Light Pvt. Ltd. ("HPL") developed a 24MW Hydro Power Project. Despite the dedicated transmission line being the exclusive property of HPL, Karnataka Power Transmission Corporation Ltd. ("KPTL") intended to allow one company namely M/s Maruthi Power Gen Pvt. Ltd. to utilize the dedicated transmission line for evacuation of power from the generating unit of that company, to which HPL objected. HPL contended that it was entitled to tap the transmission line for its efficient economical use as per Section 40 of the Electricity Act, 2003 ("Electricity Act").

[12] Petition No. 225/MP/2017
[13] OP. No. 14 of 2022
[14] OP No. 30 of 2021

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The KERC observed that HPL had constructed the transmission line on its own and the same could not be equated to the dedicated transmission line of the generator. Hence, no third party could be allowed to utilize it without the permission of HPL, even if the transmission was entrusted for maintenance by the power purchaser under the PPA executed by the distribution licensee. Further, it was observed that the definition of the 'dedication transmission line' provided in Section 2(16) read along with Section 10 of the Electricity Act describing the duties of Generating Companies, clarified that a dedicated transmission line was the exclusive property of the Generator.

KERC observed that the twin criteria mentioned under Rule 3 of the Electricity Rules, 2005 is required for an entity to fall under the definition of Captive user.

The KERC *vide* its order dated 02.05.2023 in the matter of ***M/s Clean Wind Power (Manvi) Pvt. Ltd. v. Chamundeshwari Electricity Corporation Ltd.***[15] held that in order for an entity to qualify as a captive user, it must fulfill the twin criteria mentioned in Rule 3 of the Electricity Rules, 2005 ("Electricity Rules").

In the instant case, KERC had initially passed an order dated 11.10.2018 ("Initial Order") holding that a generating plant should be established as a captive generating plant ("CGF") so as to be entitled to relief in terms of Sections 2(8) and 9 of Electricity Act and Rule 3 of the Electricity Rules. However, in appeal against the Initial Order, the APTEL *vide* its order dated 27.09.2022 ("Remand Order") partially overturned the Initial Order holding that KERC's interpretation was incorrect. The APTEL further stated that there was no requirement to verify the shareholding pattern of the entity claiming to be a captive user at the time of establishing the generating unit. The APTEL remanded the matter back to KERC for considering the issue of captive status of the generating plant for FY 2017-18.

In the present order, KERC observed that Clean Wind Power (Manvi) Pvt. Ltd. ("CWPM") had 12 shareholders out of which 11 shareholders were captive users who consumed 100% of the electricity generated from the power plant and the captive consumers held 32.90% of the equity shares. KERC relied upon the judgement of APTEL in the matter of T*amil Nadu Power Producers Association v. Tamil Nadu Electricity Regulatory Commission and Ors.*[16] where it was held that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) of the Electricity Rules could only be done annually, i.e., with respect to the shareholding existing at the end of the financial year.

Relying upon the said judgment, KERC concluded that a company which was operating as Special Purpose Vehicle ("SPV") could not be equated to Association of Persons and the proportionality could not be made applicable in case a company was functioning as a SPV i.e., as a legal entity owning, operating, and maintaining a generating station and with no other business or activity. As such, an SPV needed to fulfil only the twin-criteria provided under Rule 3 of the Electricity Rules with respect to the shareholding pattern and minimum consumption for declaration of captive status.

Accordingly, KERC held that the consumer of CWPM satisfied the twin conditions with respect to the shareholding pattern and minimum consumption by holding 32.90% of the equity shares and by consuming 100% of the total energy generated by CWPM.

NCDRC held that it has the power to adjudicate complaints, even if there is an arbitration agreement between the parties.

The National Consumer Dispute Redressal Commission ("NCDRC") *vide* its judgment dated 01.05.2023 in the matter of ***Dr. Satpal Kaur Nalwa & Anr. v. M/s Emaar MGF Land Ltd.***[17] held that the consumer court has the power to adjudicate a complaint, even if there is an arbitration agreement between the buyer and the developer.

NCDRC rejected the argument of the developer that the A&C Act would have an overriding effect over the Consumer Protection Act, 1986 and as there was an arbitration clause in relevant Agreement to Sell (between the parties), the dispute regarding delay in delivery and consequent compensation should be referred to the arbitration only.

NCDRC relied upon the judgment of the Supreme Court in the case of *M/s Emaar MGF Land Ltd. v. Aftab Singh*[18] and held that the arbitration clause in an agreement between the parties does not bar the jurisdiction of the consumer courts to entertain the complaint.

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[15] OP No. 120 of 2018
[16] Appeal No. 131 of 2020
[17] Consumer Case No. 854 of 2016
[18] (2019) 12 SCC 751

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ABOUT SAGUS LEGAL

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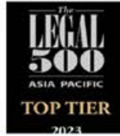

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