SAGUS SPEAKS

Sagus Legal
Advisors & Advocates

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

REGULATORY & POLICY UPDATES

Securities and Exchange Board of India issued a circular simplifying the KYC process and rationalising the risk management framework at KYC (Know Your Client) Registration Agencies ("KRAs")[1]

The Securities and Exchange Board of India ("SEBI") issued a circular dated 11.08.2023 for simplification of the Know Your Customer ("KYC") process for clients dealing in the securities market and for rationalizing the risk management framework at KRAs ("KYC Circular").

The KYC Circular simplifies the KYC process for intermediaries while onboarding clients.

The KYC process shall only require obtaining proof of identity (POI) and proof of address (POA) of the client and the client shall be allowed to open their accounts with intermediaries immediately upon the completion of the KYC process.

As a part of the risk management framework, the KRA's are thereafter required to complete verification of KYC documents (including mobile number and email) within 2 days of the receipt of KYC documents, as opposed to the existing procedure wherein the said accounts are opened after the validation of the KYC documents submitted to the KRAs.

[1] SEBI_Circular_Simplification of KYC Process

Clients whose KYC documents and data cannot be verified, shall not be allowed to transact further in the securities market until the KYC attributes are verified.

Upon proper verification of the KYC Documents with the official databases (such as the income tax department database on PAN, Aadhaar XML/ Digilocker/ M-Aadhaar) the records of such clients shall be considered as Validated Records.

The validated records shall be allowed portability i.e., the client need not undergo the KYC process again when he approaches a different intermediary in the securities market and the intermediary shall fetch the validated records from the KRA database.

Validated Records will be portable across intermediaries i.e., clients will not need to undergo the KYC process again when they approach another intermediary in the securities market. Intermediaries and KRAs are required to integrate their systems to facilitate seamless movement of documents/ information to and/or from the intermediaries to KRAs for the purpose of validation/ verification of attributes under the risk management framework.

KRAs are required to complete the KYC verification/ validation of existing clients, based on officially valid documents other than Aadhaar, within 90 days starting from 1st September 2023.

SEBI notifies the SEBI (Facilitation of Grievance Redressal Mechanism) (Amendment) Regulations 2023[2]

SEBI through its notification dated 16.08.2023, issued the SEBI (Facilitation of Grievance Redressal Mechanism) (Amendment) Regulations 2023 ("Amendment Regulations") to strengthen the existing investor grievance redressal mechanism applicable to all market participants.

The timelines for addressing the investor grievances have been reduced from the existing 30 days to 21 working days. The Amendment Regulations bring forth similar amendments to the relevant regulations applicable to various market participants such as stockbrokers, mutual funds, portfolio managers, debenture trustees, investment advisors, etc.

Additionally, under the Amendment Regulations SEBI has the authority to recognise or designate specific body corporates for handling and monitoring the grievance redressal process within such timelines as may be prescribed.

SEBI notifies the SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2023[3]

SEBI vide its notification dated 23.08.2023, issued the SEBI Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations 2023 ("LODR Amendment Regulations")

The provisions of this Chapter VIA are applicable to the voluntary delisting of non-convertible debt securities ("NCDS") or non-convertible redeemable preference shares ("NCRPS") from any and all stock exchanges where such NCDS or NCRPS are listed except in the following cases: (i) the listed entity has outstanding listed NCDS or NCRPS; or (ii) the listed entity has more than two hundred (200) securities holders except for qualified institutional buyers; or (iii) the delisting of NCDS or NCRPS due to factors such as penalties or action initiated against the listed entity; or (iv) due to redemption of such securities or shares; or (v) pursuant to a resolution plan as per the provisions of the Insolvency and Bankruptcy Code, 2016 ("IBC"). Further, in cases of delisting pursuant to a resolution plan, the stock exchanges are required to be informed within 1 working day of the resolution plan being approved under IBC.

The key provisions of the chapter are:

i. Listed entities are required to obtain prior in-principle approval from the relevant SEs for the proposed delisting of listed NCDS or NCRPS within 15 working days of passing the board resolution to this effect. The SEs have to take the following factors into account while considering the application for obtaining in-principle approval like necessary resolutions/ approvals by the board of directors of the listed entity, outstanding listing fees or fines or penalties to the SEs of the listed entity, compliance of the listed entity with provisions of these regulations, pendency of litigations or actions against the listed entity pertaining to its activities in the securities market, and/or non-payment of any penalties imposed by SEBI or existence of any restrictions or limitations imposed by SEBI upon the listed entity. Further, Chapter VIA sets a 15 working day timeline from the date of receipt of an application by the SEs to consider and accept or dispose of the application made by the listed entity.
ii. Upon receipt of the in-principle approval from the Stock Exchanges, the listed entity is required to send the 'notice of delisting' to the holders of NCDS and NCRPS within 3 working days of receiving in-principle approval from the SEs for such delisting and is required to disclose all

[2] SEBI_Grievance Redressal Mechanism_Amendment Regulations_2023

3 SEBI LODR Third Amendment Regulations 2023

relevant facts/ events for such delisting including the in-principle approval obtained from the relevant SE's. Further, the listed entity needs to disclose details of all securities sought to be delisted, the cut-off date for determining the list of holders of such securities sought to be delisted, the objects and reasons for delisting, and the provisions of e-voting, etc., in the notice of delisting and is required to display the same on its website within 2 working days of receiving in-principle approval from the relevant SE.

iii. The listed entity is required to obtain approval from the holders of the NCDS/ NCRPS and the Debenture Trustee (in case of delisting of NCDS) within 15 working days from the date of issuance of the notice of delisting by the listed entity.

iv. A listing proposal shall be deemed to have failed in case of non-receipt of SEs approval or non-receipt of approval from holders of securities or non-receipt of no-objection letter from the debenture trustee (in case of delisting of NCDS). In case of failure, the listed entity must promptly within 1 working day from the date of the event of failure notify the SEs.

v. The listed entity is required to make the final application for delisting to the SEs within five working days from the date of obtaining the requisite approvals and the SEs are mandated to dispose of the said final application within 15 working days from the date of receipt of the final application. Upon successful disposal, the securities shall stand delisted from the stock exchange.

The Karnataka Electricity Regulatory Commission issued an order allowing Open Access under the KERC (Terms and Conditions to Green Energy Open Access) Regulations, 2022, to customers having an aggregate contracted demand/sanctioned load of 100kW or more.[4]

The Karnataka Electricity Regulatory Commission ("KERC") has issued an order dated 09.08.2023 directing that consumers who have contracted demand or sanctioned load of 100 kW or more, either through a single connection or through multiple connections aggregating 100 kW or more located in the same electricity division of a distribution licensee, shall be eligible to source power through Green Energy Open Access.

This is pursuant to the amendment to Rule 5 of the Electricity (Promoting Green Energy Open Access) Rules, 2022 ("Principal Regulation") issued by the Ministry of Power ("MoP") on 23.05.2023. KERC observed that following the MOP's issuance of the amendment, numerous stakeholders in the state of Karnataka approached the Commission, requesting its intervention and the issuance of an appropriate order. The Commission stated that the KERC (Terms and Conditions to Green Energy Open Access) Regulations, 2022 ("KERC Regulations") itself provides that anything that is not specified in the KERC Regulations but specified in the Principal Regulations issued by MOP including any amendment issued subsequently, the provisions under the Principal Regulations will prevail, and accordingly issued this Order.

RBI issues a circular on levying penal charges on loan accounts[5]

The Reserve Bank of India ("RBI") issued a circular dated 18.08.2023 addressed to all Commercial Banks, Co-Operative Banks, NBFCs, and All India Financial Institutions, etc. (collectively "Regulated Entities" or "REs") on disclosures and reasonableness requirements for the levy of penal interest/ charges on loan accounts ("RBI Circular").

This RBI Circular has been issued pursuant to the supervisory reviews conducted by the RBI which have indicated divergent practices among the REs with regard to levy of penal interest/ charges leading to customer grievances and disputes.

The RBI Circular prescribes the following instructions to REs:

i. Penalties, if charged, for non-compliance with material terms and conditions of a loan contract shall be treated as 'penal charges' and not 'penal interest' which is added to the rate of interest charged on the advances.

ii. There shall not be any capitalisation of the penal charges, i.e., no further interest shall be computed on such charges. However, this RBI Circular shall not affect the normal procedures for compounding interest in the loan account.

iii. REs has been explicitly instructed to not introduce any additional component to the interest rates, and to formulate a board-approved policy for penal charges, adhering to the RBI Circular in letter and spirit.

iv. The quantum of penal charges needs to be reasonable and commensurate with the non-compliance of material terms and conditions of the loan contract without being discriminatory within a particular loan/ product category.

v. The penal charges in case of loans sanctioned to 'individual borrowers' for purposes 'other than business', shall not be higher than the penal charges applicable to non-individual borrowers for similar non-compliances.

vi. REs shall explicitly disclose the quantum and reason for penal charges in the loan agreement and most important terms and conditions/ key fact statements ('KFS'), as may be applicable.

[4] Karnataka Electricity Regulatory Commission order dated 09.08.2023

[5] RBI_Circular_18.08.2023

vii. REs shall also display the interest rates and service charges on their website.
viii. REs shall communicate the applicable penal charges along with reasons, every time reminders for non-compliance of material terms and conditions of the loan, are sent to the borrowers, including any instance of levy of penal charges and the reason therefore shall also be communicated.
ix. The RBI Circular shall come into effect from 1st January 2024. REs may carry out revisions in their policy framework to ensure the implementation of the guidelines for all fresh loans availed/renewed from such effective date. With respect to the existing loans, switchover to the new penal charges needs to be ensured on the next review or renewal or 6 months from such effective date, whichever is earlier.
x. This RBI Circular shall not apply to Credit Cards, External Commercial Borrowings, Trade Credits, and Structured obligations which are covered under product-specific directions.

GOVERNMENT NOTIFICATIONS

Ministry of Power notified guidelines for a tariff-based competitive bidding process for procurement of power from grid-connected wind-solar hybrid power projects.

Ministry of Power ("MOP") through its notification dated 21.08.2023 has notified the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Solar Hybrid Projects ("Hybrid Project Bidding Guidelines")[6] to facilitate renewable capacity addition and provide a transparent, fair and standardized procurement framework for inter-state and intra-state sale-purchase of power generated from wind energy.

Key Provisions:

i. Hybrid Project Bidding Guidelines have been issued for the procurement of electricity from grid-connected Hybrid Projects having (a) a capacity of 10 MW and above connected to an intra-state transmission system, and (b) a capacity of 50 MW and above connected to the inter-state transmission system.
ii. The rated power capacity of one of the resources (wind or solar) is at least 33% of the total contracted capacity.
iii. The solar and wind projects of the Hybrid Project may be located at the same or different locations.
iv. The tariff quoted by the bidder shall be the bidding parameter and the capacity allocation shall be on the basis of bucket filling i.e., capacity quoted by the least quoted tariff bidder at the rates quoted shall be allocated first.
v. Power Purchase Agreement ("PPA") shall generally be for a period of 20 years.
vi. Hybrid Project Bidding Guidelines provide for model PPA and encapsulate key provisions of PPA.

The Hybrid Project Bidding Guidelines envisions a State Nodal Agency appointed by the respective State Government which will provide the necessary support to facilitate the required approvals and sanctions in a time-bound manner.

The Hybrid Project Bidding Guidelines have come into effect upon notification in the Official Gazette (i.e., 21.08.2023). However, power projects awarded under previous guidelines will be governed by erstwhile guidelines.

JUDICIAL PRONOUNCEMENTS

Supreme Court held that an arbitration award cannot be set aside on the mere possibility of an alternative view on the interpretation of the contract.

The Supreme Court in its judgment dated 17.08.2023 in the matter of ***Konkan Railway Corporation Limited v. Chenab Bridge Project Undertaking***[7] held that under Section 37 of the Arbitration & Conciliation Act, 1996 ("A&C Act") the mere possibility of an alternative view on facts or interpretation of the contracts does not entitle courts to reverse the findings of the arbitral tribunal.

In this case, the arbitral tribunal rejected all the claims of Chenab Bridge Project Undertaking ("Chenab Bridge") against Konkan Railway Corporation Limited ("Konkan Railway"). The Single Judge of the Bombay High Court confirmed the arbitral award and dismissed the application under Section 34 of the A&C Act. However, the Division Bench, on appeal, observed while interpreting the clauses of the contract that an alternative view was possible, and accordingly partly allowed certain claims.

The issue before the Supreme Court was whether the division bench of the High Court under Section 37 of the A&C Act could reinterpret the clauses of the contract based on an alternative plausible view and set aside the award.

The Supreme Court relying on the principles laid down in ***MMTC v. Vedanta Limited***[8] noted that the scope of interference by a court in an appeal under Section 37 of the A&C Act, was limited and restricted, and was subject to the same grounds as a challenge under Section 34 of A&C Act. The Court added that the scope of jurisdiction under Section

[6] Hybrid Project Bidding Guidelines.
[7] Civil Appeal No. 2903 of 2023.
[8] (2019) 4 SCC 163.

34 is not akin to normal appellate jurisdiction. Therefore, it allowed the appeal and restored the judgment of the Single Judge of the High Court while setting aside the order of the Division Bench.

The Supreme Court held that a dissenting opinion of an arbitrator cannot be treated as an award if the majority award is set aside.

The Supreme Court in its judgement dated 24.08.2023 in the matter of ***M/S Hindustan Construction Company Limited v. M/S National Highways Authority of India***[9] held that the dissenting opinion of an arbitrator cannot be treated as an award, if the majority award is set aside.

The National Highways Authority of India ("NHAI") challenged the award under Section 34 of the A&C Act. The Single Judge of Delhi High Court upheld the award and held that the mere dissenting opinion of an arbitrator did not warrant interference of the court under Section 34 of the A&C Act. NHAI filed an appeal to the Division Bench which set aside the order and held that the arbitral tribunal's majority view was based on an implausible interpretation of the contract.

The Supreme Court while adjudicating the issue observed that when an award is challenged by an aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the award. Upholding the view of the Single Judge, the Court observed that the minority award only embodies the views of the arbitrator disagreeing with the majority view. Therefore, the so-called conversion of the dissenting opinion, into a tribunal's findings, in the event a majority award is set aside, and elevation of that opinion as an award, would, with respect, be inappropriate and improper.

High Court of Calcutta held that a challenge for removal/ withdrawal of an arbitrator would only be maintainable before the Court where the earlier Section 9 application for interim relief was filed as envisaged under Section 2(i) (e) and Section 42 of A&C Act.

The High Court of Calcutta in its judgement dated 11.08.2023 in the matter of ***M/s Gammon Engineers and Contractors Pvt. Ltd. v. The State of West Bengal***[10] held that a challenge for removal/ withdrawal of an arbitrator would only be maintainable before the court where the earlier Section 9 application for interim relief was filed, as envisaged under Section 2(i)(e) and Section 42 of A&C Act.

The main issue for consideration by the court was the maintainability of the application challenging the removal/withdrawal of an arbitrator under Section 14(1)(a) of the A&C Act owing to a prior Section 9 application having been filed before the learned District Judge at Jalpaiguri.

The court observed that the meaning of 'court' under Section 42 is indisputable in terms of Section 2(1)(e) of the Act. An application under Section 9 is also made to a 'court' as understood under Section 2(1)(e) of the Act. Once such an application to a 'court' as understood under Section 2(1)(e) of the A&C Act is made, all further applications under Part I to a 'court' must be to that 'court' to which the prior application was made.

The Court held that since an application under Section 9 was filed before the Jalpaiguri District Court, Gammon Engineers is barred under Section 42 of the A&C from approaching any other court. The Hon'ble Court while dismissing the application held that an application under Section 14(1)(a) for termination of an arbitrator, is required to be made before a '*Court*' as provided under Section 2(1)(e) and Section 42 of the A&C Act, and as such application has to be made before the Jalpaiguri District Court.

High Court of Delhi held that if a venue is identified where the arbitral proceedings were anchored, then such place would also be considered as the *'seat of arbitration'* overriding the generic exclusive jurisdiction clause.

The High Court of Delhi in its judgment dated 14.08.2023 in the matter of ***Reliance Infrastructure Limited v. Madhyanchal Vidyut Vitran Nigam Limited***[11] held that if a venue has been identified for arbitral proceedings specifically in an agreement, then such place shall also be considered as the 'seat of arbitration', overriding any general exclusive jurisdiction clause.

The Court in the present matter was adjudicating upon the issue of its territorial jurisdiction due to the ambiguity in the exclusive jurisdiction clause under the letter of award ('LOA') and clause providing the seat of the arbitration under the general conditions contract ('GCC') pertaining to a tender.

The Court observed that when a contract contains an arbitration clause that specifies a "venue", thereby anchoring the arbitral proceedings thereto, then the said "venue" is really the "seat" of arbitration. In such a situation the courts having supervisory jurisdiction over the said "seat" shall exercise supervisory jurisdiction over the arbitral process,

[9] Civil Appeal No. 4658 of 2023.
[10] A.P. No. 785 of 2022.
[11] O.M.P.(MISC.) (COMM.) 161/2020 and IA No. 9377/2020.

notwithstanding that the contract contains a clause seeking to confer "exclusive jurisdiction" on a different court.

The Court further observed that in the present case, the relevant clause in the LOA purporting to confer "exclusive jurisdiction" is a generic clause, and does not specifically refer to arbitration proceedings. For this reason, the same also does not serve as a "contrary indicia" to suggest that Delhi is merely the "venue" and not the "seat" of Arbitration. As such, the same cannot be construed or applied so as to denude the jurisdiction of the Courts having jurisdiction over the "seat" of arbitration.

High Court of Delhi held that the Court under Section 34 of the A &C Act has the power to partially set aside the offending portion of the award and the recourse under Section 34(4) of the A&C Act can only be used for curable defects.

The High Court of Delhi in its order dated 21.08.2023 in the matter of ***National Highways Authority of India v. Trichy Thanjavur Expressway Limited***[12] held that the Court has the power to partially set aside or strike off the offending part of an arbitral award under Section 34 of the A&C Act. The scope of the power of the court under Section 34(4) extends to only curable defects such as gaps in reasoning and not reviewing the award under the A&C Act.

In the instant matter, the Court was adjudicating upon two cross-appeals seeking to quash the arbitral awards under Section 34 of the A&C Act. The key issues before the Court were whether partial setting aside of award is restricted as per the grounds mentioned under Section 34(2)(iv), and the scope of power of the courts under Section 34(4).

The Hon'ble Court held that Section 34(2)(a)(iv) recognizes the doctrine of severability, and an arbitral award comprises decisions on multiple claims where each claim is distinct and separate, and therefore the courts could set aside the offending part of an arbitration award.

High Court of Delhi held that in case of unstamped/ insufficiently stamped arbitration agreement, it is not mandatory to send the impounded agreement to the Collector of Stamps but the Court itself can receive the requisite stamp duty.

The High Court of Delhi in its judgment dated 22.08.2023 in the matter of ***Splendor Landbase Ltd. v. Aparna Ashram Society & Anr.***[13] dealt with various issues that may arise for consideration, pursuant to N.N. Global Judgment, if an unstamped arbitration agreement is presented with application for appointment of arbitrator under Section 11 of the A&C Act.

The Court held that as per statutory mandate of Section 33 of the Indian Stamp Act, 1899 ("Stamp Act"), an unstamped/ insufficiently stamped arbitration agreement is mandatorily required to be impounded in proceedings under Section 11 of the A&C Act. Thus, a petitioner who files a petition under Section 11 of the A&C Act is obligated to file the original agreement as executed if the agreement is unstamped or insufficiently stamped. However, where the arbitration agreement is duly stamped, filing of the original instrument can be obviated, provided the true or certified copy thereof clearly indicates that it has been duly and properly stamped.

With respect to receiving the requisite stamp duty in case of unstamped/ insufficiently stamped arbitration agreement, the Court held that the Court can either (i) send the impounded agreement to the Collector of Stamps for collection of requisite stamp duty with penalty, if applicable, as per Section 40 of the Stamp Act or (ii) Court itself can take recourse to Section 35 of the Stamp Act and direct the party to deposit the requisite stamp duty along with penalty. The Court further held that in cases where quantum of stamp duty payable is not in dispute, it is apposite for the Court to take recourse to option (ii).

Further, if a court sends the original impounded instrument/ agreement to the Collector of Stamps for adjudication, it shall be open for the Court to issue time-bound directions to perform the adjudicatory functions in terms of the relevant provisions of the Stamp Act.

Court of Calcutta held that an order of an emergency arbitrator in a foreign-seated arbitration should be considered as a supplemental factor during the proceedings under Section 9 of the A&C Act.

The High Court of Calcutta in its judgment dated 23.08.2023 in the matter of ***Uphealth Holdings Inc. v. Glocal Healthcare Systems Pvt. Ltd. & Ors***[14] held that an order of an emergency arbitrator in a foreign seated arbitration is not directly enforceable under the A&C Act due to absence of similar provision in Part II of the A&C Act. However, such an order can act as a supplemental factor during the proceedings under Section 9 of the A&C Act.

Certain disputes arose between the parties arising out of the Share Purchase Agreement ("SPA") executed between them wherein Uphealth Holdings invoked the arbitration clause

12 O.M.P. (COMM) 95/2023.
13 (2023) 7 SCC 1.
14 Arb. Petition No. 809 of 2022.

under SPA and filed an application before an emergency arbitrator. The emergency arbitrator by an order dated 16.11.2022 held that the emergency arbitrator had jurisdiction to rule on the application and directed Glocal Healthcare to provide unaudited financial statements and other data to Uphealth Holdings for the purpose of consolidation, and to refrain from accessing funds in the share account. Glocal Healthcare failed to comply with the order and Uphealth Holdings filed an application under Section 9 of A&C Act. It was contended that the order of the emergency arbitrator was not an award enforceable under Part I of the Act.

The Court held that the orders of the emergency arbitrator are a supplemental factor which may be taken into consideration during the proceedings under Section 9 of the Act and allowed the application.

NCLAT rules that default committed prior to the prescribed period under Section 10A shall not bar applications filed under Section 7 or 9 of IBC.

The NCLAT in its judgment dated 18.08.2023 in the matter of ***Raghavendra Joshi, Director of M/s Khadkeshwar Hatcheries Ltd. v. Axis Bank Limited***[15] held that defaults committed prior to the prescribed period under Section 10A and continuing, shall not affect the applications filed under Section 7 or 9 of IBC.

In the instant case, a default was committed by the corporate debtor on 19.07.2016, and subsequently, a one-time settlement ("OTS") proposal was sanctioned by the financial creditor on 14.02.2020. The OTS was eventually withdrawn during the prescribed period under Section 10A due to breach and non-compliance of the OTS. Post such withdrawal, an application under Section 7 was filed by the financial creditor.

The NCLAT relying on the Supreme Court judgement of ***Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Pvt. Ltd***[16] held that Section 10A is not intended to cover defaults committed prior to the prescribed period and as in the instant matter the default had already been committed in 2016, the applicant was not entitled to benefit under Section 10A. NCLAT observed that in the present case, the default has been committed by the Corporate Debtor since 2016 as the NPA was declared on July 19, 2016, which is before the commencement of the Section 10A period, and held that the Adjudicating Authority did not commit any error in admitting Section 7 application.

NCLAT rules that the personal guarantee given to a financial creditor can be extinguished in a resolution plan.

The NCLAT in its judgment dated 21.08.2023 in the matter of ***SVA Family Welfare Trust & Anr. v. Ujaas Energy Ltd. & Ors***[17] has held that the personal guarantee given to a financial creditor can be extinguished in a resolution plan.

In the present case, an appeal was filed against the order of NCLT, Indore wherein the application filed by a resolution professional for approval of the resolution plan was rejected on the grounds that it was not open for the Committee of Creditors ("CoC") to extinguish the right of a secured creditor to proceed against the personal guarantor of the corporate debtor.

The issue before NCLAT was whether, in a resolution plan, a security interest of the financial creditor by way of personal guarantee by the ex-director of the corporate debtor could be extinguished. NCLAT held that the security interest of dissenting financial creditor by virtue of the personal guarantee of the ex-director of the corporate debtor could have very well been dealt with in the resolution plan and the decision of the CoC to accept the value for relinquishment of personal guarantee was a commercial decision of the CoC which could not be allowed to be impugned at the instance of dissenting financial creditor. Thus, the order of NCLT was set aside, and the appeal was accordingly allowed.

NCLT Mumbai has held that parties, through a mutual agreement, cannot convert an 'operational debt' into 'financial debt' for the purposes of Section 7 of the IBC based on such agreement.

The NCLT, Mumbai Bench in its judgement dated 17.08.2023 in the matter of ***Mr. Santosh Mate (Prop. Of Mahalaxmi Traders) v. M/s. Satyam Transformers Pvt. Ltd***[18] held that parties through a mutual agreement cannot convert an 'operational debt' into 'financial debt' and subsequently file an application under Section 7 of IBC on the basis of such agreement.

In the instant matter, as the corporate debtor was not in a position to clear outstanding dues, the parties decided to execute a 'debt converting loan agreement' wherein operational debt was converted to financial debt. Subsequently, the creditor filed an application under Section 7 of the IBC as a 'financial creditor' relying upon the agreement.

The Court while deciding upon the validity of such an agreement held that the definitions of the 'Financial Creditor' and 'Financial Debt' under the IBC make it explicitly clear that the claim of the creditor did not fall under any of the categories of the "Financial Debt". Further, it was held that if courts and tribunals recognize such an agreement as valid and

[15] Company Appeal (AT) Insolvency No. 914 of 2023.
[16] Civil Appeal No. 4050 of 2020.
[17] Company Appeal (AT) (Insolvency) No. 266 of 2023.
[18] [CP (IB) No. 253 of 2023].

permissible it would defeat the very object of IBC and would lead to rewriting the IBC. Thus, the application filed under Section 7 was held to be not maintainable, as any claim by such creditor should have been filed under Section 9 of the IBC.

The Andhra Pradesh Electricity Regulatory Commission held that claims barred by limitation cannot be allowed and parties are bound by terms of agreement between the parties.

The Andhra Pradesh Electricity Regulatory Commission ("APERC") in its judgement dated 09.08.2023 in the matter of ***M/s ITC Limited v. Southern Power Distribution Company of Andhra Pradesh Limited & Ors***[19] held that claims barred by limitation could be allowed and parties are bound by the terms of the agreement with respect to the charges claimed.

APERC, while dealing with the issue of whether the petitioner filed its claims within the limitation period, held that time-barred claims could not be entertained. For the purpose of computing this limitation period, APERC excluded the time during which the case was pending before CERC and allowed the claims of M/s ITC Limited ("ITCL") which were within the period of limitation. APERC also partly allowed the claims of ITCL towards compensation for the supply of electricity.

With respect to the issue of whether the petitioner ITCL was entitled to claim the charges at a higher Tariff Rate for various periods under dispute instead of the agreed price, APERC observed that ITCL did not specifically plead that the consent given was vitiated by coercion, undue influence, fraud, misrepresentation or mistake and ITCL had not imposed any condition or reserved its right to claim higher price while entering into agreement with Andhra Pradesh Power Co-Ordination Committee. Hence, APERC rejected the claim of ITCL seeking compensation at a higher per unit price on account of the agreement between the parties for the supply of electricity at a specified price which is a valid contract and cannot be resiled by ITCL.

The judgment passed by APERC is at variance with the judgement of the Chhattisgarh State Electricity Regulatory Commission ("CSERC") dated 07.08.2023 in the matter of ***M/s Maruti Clean Coal & Power Limited v. Chhattisgarh State Power Distribution Company Limited***[20] covered in August Part – 1 edition of Sagus Speak.

***

ABOUT SAGUS LEGAL

Sagus Legal is a full-service law firm that provides comprehensive legal advisory and advocacy services across multiple practice areas. We are skilled in assisting businesses spanning from start-ups to large business conglomerates including Navratna PSUs, in successfully navigating the complex legal and regulatory landscape of India. Our corporate and M&A, dispute resolution, energy, infrastructure, banking & finance, and insolvency & restructuring practices are ranked by several domestic and international publications. We also have an emerging privacy and technology law practice.

Delhi Office:
First Floor, S-35B,
Panchsheel Park,
New Delhi – 11001

Gurugram Office:
I-46, Emaar Emerald Hills,
Sector 65, Gurugram – 122001

Satellite Office:
Bhubaneswar, Odisha
Email: info@saguslegal.com
Phone No.: +91 1146552925
Website: https://www.saguslegal.com/

[19] O.P. No. 43 of 2019.

[20] P. No. 17/2023