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Law, Regulatory & Policy

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Legal Updates

Supreme Court holds that an Arbitration Agreement in unstamped/ insufficiently stamped Contract is not enforceable

The Constitution Bench of the Supreme Court vide judgment dated 25.04.2023 in Civil Appeal No. 3802-3803 of 2020 titled *M/s N.N. Glabal Mercantile Pvt. Ltd. vs. M/s Indo Unique Flame Ltd. & Ors.*, held that an instrument which is eligible to stamp duty may contain an arbitration clause and which is not stamped cannot be said to be a contract enforceable in law within the meaning of Section 2(h) of the Contract Act, 1872, hence, not enforceable under Section 2(g) of the Contract Act. The majority observed that an arbitration agreement within the meaning of Section 7 of the Arbitration and Conciliation Act, 1996 ("**A&C Act**") attracts stamp duty. Such agreements which are not stamped or are insufficiently stamped cannot be acted upon in view of Section 35 of the Stamp Act, 1899. Furthermore, the Court observed that the provisions of Section 35 and the bar under Section 35, of the Stamp Act, 1899 would render the arbitration agreement provided under such an instrument as being non-existent in law until the instrument is validated as the provisions of the Stamp Act, 1899. Moreover, the Court, by majority, held that the Court at the stage of deciding petition under Section 11 A&C Act, is bound to examine the instrument and impound such an instrument if it is unstamped or insufficiently stamped.

The Supreme Court, vide its judgment dated 20.04.2023, in Civil Appeal No.11095 of 2018 titled *GMR Warora Energy Limited vs. Central Electricity Regulatory Commission & Ors.*, has appealed to Union of India to evolve a mechanism, for timely payment of dues and to avoid with unnecessary litigation due to 'Change in Law' ("**CIL**") claims.

The Supreme Court observed that the term 'Law' would also include all applicable rules, regulations, orders, Notifications issued by an Indian Governmental Instrumentality. Accordingly, it was held that all such additional charges which are payable on account of orders, directions,

notifications, regulations, etc., issued by the instrumentalities of the State, after the cut-off date, as enumerated hereinbelow will have to be considered to be 'CIL' events:

1. The revision of charges to be paid on Busy Season Surcharge, Development Surcharge and Port Congestion Charges from time to time by the 'Railway Board' would come within the ambit of 'CIL'.
2. The Ministry of Environment, Forest and Climate Change ("**MoEFCC**"), vide notification dated 02.01.2014, i.e. subsequent to the particular cut-off date of 01.06.2012, has mandated power projects to use beneficiated coal with ash content lower than 34%. Hence, the notification would amount to 'CIL'.
3. Insofar as shortfall in linkage coal due to changes in the New Coal Distribution Policy, 2007 ("**NCDP**") issued by the Ministry of Coal ("**MoC**") is concerned, the issue is no more *res integra*. The Supreme Court while relying on the cases of *Energy Watchdog v. Central Electricity Regulatory Commission and others, (2017) 14 SCC 80, Jaipur Vidyut Vitaran Nigam Ltd. and others v. Adani Power Rajasthan Limited and another (2020) SCC OnLine SC 697, Maharashtra State Electricity Distribution Company Limited v. Adani Power Maharashtra Limited & Ors. 2023 SCC OnLine 233*, has held that the change in NCDP would amount to 'CIL'.
4. Forest Tax at a fee at the rate of Rs.7 per ton, applicable on coal mined and transported from South Eastern Coalfields Limited mines located in Forest area, vide Notification of the Chhattisgarh State Government, Department of Forest, under the provisions of Chhattisgarh Transit (Forest Produce Rule) 2001, would amount to 'CIL'.
5. Insofar as 'add on premium price' is concerned, the same was required to be paid on account of cancellation of captive coal blocks and inordinate delay on account of Go-No-Go policy. Hence, it would amount to 'CIL'.
6. Evacuation Facility Charges ("**EFC**") was imposed by Coal India Ltd. vide its circular dated 19.12.2017 would also amount to 'CIL'.

SC appeals to the Union of India to evolve mechanism, for timely payment of due and avoid unnecessary litigation, for change in law claims.

The Supreme Court further held that the generators would be entitled to compensation on the restitutionary principle on such changes occurring after the cut-off date. The Supreme Court made some very important observation in respect of 'CIL' claims in general, such as:

1. When the power purchase agreement ("**PPA**") itself provides a mechanism for payment of compensation on the ground of 'Change in Law', unwarranted litigation, which wastes the time of the Court as well as adds to the ultimate cost of electricity consumed by the end consumer, ought to be avoided.
2. Non-quantification of the dues by the Electricity Regulatory Commissions ("**ERCs"**) and the untimely payment of the dues by the distribution companies ("**DISCOMs**") is also detrimental to the interests of the end consumers.
3. The late payment surcharges which accrued due to untimely payments by Discoms under the PPA, are ultimately added to the cost of electricity supplied to the end consumers.
4. An appeal to the Supreme Court under Section 125 of the Electricity Act, 2003 ("**Electricity Act"**) is only permissible on any of the grounds as specified in Section 100 of the Code of Civil Procedure, 1908 ("**CPC"**) which should be on substantial question of law. However, even in cases where well-reasoned concurrent orders are passed by the State Commissions and the Appellate Tribunal for Electricity ("**APTEL**"), the same are challenged by the DISCOMs and the generators. The Supreme Court should be slow in interfering with the concurrent findings of fact unless they are found to be perverse, arbitrary and either in ignorance of or contrary to the statutory provisions. On account of pendency of litigation, non-payment of dues would entail paying of heavy carrying cost to the generators by the DISCOMs, which, in turn, will be passed over to the end consumer.
5. As a result of unnecessary and unwarranted litigation, it will be the end consumer who would be at sufferance, and which ought to be curbed.

In view of above observations, the Supreme Court appealed to the Union of India through Ministry of Power to evolve a mechanism to ensure timely payment by the DISCOMs to the Generating Companies, which would avoid huge carrying cost to be passed over to the end consumer as well as evolved a mechanism to avoid unnecessary litigation.

SC held that the PPA cannot be changed by the retrospective application of an amendment to the REC Regulations

The Supreme Court, vide judgment dated 13.04.2023, in Civil Appeal No(S). 3480-3481 OF 2020 titled *Gujarat Urja Vikas Nigam & Ors. v. Renew Wind Energy (Rajkot) Private Limited & Ors.*, has held that the PPA entered between the parties cannot be changed as a result of retrospective application of a new amendment to the Central Electricity Regulatory Commission (Terms and Conditions for Recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("**REC Regulations 2010"**).

The State Commission vide its order provided for levelized tariff of Rs 3.56 per kWh. However, the PPA entered between Gujarat Urja and Wind Power Developer ("**WPD**") provided for ceiling on tariff Rs 2.64 per unit for 25 years. In addition, the WPD's were eligible for issuance of REC whose price was determined on the basis of the "weighted average pooled price". On 11.07.2013, Central Electricity Regulatory Commission ("**CERC"**) amended the REC Regulations 2010 ("**Second Amendment**") and replaced the phrase *"at a price not exceeding pooled cost of the power purchase "*with*" at the pooled cost of power purchase"*. It was clarified in the Second Amendment that the PPAs already executed prior to this amendment at a tariff lower than Average Pooled Power Purchase Cost ("**APPC**") would not be affected.

The WPDs filed petitions before the State Commission arguing that the terms of the PPA had to be changed in view of the change in the REC Regulations 2010. The State Commission allowed the petition directing that order of the CERC was general and was, therefore, applicable to all similarly situated WPDs. The APTEL upheld the State Commission's order.

The Supreme court observed that from a reading of the provision relating to applicability of renewable purchase obligation ("**RPO**") in Gujarat Electricity Regulatory Commission (Procurement of Energy from Renewable Sources) Regulations, 2010 ("**Renewable Sources Regulations**"), it is evident that there was never any provision, which mandated prior approval by the State Commission, of PPAs entered into, by parties, in exercise of their free choice, in relation to renewable energy sources. As a matter of fact, in the case of renewable power, the State Commission had approved a model PPA. Further, the tariff terms and conditions to the extent decided are by the CERC and not by the State Commission. These are incorporated in the model PPA. The Supreme Court held that it was not established how in the absence of any reference to the Multi Year Tariff Regulations, they were applicable to PPAs relating to renewable energy sources. Relying on previous established precedents, the Supreme Court held that once agreements were signed and were enforceable in law, such enforceable obligations could not be frustrated. In the present case, the PPA was entered into by the parties on 29.03.2102, *within the control period* stipulated in the tariff order of 2010. The Second Amendment was carried out on 10.07.2013. The Supreme Court observed that for the period between 29.03.2102 and 10.07.2013 - and indeed, after the Second Amendment, no difficulty was experienced in the pricing mechanism agreed by the parties, under the PPA. It was on 10.12.2013 that the respondent WPD approached the State Commission for re-determination of tariff. Thus, this is a clear instance of an opportunistic attempt to derive advantage from the change, brought about by the Second Amendment, and seek to have it applied to an existing contract, which cannot be countenanced. The Supreme Court reiterated that it is settled position of law that the amendments to laws, or regulations, unless expressly retrospective, are always prospective

CERC expands the scope of eligibility of participation of generating stations who can provide Reserve Regulation Ancillary Service

CERC, vide order dated 23.04.2023, expanded the scope of eligibility of generating stations who can provide Reserve Regulation Ancillary Service ("**RRAS**").

The CERC (Ancillary Services Operations), Regulations 2015 ("**RRAS Regulations, 2015**") were notified on 13.08.2015 which the objective to restore the frequency at desired level and to relieve the congestion in the transmission network. As per Regulation 5.1 of the RRAS Regulations, 2015, the generating stations which are regional entities and whose tariff is determined or adopted by the Commission for their full capacity are eligible to provide RRAS. In the light of the fact that the Peak Demand is expected to intensify further with the increase in temperature, Grid-India requested the CERC to expand the scope of RRAS Regulations, to ensure adequacy of reserves and therefore include resources other than the generating stations regulated by the Commission.

The CERC, therefore exercising its power under Regulation 16 of the RRAS Regulations, directed for the expansion of scope of eligibility of RRAS participation with immediate effect in following manner:

1. The eligibility for participation for RRAS referred to in Regulation 5 of the RRAS Regulations, 2015 shall, in addition to the regional entity generating stations whose tariffs are determined or adopted by the Commission, also include the state generating stations whose tariffs are determined or adopted by the State Commission and willing to participate under RRAS; and the generating stations which are mandated by the Central Government to participate under RRAS and whose tariffs are discovered through a competitive bidding process.
2. The merit order stack to be prepared by the Nodal Agency shall include the state generating stations whose tariffs are determined or adopted by the State Commission and willing to participate under RRAS; and the generating stations which are mandated by the Central Government to participate under RRAS, along with the regional entity generating stations whose tariffs are determined or adopted by the Commission.

PNGRB extends time for submission of comments on draft Access Code Regulations

The Petroleum and Natural Gas Regulatory Board ("**PNGRB**") vide its notice dated 21.04.2023, in view of the request from the stakeholders, has extended the last date for submission of views / comments on the draft Petroleum and Natural Gas Regulatory Board (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines) Regulations, 2021, by two months i.e., up to 23.06.202

PNGRB invites views / comments on draft Technical Standards Regulations

PNGRB, vide its public notice dated 28.04.2023, has sought views / comments on the draft PNGRB (Technical Standards and Specifications including Safety Standards for Petroleum and Petroleum Product Pipelines) Amendment Regulations, 2023, from all stakeholders including the general public. The view and comments may be sent via email to secretary@pngrb.gov.in or in writing addressed to Secretary, PNGRB within 30 days from the issue of public notice i.e., by 28.05.2023.

TRAI issues Consultation Paper on "Issues related to Low Power Small Range FM Radio Broadcasting

The Telecom Regulatory Authority of India ("**TRAI**"), vide notification dated 17.04.2023, issued a Consultation Paper on "Issues related to Low Power Small Range FM Radio Broadcasting" ("**FM Consultation Paper"**).

The FM Consultation Paper seeks comments/views of the stakeholders on the issues related to Low Power Small Range FM Radio Broadcasting. The low-power short range FM Radio broadcasting is an effective method of sound broadcasting for services that are intended for limited locations and reception areas such as drive-in theatres, hospital radio services, amusement parks, business premises, closed communities such as residential complex, small habitations, local events such as air shows and sports events, etc.

The TRAI has invited the written comments on the consultation paper from the stakeholders by 15.05.2023. Counter comments, if any, may be submitted by 29.05.2023.

TRAI issues Consultation Paper on spectrum for space-based communication services

The TRAI, on 03.04.2023, released a consultation paper on "Assignment of Spectrum for Space-based Communication Services" on which stakeholder comments have been invited by 04.05.2023, and counter-comments by 18.05.2023.

The Department of Telecommunications ("**DoT**"), through its letter dated 13.09.2021, had requested the TRAI to provide recommendations on auction of spectrum in the frequencies identified for International Mobile Telecommunications ("**IMT**") 5G. TRAI was also requested to provide recommendations, on appropriate frequency bands, band plan, block size, applicable reserve price, the quantum of spectrum to be auctioned, and associated conditions for the auction of spectrum for space-based communication services.

The TRAI, through consultations, seeks to assess the demand for space-based communication services and accordingly provide recommendations on the quantum of spectrum in each band required to be put to auction. It has been envisaged to auction the Space Spectrum on exclusive basis. Accordingly, the TRAI seeks to explore feasibility and procedure of sharing auctioned spectrum among multiple service licensees may provide suggestions on how satellite networks and terrestrial networks should share frequency bands that were auctioned off, along with the guidelines for sharing and the best ways to prevent interference when doing so. Since the service providers may require spectrum both in user link as well as in feeder link, the TRAI seeks inputs from the stakeholders in order to recommend the appropriate auction methodology so that the successful

bidder gets appropriate spectrum. In the present consultation paper, TRAI has considered all the spectrum bands relevant for space-based communication services as indicated by DoT.

MPERC issues the MPERC (Verification of Captive Generating Plants and Captive Users) Regulations, 2023

Madhya Pradesh Electricity Regulatory Commission ("**MPERC**") has issued the MPERC (Verification of Captive Generating Plants and Captive Users) Regulations, 2023 ("**CGP Regulations**"). The CGP Regulations have been issued to specify the methodology for verification of status of captive generating plants (**"CGPs"**) and captive users (**"CUs"**) when consumers import power from their captive generator located either within the State or outside the State and consequences of not meeting the conditions of either CGP or CU. The CGP Regulations provides that a Designated Authority of the State, which shall be identified by MPERC vide a separate order, shall be responsible for determining / verifying the captive status of a plant within the time frame specified in the CGP Regulations. The CGP Regulations may be accessed vide this *link.*

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