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-LAW IN ACTION



Legal Updates

The Supreme Court, vide its judgment dated 24.08.2023, in *M/s Hindustan Construction Company Limited vs National Highway Authority of India*, has held that the dissenting opinion cannot be treated as an award if the majority opinion is set aside.

The Supreme Court highlighted the aspect pertaining to dissenting opinion, which is likely to arise in some arbitration proceedings, especially when it involves adjudication by multi-member tribunals. The Supreme Court observed that this aspect was highlighted in *Russel on Arbitration*, where the relevance of a dissenting opinion was explained which was later quoted in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd.* 2021 (1) SCR 1135 (“**DHBNPL case**”) in following manner:

“6-058. Dissenting opinions.—Any member of the Tribunal who does not assent to an award need not sign it but may set out his own views of the case, either within the award document or in a separate “dissenting opinion”. The arbitrator should consider carefully whether there is good reason for expressing his dissent, because a dissenting opinion may encourage a challenge to the award. This is for the parties’ information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge or may add weight to the arguments of a party wishing to appeal against the award.”

The court also quoted Gary B. Born’s commentary on *International Commercial Arbitration* on the aspect of dissenting opinion. However, the court, in *DHBNPL case*, did not direct the dissenting opinion to be treated as an award.

Supreme Court holds that the dissenting opinion cannot be treated as an award if the majority opinion is set aside.

The Supreme Court opined that such approach is correct because there appears to be a slight divergence in thinking between Russel and Gary Born. The former, Russel is careful to point out that a dissenting opinion is not *per se* an award, but “*is for the parties' information only and does not form part of the award, but it may be admissible as evidence in relation to the procedural matters in the event of a challenge.*” However, Gary Born does not expressly say that the opinion is not a part of the award. That author yet clarifies that “*This is an essential aspect of the process by which the parties have an opportunity to both, present their case, and hear the reasons for the Tribunal's decision; not hearing the dissent deprives the parties of an important aspect of this process.*”

In view of above, the Supreme Court observed that it is evident that a dissenting opinion cannot be treated as an award if the majority award is set aside. It might provide useful clues in case there is a procedural issue which becomes critical during the challenge hearings. When a majority award is challenged by the aggrieved party, the focus of the court and the aggrieved party is to point out the errors or illegalities in the majority award. The minority award (or dissenting opinion, as the learned authors point out) only embodies the views of the arbitrator disagreeing with the majority. There is no occasion for anyone- such as the party aggrieved by the majority award, or, more crucially, the party who succeeds in the majority award, to challenge the *soundness, plausibility, illegality or perversity* in the approach or conclusions in the dissenting opinion. That dissenting opinion would not receive the level and standard of scrutiny which the majority award (which is under challenge) is subjected to. The Supreme Court held that 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.

The Hon'ble High Court of Delhi in the matter of *Amit Guglani and Anr. v. L and T Housing Finance Ltd.* ARB.P. 1317/2022 and I.A. No. 19286/2022 vide Order dated 22.08.2023 has observed that when disputes under two connected agreements are faced with different Arbitration Clauses, then such disputes should be resolved under the main or umbrella agreement and the arbitration clause contained therein should be given primacy over that contained in the connected agreement.

In the said case, while the Tripartite Agreement between the Buyer, Builder and the Financing entity provided for dispute resolution through Arbitration with designated seat at New Delhi, the separate Loan Agreement between Buyer and the Financing entity provided for Arbitration ,with Courts at Calcutta to have exclusive jurisdiction.

Following disputes between the Buyer and the Financing entity, the Buyer approached the Hon'ble High Court of Delhi for the appointment of the arbitrator.

The Bench opined that the scope of both the agreements was overlapping and that they are interconnected and inextricably linked to each other with the Tripartite Agreement being the main agreement. The Bench also clarified that even when the agreement provides for unilateral appointment of an Arbitrator, it doesn't exempt a party from adhering to the notice requirement stated in Section 21 of the Arbitration and Conciliation Act of 1996.

The Karnataka High Court in the matter of *Shakeel Pasha and ors v. M/s City Max Hotels* Writ Petition No.8352 Of 2022 (GM-CPC) and Writ Petition No. 12935 Of 2022 (GM-CPC), vide Order dated 28.07.2023 has ruled that the concept of imposing penalty on an insufficiently stamped instrument cannot be applied to an arbitral award in an execution proceedings.

The abovementioned Petitions were filed by the decree holder as well as judgment debtors assailing an order passed by the Executing Court having determined the stamp duty payable at Rs.72,500/- on the arbitral award of Rs.1,20,000/- with interest at the rate of 18% p.a. as also penalty imposed at Rs.7,25,000/-.

The Hon'ble Bench observed that after the arbitration process is completed, the merits are given finality by issuing an arbitral award. By way of a legal fiction, the award is to be treated as decree. Such legal fiction is created for the limited purpose of enforcement of an award as a decree.

Delhi High Court holds that Arbitration clause under the Umbrella Agreement shall supersede the Arbitration clause under Interconnected Agreements

Karnataka High Court observes that penalty cannot be imposed on insufficient stamping of arbitral award at execution stage

Arbitral award is tendered in execution proceedings for enforceability of an award. Sections 33 and 34 of the Stamp Act which mandates and requires an insufficient stamped instrument to be impounded and consequently penalty to be imposed cannot be extended and applied to arbitral awards as an award cannot be construed by the executing court as an instrument.

The National Company Appellate Tribunal (“NCLAT”), vide Order dated 28.08.2023 in the case titled as “*Madras Chemicals & Polymers Ltd. vs. Vijay Aqua Pipes Pvt. Ltd.*” bearing Case no. Company Appeal (AT) CH (INS.) No. 298/2021, held that the default which took place pertaining to the supply of goods comes within the definition of Operational Debt as per Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (“**the Code**”). Hence, Section 9 of the Code, 2016 is attracted in an unambiguous manner.

The present Appeal arose from the order dated 11.01.2021 passed by the National Company Law Tribunal, Chennai (“NCLT”). The Appellant filed an Application under Section 7 of the Code against the default arose in relation to the supply of PVC Suspension Resin (Goods) to the Corporate Debtor / Respondent and as such, the amount claimed to be in default by the Corporate Debtor as on 20.07.2019 amounting to Rs.1,23,14,186.94/-. The NCLT dismissed the Section 7 Application of the Appellant on the ground that there is no financial contract between the parties to establish that the relationship between the Financial Creditor and Corporate Debtor in order for the Applicant to qualify as a “Financial Creditor”.

The NCLAT observed that there exists a Del Credere Agency Agreement dated 04.04.2017 between M/s Chemplast Sanmar Ltd., wherein M/s Chemplast Sanmar Ltd. which manufactures and sells the PVC Resin appointed the Appellant as its ‘Agent’. Accordingly, NCLAT observed that the default arose in relation to the goods supplied to the Corporate Debtor and as such the amount to claimed, to be in default, is an Operational Debt. The NCLAT observed that ‘Agents’, are not normally liable for the ‘Dues’, from the ‘Creditors’, and such ‘liability’ will arise, only if the ‘Agent’, is a ‘Del Credere Agent’. A Del Credere Agent is one who, in consideration of extra remuneration called del credere commission, undertakes that persons with whom he enters into contract on principal’s behalf will be in a position to perform those duties. The extra remuneration is charged for the risk of bad debts. Considering the spirit and tenor of the ‘Del Credere Agency Agreement’, the NCLAT held that in the instant case, the ‘Default’, arose in relation to the supply of ‘PVC Suspension Resin’ (‘Goods’), to the ‘Respondent / Corporate Debtor’, and as such, the amount ‘Claimed’, to be in ‘Default’, by the ‘Corporate Debtor’, as on 20.07.2019, amounting to Rs.1,23,14,186.94/-, is an ‘Operational Debt’, and for the said ‘Operational Debt’, only an Application, under Section 9 of the Code, will apply.

In view of the above, the NCLAT upheld the finding of NCLT and held that the Section 7 Application of the Code, 2016 is not maintainable.

The Ministry of Power (“**MoP**”), vide its resolution dated 21.08.2023, has issued the guidelines under Section 63 of the Electricity Act, 2003 (“**Electricity Act**”) for Tariff Based Competitive Bidding Process for procurement of power from Grid Connected Wind Solar Hybrid Projects (“**Guidelines**”). The same has been done in accordance with the Ministry of New and Renewable Energy’s (“**MNRE**”) Wind-Solar Hybrid Policy dated 14.05.2018. Some of the salient features of the Guidelines are as under:

1. The main objectives of the Guidelines are to promote competitive procurement of electricity from grid connected wind solar hybrid power projects (hereafter termed as 'Hybrid Power Project'), by distribution licensees, to protect consumer interests. Further to promote renewable capacity addition and fulfillment of Renewable Purchase Obligation (“**RPO**”).
2. The Guidelines also aim to provide a risk-sharing framework between various stakeholders and ensure reasonable returns to the investors involved in the wind solar hybrid power procurement, thereby encouraging further investments, enhanced bankability of the Projects and profitability for the investors.

NCLAT holds that a Del Credere Agent who pays to Principal Supplier the outstanding amount is an Operational Creditor.

**MoP issues
Guidelines for Tariff
Based Competitive
Bidding Process for
Procurement of
Power from Grid
Connected Wind
Solar Hybrid
Projects.**

3. The Guidelines have been issued for long term procurement of solar power by 'Procurers' from Solar PV Power Projects, with or without Energy Storage, through competitive bidding process. The term 'Procurer', as the context may require, shall mean the distribution licensees, or the Authorized Representative(s), or an Intermediary Procurer.
4. The Guidelines supersede the erstwhile "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects" issued vide resolution No. 23/27/2017-R&R dated 03.08.2017 as amended from time to time. However, the projects already awarded/ under implementation/ commissioned under the erstwhile Bidding Guidelines, will continue to be governed by those Guidelines and will not be covered under these Guidelines. In case there are any ongoing bids wherein the last date of bid submission is after the date of notification of these Guidelines, then the tender documents in respect of such bids shall be appropriately modified to bring them in alignment with these Guidelines.
5. The Guidelines clarify that in cases, where the Power Purchase Agreement ("PPA") signing agency and the agency carrying out the tendering / bidding process are different, the agency carrying out the tendering / bidding process shall deem to be the Authorized Representative of the 'Procurer' and shall, on behalf of the Procurer, be responsible for fulfilling all the obligations imposed on the 'Procurer' during the bidding phase, in accordance with these Guidelines.
6. In some cases, an intermediary, as designated by the MNRE, or a State Government, may be tasked to aggregate the power purchased from different Solar Power Generators and sell it to the distribution licensee(s)/consuming entities/open access consumers. In such cases, the distribution licensees/consuming entities/open access consumers shall be the "End Procurer" and the intermediary shall be "Intermediary Procurer" for the purpose of these Guidelines.
7. The Guidelines prescribe that the Intermediary Procurer shall enter into a PPA with the Solar Power Generator and also enter into a Power Sale Agreement ("PSA") with the End Procurer. The PSA shall contain the relevant provisions of the PPA on a back-to-back basis. Trading margin, of Rs. 0.07/kWh shall be payable by the End Procurer to the Intermediary Procurer.
8. The Guidelines further clarify that as long as the Intermediary Procurer has followed these Guidelines for procurement of power, the End Procurer shall be deemed to have followed these Guidelines for procurement of power.
9. Scheduled Commencement-of-Supply Date ("SCSD") in relation to the contracted capacity shall mean the date corresponding to the date of commencement of supply as indicated in the Request for Selection ("RfS").
10. A single tariff for supply of Solar power shall be quoted by the bidders (the "Tariff").
11. The procurement of power -shall be in power (MW) terms. The range of Capacity Utilization Factor ("CUF") will be indicated in the bidding documents. Calculation of CUF will be on yearly basis.
12. The bidder are required to have sufficient cash flow/ internal accruals to manage the fund requirements for the Project. Accordingly, the Procurer may also stipulate suitable parameters such as annual turnover, internal resource generation, bidding capacity, etc.

The MoP, vide its notification dated 01.09.2023, has notified the Electricity (Third Amendment) Rules, 2023.

The MoP, vide its Notification dated 30.06.2023, had issued the Electricity (Amendment) Rules, 2023 wherein Rule 3(1)(a)(i) of the Electricity Rules, 2005 ("Electricity Rules") had been substituted with the following:

**MoP issues
Electricity (Third
Amendment) Rules,
2023**

“(i) “not less than twenty-six per cent. of the ownership is held by the captive user: Provided that if the Captive Generating Plant is set up by an affiliate company, not less than fifty-one per cent. of the ownership, is held by the captive user, in that affiliate company; and”

Vide the Electricity (Third Amendment) Rules, 2023, the above proviso has been deleted and the term “*captive user*” has been substituted with “*captive user(s); and*”. Rule 3(1)(a)(i) has effectively reverted to its original terminology under the Electricity Rules.

The MoP, in its Notification dated 30.06.2023, had stipulated in second proviso of Rule 3(2)(b) that consumption of power from a captive generating plant (“**CGP**”) by a subsidiary company of a captive user will also be counted as captive consumption by such captive user. The Electricity (Third Amendment) Rules, 2023 amends the said proviso to also include consumption of power by the parent company of a captive user as consumption of such captive user.

The Electricity (Third Amendment) Rules, 2023 has introduced a new sub-rule (3) in Rule 3 of the Electricity Rules, which states that where the CGP and the captive user(s) are located in more than one state, the verification of captive status shall be carried out by the Central Electricity Authority (“**CEA**”) as per the procedure issued by it.

The Central Electricity Regulatory Commission (“**CERC**”), vide notification dated 28.08.2023, has notified the CERC (Cross Border Trade of Electricity) (First Amendment) Regulations, 2023 (“**First Amended Regulations**”). The First Amendment Regulations shall come into force with effect from the date of their publication in the Official Gazette. The following amendments have been proposed to be made to the CERC (Cross Border Trade of Electricity) Regulations, 2019 (“**the Principal Regulations**”):

1. A new clause, namely, clause (tt-A) has been inserted after clause (tt) of Regulation 2(1) of the Principal Regulations which provides for ‘**Settlement Nodal Agency Charge**’ or ‘**SNA Charge**’ meaning the charge payable to the SNA by the cross-border customers, for discharging the mandated functions;
2. Clause (2) of Regulation 30 of the Principal Regulations has been substituted to provide that the “*Settlement Nodal Agency shall recover SNA charge of One (1.00) paise/ kWh from the cross-border customers and shall formulate a suitable payment security mechanism for collection of such charges.*”

The CERC has invited comments/ suggestions/ objections from the stakeholder and interested persons on the above Draft First Amended Regulations. The comments/ suggestions/ objections may be sent at the email addresses, secy@cercind.gov.in and gagandiwan@cercind.gov.in on or before 11.09.2023.

The Telecom Regulatory Authority of India, (“**TRAI**”), vide notification dated 30.08.2023, has extended the last date of submissions of comments and counter comments on the consultation paper on ‘Review of Regulatory Framework for Broadcasting and Cable services.’

To deliberate on the issues related to pending implementation of the amended TRAI’s framework for 2020, a Committee consisting of members from Indian Broadcasting and Digital Foundation, All India Digital Cable Federation and DTH Association was constituted under the aegis of TRAI to facilitate discussions among various stakeholders for smooth implementation of Tariff Amendment Order 2020. The stakeholders advocated for the need of moving towards larger picture of forbearance. To address such and other issues pertaining to Tariff, Interconnection and Quality of Service of Broadcasting and Cable services, as identified by the stakeholders’ Committee and other stakeholders, TRAI issued a Consultation Paper pertaining to ‘Review of Regulatory Framework for Broadcasting and Cable services.’

The updated submission dates of written comments and counter comments on the aforementioned Consultation Paper are 19.09.2023 and 03.10.2023, respectively.

CERC notifies the Draft CERC (Cross Border Trade of Electricity) (First Amendment) Regulations, 2023

TRAI extends last date of comments and counter comments on the Consultation Paper pertaining to ‘Review of Regulatory Framework for Broadcasting and Cable services.’

TRAI releases Consultation Paper on 'Review of Terms and Conditions of PMRTS and CMRTS Licenses'.

The TRAI, vide notification dated 29.08.2023, has released a Consultation Paper on 'Review of Terms and Conditions of public mobile radio trunking services ("PMRTS") and captive mobile radio trunking services ("CMRTS") Licenses'. The Consultation Paper has been issued with an object to resolve certain subject-specific issues pertaining to PMRTS and CMRTS licenses and to comprehensively review the existing terms and conditions thereof.

The Telangana State Electricity Regulatory Commission ("TSERC") has prepared the Draft Open Access Regulation on the TSERC (Terms and conditions of Open Access) Regulation, 2023 ("**Draft OA Regulation**") for the purpose of consolidating its Open Access Regulations. The Draft OA Regulation shall apply to Open Access users for use of intra-state transmission system and/or distribution system in the Telangana State, including when such system is used in conjunction with inter-state transmission system. The draft Regulation shall apply to Open Access Generators, Scheduled consumers and OA consumers.

A summary of some of the important provisions of the Draft OA Regulation are as follows:

- 1. Categorization of Open Access users:** The Draft OA Regulation introduces Green Energy Open Access Consumers. The Open Access users are classified under four categories i.e.
 - a. Long- Term Open Access ("**LTOA**") User which includes any user of the transmission and/or distribution system entering into an open access agreement with the concerned licensees for a period exceeding 7 years but not exceeding 25 years;
 - b. Medium-Term Open Access ("**MTOA**") User including any user of the transmission and/or distribution system entering into an open access agreement with the concerned licensees for a period exceeding 3 months but not 5 years;
 - c. Short Term Open Access ("**STOA**") User includes any user of the transmission and/or distribution system entering into an open access agreement with the concerned licensees for a period not exceeding 1 month at a time; and
 - d. Green Energy Open Access ("**GEOA**") Consumer includes any user of the transmission and/or distribution system entering into an open access agreement with the concerned licensees for availing green energy open access.
- 2. Criteria for allowing open access to transmission and/or distribution systems:** The LTOA and MTOA shall be allowed in accordance with the transmission planning criterion and distribution planning criterion stipulated in the State Electricity Grid Code and/or Distribution Code and/or CEA Safety Regulations as the case may be. The STOA shall be allowed if the request can be accommodated by utilizing inherent design margin; margins available due to variations in power flows and unutilized capacity, if any and margins available due to in-built spare capacity in transmission and/or distribution system created to cater to future load growth.
- 3. Capacities for allowing open access:** Open Access users having contracted capacity of above 1 MW are eligible for Open Access. Provided that only consumers who have contracted demand or sanctioned load of 100 kW or more, either through single connection or through multiple connections aggregating 100 kW or more located in same electricity division of a distribution licensee, shall be eligible to take power through GEOA and there shall be no limit of supply of power for captive consumers taking power under GEOA.
- 4. Open access agreement:** The Open Access user shall execute an open access agreement with the concerned licensee(s) which shall broadly set out the information as given in Annexure 2 to the Draft OA Regulation. The Open Access agreement shall be bipartite, tripartite, or multipartite involving the Open Access user, distribution licensee in whose area of supply, the user's exit point is located and the concerned transmission licensee. If the Open Access user's point of entry and point of exit are located within the distribution system of the same distribution licensee, the user shall be required to execute an Open Access agreement only with such distribution licensee.

TSERC issues the Draft Open Access Regulation for inviting comments/objections from stakeholders/general public for finalization TSERC (Terms and conditions of Open Access) Regulation, 2023:



5. **Open access charges:** The Open Access users connected to the transmission/distribution system shall pay the transmission charges and/or wheeling charges and any other applicable charges as determined by the commission from time to time. In case of utilization of interstate transmission system in addition to intra-state transmission system and/or distribution system by an Open Access user the transmission charges and/or wheeling charges shall be payable by the Open Access user for the intra-state system as well as inter-state system. The Open Access user shall also be liable for payment of additional surcharge on charges of wheeling as may be specified by the TSERC from time to time in case Open Access is sought for receiving supply from a person other than distribution licensee of such Open Access user's area of supply.
6. **Flexibility to change entry and exit points:** The LTOA and MTOA users including GEOA users shall have the flexibility to change entry and/or exit points twice a year subject to the results of system impact studies to be carried out by the concerned Licensees at the behest of such users. All expenses incurred by the Licensees to carry out such studies shall be reimbursed in full by such users. A STOA user including GEOA users cannot change entry and/or exit points as granted in the approval.
7. **Banking:** Banking facility shall be provided to the consumers availing GEOA at banking charges of 8%. The surplus energy of a green energy open access consumer, from a 'Green Energy' Generating Station, after own consumption in its premises, may be banked with the Distribution Licensee.

The TSERC has invited comments and suggestions of stakeholders and general public on the draft Regulations and the same can be sent to the postal address of TSERC and on secy@tserc.gov.in. The last date for submission of the comments/suggestions is 23.09.2023 before 05:00 P.M.

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