

# GATI - विधि

-LAW IN ACTION



## Legal Updates

**SC holds that arbitral award allowing loss of profit not substantiated by evidence is in conflict with Public Policy of India under section 32(4)(b)**

The Supreme Court, vide judgement dated 19.10.2023, in SLP (Civil) No. 8791 of 2020 titled *M/S Unibros vs. All India Radio*, has held arbitral award allowing claim for loss of profit without substantial evidence is in conflict with Public Policy.

The Appellant was awarded a work contract for construction of Delhi Doordarshan Bhawan by the Respondent. However, the work suffered a delay of roughly 42½ months. The Appellant claimed compensation for the loss of profit on account of delay caused by Respondent, the same was upheld by the Arbitrator on two occasions.

The loss of profit was worked out based on a profit allowance of 7½% per year, which the Arbitrator held to be reasonable in a civil works contract. It was further observed that exact amount of gain or loss with absolute certainty is not required; instead, presenting the best available evidence would suffice and the party responsible for the breach of the contract is liable for reasonably foreseeable losses.

The impugned award was set aside by the Supreme Court on the ground that a claim for damages, whether general or special, cannot as a matter of course result in an award without proof of the claimant having suffered injury. Therefore, the Supreme Court held that an arbitral award based on no evidence is perverse and in conflict with the “public policy of India”.

**SC clarifies the captive structure under the Electricity Rules, 2005**

The Supreme Court, vide its judgment dated 09.10.2023 in Civil Appeal No. 8527-8529 of 2009, titled *Dakshin Gujarat Vij Company Limited V. Gayatri Shakti Paper And Board Limited And Another, Etc.* explains the legal position for being classified as a Captive Generating Plant ('CGP') and a captive user under the Electricity Act, 2003 ('Act') and Rule 3 of the Electricity Rules, 2005 ('Rules').

Following issues were considered by the Supreme Court-

1. Eligibility Criteria for a CGP / captive user under Rule 3(1)(a) of the Electricity Rules, 2005.
2. Interpretation of Second Proviso to Rule 3(1)(a) and in particular the words "association of persons"
3. Whether a company as a Special Purpose Vehicle for generating electricity is an "association of persons", in terms of second proviso to Rule 3(1)(a)

The Supreme Court held the following with respect to above issues –

1. To qualify as a CGP under Section 9 read with Section 2(8) of the Electricity Act, 2003 ("the Act"), the twin requirements of minimum 26% ownership and 51% consumption of electricity from the CGP have to be satisfied.
2. As per the second proviso to Rule 3(1)(a), for an association of persons, the captive user(s) need to have a minimum of 26% ownership and have to consume at least 51% of the electricity generated on an annual basis, in proportion to their shareholding in the CGP.
3. The use of the words "not less than" in paragraphs (i) and (ii) to Rule 3(1)(a) reflect that the requirement of 26% ownership and 51% consumption is the minimum threshold provided. The maximum has not been provided. In case of association of persons, the minimum threshold can result in abuse or gaming when there are multiple owners with different shareholding.
4. Proviso to clause (b) to Explanation 1 to Rule 3 further states that consumption of electricity by a subsidiary or holding company as defined in the Companies Act, 2013 when one of them is a captive user, shall be considered as consumption by the captive user.
5. Proviso to clause (b) to Explanation 1 to Rule 3 further states that consumption of electricity by a subsidiary or holding company as defined in the Companies Act, 2013 when one of them is a captive user, shall be considered as consumption by the captive user.
6. As per first proviso to Rule 3(1)(a), for a registered cooperative society, the minimum 26% ownership and 51% consumption criteria have to be satisfied collectively by the members for them to be treated as captive users and the plant to be treated as a CGP. In such case the members will not be liable to pay cross subsidy and additional surcharge. For consumption of electricity by a non-member, additional surcharge and cross-subsidy will be leviable.
7. The minimum requirements of ownership and consumption have to be satisfied and maintained throughout the financial year and not just at the end of it.
8. In case of change in shareholding or ownership in a CGP, the concept of weighted average should be applied to determine compliance with the ROP provided that the minimum 26% ownership criterion is never breached. Therefore, for captive users who were shareholders for only part of the year, will have to consume electricity proportional to their weighted average annual shareholding to qualify as a shareholder.

The National Company Law Tribunal, Mumbai bench ("NCLT"), vide its order dated 06.10.2023, in the case of *Chaitra Gowdar Chidanand vs. Get Simpl Technologies Private Limited & Ors.* (CA-67/2022 IN CP.09(MB)2022), has observed that the issues falling

**NCLT Mumbai observes that issues falling within scope of Arbitration Agreement, must be referred to Arbitration by the parties itself.**

within the scope of Arbitration Agreement must be referred to Arbitration by the parties itself and not by the Tribunal.

The petition was filed under Sections 241 and 242 of the Companies Act, 2013 (“**CA 2013**”) alleging oppression and mismanagement in respect of the affairs of the Respondent Company, and grievances relating to the restructuring of said company pursuant to the Shareholders’ Agreement (“**SHA**”). One of the Respondents moved an application under Section 8 of the Arbitration & Conciliation Act, 1996 seeking a reference of the disputes in the Company Petition to arbitration and dismissal of the Company Petition No. 9 of 2022 on the ground that the purported shareholder rights are nothing but contractual rights emanating from the SHA especially as the restructuring of Company is an event contemplated by the SHA.

The NCLT consequently observed that the SHA contained an arbitration clause, the parties to the SHA were also parties to the petition u/s 241-242 and if the relief can be granted by the arbitrator to resolve the dispute, such petition ought not to be entertained u/s 241-242. The Bench further observed that the issues as pleaded, arise from the SHA w.r.t. reincorporation plan of Respondent company and consequential rights of the Petitioner under the said reincorporation, which does not require repudiation of the resolutions passed in Extraordinary General Meeting and the Board Resolution, and all other issues being factual issue which can be looked into by the arbitrator.

The NCLT thus held that the issues arising purely from the SHA, can be referred to the Arbitrator by either of parties, to decide (a) whether the Petitioner’s claim for equitable treatment, in the fact and circumstances of the case, is tenable; and (b) whether the Petitioner’s claim for allotment of shares, against delayed remittance, at initial offered price is also tenable in terms of SHA, if yes, whether the Petitioner is liable to be compensated for the monetary loss

**MOP issues approval of Procedure for Implementations of Uniform Renewable Energy Tariff.**

The Ministry of Power (“**MoP**”), vide its notification No. 13/05/2023-RCM/NRE dated 25.10.2023, has approved the Procedure for Implementation of Uniform Renewable Energy Tariff (“**URET**”), which has also been accorded approval by the Ministry for Power and New & Renewable Energy. Some of the salient features of the Procedure for implementation of URET are as followings:

1. There may be more than one category of Central Pool for Solar-Wind Hybrid Central Pool, Round the Clock Power (Solar Wind Hybrid + Storage) Central Pool and Peaking Power (Solar Wind Hybrid + Storage) Central Pool depending upon the technology, generation mix, etc. as decided by the Central Government.
2. The start date of each category of central pool will be separately notified by Central Government. The duration of the central pool will be for five years. All the capacity for which PSA is signed within this duration of 5 years will be part of the Central Pool, provided, other eligibility conditions are fulfilled.
3. After the end of five years from the start date of the central pool of any renewable energy source, a new Central Pool of that renewable energy source may be formed. All new participants of the pool may be added in the new pool.
4. The URET will be applicable only to power procured by the End Procurer and will not in any manner have any implication on the renewable energy tariff discovered under the respective tariff based competitive bidding process and payable to renewable energy generators by the Intermediary Procurer as per the PPA.
5. An Independent Procurer will ensure that the bidding documents including PPA and PSA, have suitable provisions aligned with the relevant proviso of Electricity (Amendment) Rules 2022 pertaining to the URET and these procedures.
6. Part or Full capacity of a Generator of the RE Source as defined in this procedure will be eligible to be a part of the Central Pool if it fulfills all the following conditions:
  - Generator/Producer will be based on a Renewable Energy Source (RESs); and

- Generator/Producer will be connected at Inter State Transmission System; and
  - Energy from the Generator/Producer will be procured by the designated intermediary procurers under section 63 of the Act and as per provisions of bidding guidelines notified by the Central Government from time to time,; and
  - The PSA for such capacity of the Generator with the Intermediary Procurer has been done after the start date of the respective Central Pool.
7. The Intermediary Procurer with a valid trading license is designated by an order made by the Central Government as an intermediary between the end procurer and the generating company to purchase electricity from generating companies and resell it to the end procurer by aggregating the purchases.
  8. The Implementing Agency will compute the uniform renewable energy tariff on a monthly basis, based on information submitted by the Intermediary Procurer and will issue the monthly account statements for adjustment of any surplus or deficit tariff among the intermediary procurers,
- A copy of the abovementioned Procedure is attached herewith, [LINK](#).

**MoP issues circular on Imposition of Charges by various State Governments on of generation of electricity.**

The MoP, vide its notification No. F. No. 09/01/2023-RCM, dated 25.10.2023, has issued a circular on Imposition of Charges by various State Governments on various forms of generation of electricity – from Hydropower/ Renewables/ Thermal etc. The MOP observed that some State Governments have imposed certain additional charges on generation of electricity from various sources under the guise of development fee/ charges/ fund etc., and the said additional charges are illegal and unconstitutional.

The MoP highlighted the legal position with respect to the abovementioned subject matter as per its previous letter dated 25.04.2023 in view of powers conferred under Schedule VII to levy taxes/ duties are specifically stated in the VII Schedule read with Article 286 to 288 of the Constitution of India. The MOP clarified that in view of the same, no taxes/ duties can be levied by any State on generation or inter-State supply of electricity under the guise of additional charges/ fee on generation of electricity from any source.

**The MoP issues a Notification Regarding RPO**

The MoP, vide notification dated 20.10.2023, has issued the following notification with respect to minimum share of consumption of non-fossil sources (RE) by designated consumers as energy or feedstock and different share of consumption for different types of non-fossil sources for different designated consumers in respect of electricity distribution licensee and other designated consumers who are open access (“OA”) consumers or captive users to the extent of consumption of electricity from sources other than distribution licensee as a percentage of their total share of energy consumption.

The Total share on energy consumption has been indicated as per the table reproduced below:

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<i>Sl. No</i>	<i>Year</i>	<i>Wind renewable energy</i>	<i>Hydro Renewable energy</i>	<i>Distributed renewable energy*</i>	<i>Other renewable energy</i>	<i>Total renewable energy</i>
<i>(1)</i>	<i>(2)</i>	<i>(3)</i>	<i>(4)</i>	<i>(5)</i>	<i>(6)</i>	<i>(7)</i>
1.	2024-25	0.67%	0.38%	1.50%	27.35%	<b>29.91%</b>
2.	2025-26	1.45%	1.22%	2.10%	28.24%	<b>33.01%</b>
3.	2026-27	1.97%	1.34%	2.70%	29.94%	<b>35.95%</b>
4.	2027-28	2.45%	1.42%	3.30%	31.64%	<b>38.81%</b>
5.	2028-29	2.95%	1.42%	3.90%	33.10%	<b>41.36%</b>
6.	2029-30	3.48%	1.33%	4.50%	34.02%	<b>43.33%</b>

”

The MoP has clarified that any shortfall in achievement of stipulated wind RE consumption in a particular year may be met with hydro RE which is in excess of that energy component for that year and *vice versa*. For designated open access, consumers or captive users shall fulfil their obligation as per the specified total RE target irrespective of the non-fossil fuel source. The specified targets are to be met either directly or through Certificate in accordance with the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation).

The said notification shall come into force on 01.04.2023.

**TRAI extends last date to receive comments on Pre-Consultation Paper on Inputs for formulation of "National Broadcasting Policy".**

The TRAI, vide notification dated 21.09.2023, had issued Pre-consultation Paper on "Inputs for Formulation of "National Broadcasting Policy" and invited stakeholders to send their comments by 10.10.2023. The said deadline is now being extended.

The Ministry of Information & Broadcasting ("MIB"), vide its letter dated 13.07.2023 had requested TRAI to give its considered inputs under Section 11 of the TRAI Act, 1997 for formulation of the National Broadcasting Policy. The MIB had mentioned that the Broadcast Policy needs to identify the vision of a functional, vibrant and resilient broadcasting sector which can project India's diverse culture and rich heritage and help India's transition to a digital and empowered economy. In the light of the potentialities and intersection with national goals, a National Broadcasting Policy has been issued stipulating the vision, mission, strategies and the action points which could set the tone for a planned development and growth of the Broadcasting sector in the country in the era of new and emerging technologies.

The updated submission date for written comments is 07.11.2023

**TRAI issues Draft Telecommunication Mobile Number Portability (Ninth amendment) Regulations, 2023 for stakeholders' comments.**

Telecom Regulatory Authority of India, vide notification dated 27.09.2023, had issued a Consultation Paper on "Open and De-licensed use of Unused or Limited Used Spectrum Bands for Demand Generation for Limited Period in Tera Hertz Range". Recently, Department of Telecommunications ("DoT"), through its various communications to TRAI, made certain suggestions in respect of regulatory framework for Mobile Number Portability. In view of the suggestion of DoT, the TRAI has issued the Draft Telecommunication Mobile Number Portability (Ninth amendment) Regulations, 2023 for stakeholders' comments. The last date for submission of the said comments is being extended now vide Notification dated 20.10.2023.

The stakeholders' comments were solicited on the issue as to whether it would be appropriate to introduce an additional criterion for rejection of the request for allocation of Unique Porting Code ("UPC") in respect of any mobile connection, which has undergone the process of SIM swap/ replacement/ upgradation.

The last date for submitting the comments has now been extended up to 08.11.2023.

**UPERC invites Comments on consultation paper prepared by UPERC on Second Amendment of UPERC (Rooftop Solar PV Grid Interactive system Gross/Net Metering) Regulations, 2019.**

The Uttar Pradesh Electricity Regulatory Commission ("UPERC"), vide its notification No. UPERC/VCA/23-24/1031 dated 11.10.2023, has invited written suggestion/objection/comments from various stakeholder on the consultation paper prepared by UPERC on Second Amendment of UPERC (Rooftop Solar PV Grid Interactive system Gross/Net Metering) Regulations, 2019.

The Consultation paper has been issued highlighting the consequences of the amendments brought about in the Principle Regulation with respect to the eligibility of consumer under various category of Rooftop Solar Photo Voltaic ("RSPV") arrangements, cost benefit analysis for the distribution license for including the subcategories of consumers under various RSPV arrangements, the benefits that would be incurred to the licensee on account of the proposed amendments.

The Suggestion/Comments may be sent to the Secretary, UPERC, Vidyut Niyamak Bhawan, Vibhuti Khand, Gomti Nagar, Lucknow -22610 through post and email on [secretary@uperc.org](mailto:secretary@uperc.org) on or before 07.11.2023. The 'Public Hearing' for the same will be held on 08.11.2023 at 1200 Hrs.

The Andhra Pradesh Electricity Regulatory Commission (**APERC**), vide its notification dated 11.10.2023, has notified the Second Amendment to the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulation, 2005 ("**Second Amendment Regulations**"). The amended Regulations shall come into effect from 11.10.2023..

The amended Regulations has brought into effect the following amendments:

1. Sub-clauses 8.1, 8.2 and 8.3 of the APERC (Terms and Conditions for Determination of Transmission Tariff) Regulation, 2005 has been substituted. The Second Amendment Regulations modifies the provisions of the Principal Regulations w.r.t. filing procedures of Aggregate Revenue Requirement and Filing for Proposed Tariff petitions by a Transmission Licensee before the APERC.
2. The Commission shall within 120 days from the receipt of a complete application for tariff determination and after considering the suggestions and objections received from the public shall either issue a tariff order accepting the application with such modifications or conditions as may be specified in its order or reject the application for reasons to be recorded in writing. Before rejecting an application, the applicant shall be given a reasonable opportunity of hearing.
3. The amended sub-clause 8.5 provides that the tariffs so published shall be in force from the date specified in the order and shall, unless amended or revised continue to be in force for such period as may be stipulated therein. The transmission licensee shall raise the bills for the electricity transmitted or services rendered to its users in accordance with the notified tariff.
4. Further, clause 10.6, 10.7 and 10.8 has been substituted with clause 10.6 of the amended Regulation. The clause 10.6 of the amended Regulations provides for sharing of gains/losses due to variations in controllable items of the ARR. It provides that the aggregate gain/loss of the nth control period in controllable items of transmission business shall be pass-through in the ARR of (n+1) control period at the appropriate ratio for each item as decided by the Commission. The transmission licensee shall submit the gains/losses in each controllable item of the transmission business in the previous financial year by 30<sup>th</sup> November of the current financial year.

Further, new clauses 26, 27 and 28 has been added vide the amended Regulations. Clause 26 of the amended Regulations deals with the provision of "Issue of orders and practice directions"; clause 27 deals with the provision of "Power to Remove difficulties" and clause 28 deals with the provision of "Power to Relax".

**APERC notifies the Second Amendment to the Andhra Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulation, 2005**

**APERC notifies Eighth Amendment to the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999.**

The Andhra Pradesh Electricity Regulatory Commission (**APERC**), on 15.07.2023, had issued the Eighth Amendment to the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 (**draft Amendment**). Vide the draft Amendment, the APERC had proposed to delete the provision w.r.t. "*Expected Revenue from charges, and tariff proposals*" stipulated in the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999:

*“Clause 45-A (Expected Revenue from charges, and tariff proposals), and clause 45-C (Subsidies) in Chapter IV (A) of the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations,1999 as amended from time to time, shall stand **DELETED.**”*

APERC had invited the interested stakeholders to submit their comments/objections/suggestions by 05.08.2023. As the APERC did not receive any comments/objections/suggestions to the draft Amendment, the APERC in exercise of powers conferred on it under section 181 of the Electricity Act, 2003 has notified the Eighth Amendment to the Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations,1999 which has come into effect from 11.10.2023 incorporating the proposed amendment as provided under the draft Amendment. Copy of the amended Regulations can be accessed [here](#).

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