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-LAW IN ACTION



Legal Updates

Delhi High Court in its judgment dated 17.05.2023 in *Kotak Mahindra Bank Ltd. Vs. Narendra Kumar Prajapat* re-affirmed the decision given by the Commercial Court that an award rendered by a person who is ineligible to act as an arbitrator by virtue of the provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996 (“A&C Act”) is a nullity and therefore, cannot be enforced.

The Delhi High Court has adjudicated on the issue, whether failure to object to the unilateral appointment of a sole arbitrator can be construed as a waiver of the right of the party under Section 12(5) of the A & C Act. The High Court observed that a party can waive its right to object to the ineligibility of an arbitrator under Section 12(5) of the A & C Act but the same is subject to two conditions. First, that the waiver is required to be done by an express agreement in writing; and second, that such agreement is entered into after the disputes have arisen. Unless both the aforesaid conditions are satisfied, there can be no waiver of the ineligibility of an arbitrator. The High Court observed that in the instant case failure, if any, on the part of the respondent to object to the unilateral appointment of the sole arbitrator, cannot be construed as waiver of his right under Section 12(5) of the A&C Act. Therefore, the award rendered by an arbitrator who is ineligible to be appointed cannot be enforced.

The Delhi High Court in its judgment dated 25.05.2023 in *M/s Mahesh Construction Vs. Municipal Corporation of Delhi & Anr.* held that a contractual clause cannot prohibit an arbitral tribunal from allowing interest on delayed payments. While relying on the judgment of the Supreme Court in the case of *Reliance Cellulose Products Ltd. Vs. ONGC* whereunder it was held that an arbitrator is empowered under Section 31(7) of the Arbitration and Conciliation Act, 1996 (“A&C Act”) to grant interest for all the three periods, that is pre-reference, pendente lite and post award periods unless the contract prohibits the arbitrator from granting interest under Section 31(7) of the A & C Act. In furtherance to the same, the High Court observed that a clause in a contract that prohibits

An award rendered by an arbitrator who is ineligible to be appointed cannot be enforced – Delhi High Court

Contractual clause cannot prohibit Arbitral Tribunal from allowing interest on delayed payments – Delhi High Court

payment of interest on delayed payments, does not restrict the arbitrator to grant interest since it does not prohibit the arbitrator from granting interest under Section 31(7) of the A & C Act and is a restriction on the contracting party to claim interest on delayed payments. Since, interest is compensatory in nature, the arbitrator's powers are not curtailed by such narrow clauses in the contract.

The Calcutta High Court vide judgment dated 09.06.2022 in C.O. 2545 of 2022 titled *M.D. Creations & Others versus Ashok Kumar Gupta* has held that the order under Section 16 of the Arbitration and Conciliation Act, 1996 (“**A&C Act**”) can be challenged only when there is an apparent inherent lack of jurisdiction.

The petitioner filed application under section 16 of the A&C Act on the ground of lack of jurisdiction of the arbitrator to determine the dispute as the agreement containing the arbitration clause was unstamped and unregistered. The arbitral tribunal dismissed the petitioner's application. Aggrieved by the same, the petitioner filed a revisional application under Article 227 of the Constitution of India, before the Calcutta High Court.

Calcutta High Court observed that as per section 5 of the A&C Act, judicial authorities should follow the principle of minimal judicial intervention in arbitration proceedings. The court further observed that as per the principle of doctrine of *kompetenz kompetenz* under section 16 of the A&C Act, arbitral tribunal has the power to adjudicate whether it has jurisdiction on the dispute or not as well as decide on any objection with respect to the existence or validity of the arbitration agreement.

The court held that aggrieved party could file appeal under section 37 of A&C Act against the order of arbitral tribunal where the arbitrator holds that it does not have jurisdiction to adjudicate upon a dispute. However, in case of dismissal of plea of competency of the arbitrator, the aggrieved party can file an application for setting aside such an arbitral award under section 34 after the final award is passed.

Calcutta High Court dismissed the revisional application under Article 227 of the Constitution on the ground that the petitioner has not been able to establish patent inherent lack of jurisdiction, exceptional circumstances or ‘bad faith’ on the part of the opposite party. It was further observed that since the petitioner has alternate remedy under section 34 of A&C Act, the same should be availed before resorting to constitutional remedy.

Ministry of Corporate Affairs (“**MCA**”) vide its notification dated 14.06.2023 notified that the provisions of section 14(1) of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) which provides for prohibitions during moratorium period, shall no longer apply where the corporate debtor has entered any of the following:

1. Production Sharing Contracts, Revenue Sharing Contracts, Exploration Licenses and Mining Leases made under the Oilfields (Regulation and Development) Act, 1948 (53 of 1948) and rules made thereunder;
2. Any transactions, arrangements or agreements, including Joint Operating Agreement, connected or ancillary to the transactions, arrangements or agreements referred to in clause (i).

National Company Law Appellate Tribunal (“**NCLAT**”), Chennai vide its judgment dated 12.06.2023 in Comp. App (AT) (CH) (INS.) No. 246/2021 titled *M/s KK Ropeways Ltd. vs. M/s Billion Smiles Hospitality*, held that the petition filed under the section 9 of the Insolvency and Bankruptcy Code, 2016 (“**IBC**”) for implementation of the arbitral award is not maintainable and the same is not in tune of the objective of IBC.

The facts leading to the present dispute are that a rent agreement fell out between M/s KK Ropeways Ltd. (“**Operational Creditor**”) and M/s Billion Smiles Hospitality (“**Corporate Debtor**”). Arbitration clause between the parties was invoked and the matter was referred to arbitration. On 29.11.2018, the arbitral tribunal passed the *ex parte* arbitral award in favour of the

Order under Section 16 of A&C Act can be challenged only under exceptional circumstances – Calcutta HC

MCA notifies that prohibition under moratorium period shall not be applicable for certain transactions

Petition filed under Section 9 of IBC for Implementation of Arbitral Award is not maintainable – NCLAT, Chennai

Operational Creditor for an amount of Rs. 26,33,022/- along with interest @ 15% p.a. Corporate Debtor filed an appeal under section 34 of the A&C Act thereby challenging the award dated 29.11.2018.

The Operational Creditor filed a section 9 petition before the NCLT seeking initiation of Corporate Insolvency Resolution Process (“**CIRP**”) against the Corporate Debtor and the amount in dispute was based on the arbitral award. NCLT vide its impugned order dated 27.04.2021 rejected the application of the Operational Creditor on the ground of ‘pre-existence of dispute’. The NCLAT upheld the findings of NCLT and held that the ‘existence of dispute’ includes raising a dispute before a court of law or an arbitral tribunal prior to receipt of demand notice under section 8 of IBC. Furthermore, NCLAT observed that the dispute continues at the stage where challenge to the arbitral tribunal in an appeal is pending.

NCLAT, Chennai vide its judgment dated 12.06.2023 in Comp. App. (AT) (CH) (Ins.) No. 12/2023 titled *Anheuser Busch Inbev India Ltd. Vs. Pradeep Kumar Sravanam*, has permitted the Resolution Professional (“**RP**”) to keep the claim in abeyance with respect to which the arbitration proceedings were ongoing and the corporate debtor’s counter claim was pending determination before the arbitral tribunal. NCLAT further observed that it is within the power of the RP to keep the claims submitted by the creditors in abeyance, for plurality of reasons.

The facts leading to the present case are that the Appellant and the Respondent entered into the Brewing Agreement wherein corporate debtor allegedly failed to fulfil its obligations under the Agreement. The dispute was referred to arbitration for recovery of amount due from the corporate debtor and corporate debtor filed its counter claim against the appellant which is pending adjudication. Subsequently, NCLT admitted the corporate debtor into Corporate Insolvency Resolution Process (“**CIRP**”). The appellant/financial creditor submitted its claim which was a subject matter before the pending arbitral proceedings. The RP did not accept the financial creditor’s claim, rather kept it at abeyance on the ground that the final admissible claim amount would depend on the outcome of the arbitral proceedings and the determination of corporate debtor’s counter claim.

Vide order dated 02.12.2022, NCLT dismissed the application preferred by the financial creditor seeking directions to the RP to admit the claim, on the ground that the RP was justified in keeping the claim in abeyance under the outcome of the arbitral proceedings. Being aggrieved by the impugned order, the appellant filed an appeal before the NCLAT. NCLAT observed that determination of corporate debtor’s counter claim may end in a situation where the sum payable to appellant might get set off. NCLAT finally held that the RP has acted within its powers by keeping the admission of claim in abeyance. NCLAT further observed that the appellant’s plea to get the claim admitted, during the pendency of arbitration proceedings and the corporate debtor’s counter claim cannot be acceded to in the eyes of law.

Ministry of Power (“**MoP**”) vide its resolution dated 09.06.2023 issued the ‘Guidelines for Tariff Based Competitive Bidding Process for Procurement for Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems’ (“**TBCB Guidelines**”) under section 63 of the Electricity Act, 2003 (“**the Act**”) for long term procurement of firm and dispatchable power by the procurers from renewable energy (“**RE**”) projects through competitive bidding. The salient features of TBCB Guidelines include the following:

1. Definitions of the terms ‘solar’, ‘RE power’, ‘firm and dispatchable RE power’, ‘RE power generator’, ‘RE park’, ‘authorized representative of the procurer’, ‘scheduled commencement of supply date’ and ‘intermediary procurer’ and ‘end procurer’;
2. Conditions to be met by the procurer in preparation for inviting bid and project preparedness;
3. Conditions precedent for a generator including clearances, permits, licenses including arrangement of land and connectivity to the grid and access (if applicable) prior to scheduled commencement of supply date (“**SCSD**”).
4. Generator to offer 100% of annual RE power with liberty to source up to 5% RE power (on energy terms) on annual basis from the green market sources/bilateral arrangements;

Resolution Professional is empowered to keep claims in abeyance – NCLAT, Chennai

MoP issues Guidelines for Tariff Based Competitive Bidding Process for Procurement for Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems

5. Single tariff for supply of firm and dispatchable RE power shall be quoted by the bidders, at the delivery point which shall be at the central transmission utility (“CTU”) interconnection point;
6. The power purchase agreement (“PPA”) period to be for a period of twenty (20) years from the SCSD or from the rescheduled SCSD to the extent of extension given by the procurer on the grounds which are beyond the control of the generator.
7. Payment security as per Electricity (Late Payment Surcharge and Related Matters) Rules, 2022.
8. The projects to commence supply of power within a period of (i) twenty four (24) months from the date of execution of PPA, for project size not more than 1000MW and (ii) thirty (30) months from the date of execution of PPA for project size more than 1000MW;
9. Generator’s responsibility of getting transmission connectivity to inter-state transmission services (“ISTS”) network under Central Electricity Regulatory Commission (Connectivity and General Network Access to the inter-State Transmission System) Regulations, 2022 (“GNA Regulations”).
10. RE components, including energy storage system (“ESS”) component charged with RE sources, bought under this scheme will be eligible for renewable purchase obligation (“RPO”) compliance;
11. ISTS charges and losses, including waiver for RE power, as per extant rules and regulations.

Ministry of Power (“**MoP**”) vide its order dated 09.06.2023 has revised the standard operating procedure (“**SOP**”) for granting approval under provisions of section 68 at section 164 of the Electricity Act, 2003 (“**the Act**”), as follows:

1. For obtaining approval under section 68 of the Act, any inter-state transmission (“**IST**”) licensee, or a special purpose vehicle company (in case of IST projects to be implemented under tariff based company bidding), or the generation company (in case of his dedicated transmission line which is directly connected to IST), or any other entity for which the appropriate government is the Central Government, is required to submit the proposal duly completed in all respect to central electricity authority on national single window system portal, inter-alia including the following:
 - a. Request letter giving name of transmission scheme and the details of overhead transmission line included in the scheme;
 - b. The board resolution for authorized signatory
 - c. Copy of the connectivity granted by Centra Transmission Utility of India Limited / State Transmission Utility, for generation projects
 - d. Copy of the gazetted notification / ministry office order, for the inter-state transmission service (“**ISTS**”) schemes to be implemented through TBCB or regulated tariff mechanism (“**RTM**”) mode.
2. In order to process the request from private transmission companies as well as generating companies who are required to construct, maintain and operate dedicated transmission lines, the following procedure has been prescribed:
 - a. The licensee / applicant shall cause transmission scheme to be published in the gazette in case of (i) inter-state schemes (ii) cross border schemes (india portion) (iii) generating company dedicated transmission line connecting to ISTS substation, and in at least two (2) local daily newspapers along with a notice of the date, not being less than two (2) months after the date of such publication. The licensee / applicant shall take into consideration the objections submitted by stakeholders, before finalizing the optimum route alignment. Thereafter, licensee / applicant shall submit a certificate along with application under section 164 to this effect.
 - b. Any transmission licensee or generating company in the case of dedicated transmission line are required to follow the above procedure for seeking approval under section 164 of the Act.

Ministry of Power vide notification dated 14.06.2023 has notified the Electricity (Rights of Consumers) Amendment Rules, 2023 (“**Amendment Rules**”) thereby amending the Electricity (Rights of Consumers) Rules, 2020 (“**Principal Rules**”) as under:

MoP revises standard operating procedure for granting approvals under sections 68 and 164 of the Act

MoP notifies the Electricity (Rights of Consumers) Amendment Rules, 2023

1. As per the Amendment Rules, Rule 5(5) of the Principal Rule now stands modified and provides that the reading of smart meters shall be conducted remotely at least once in a day instead of once every three months. The consumers having smart pre-paid meters shall also be given the data access for checking their consumption and balance amount on a daily basis instead of real time basis.
2. Rule 5(5A) has been inserted to provide that, after the installation of smart meters, no penalty shall be imposed on the consumers based on the maximum demand recorded by the smart meter for the period before the installation date.
3. Rule 5(5B) has been inserted to provide that, in case of maximum demand recorded by the smart meter exceeding the monthly sanctioned load, the bill for that billing cycle is to be circulated based on the actual recorded maximum demand and consumers shall be informed of this change in circulation. This rule is subject to the following conditions:
 - a. In case of increase in recorded maximum demand, the lowest of the monthly maximum demand where the recorded maximum demand has exceeded at least three times the sanctioned load limit during a financial year, the same is to be considered automatically as revised sanctioned load from the billing cycle in next financial year.
 - b. In case of reduction of maximum demand, the revision of sanctioned load shall be done in accordance with the supply codes/standard operating procedures issued by the Regulatory Commission.
4. Rule 8A has been inserted to provide that, time of day tariff for commercial and industrial consumers with more than 10 KW maximum demand shall be made effective from 01.04.2023 and for other consumers except agricultural consumers, the time of day tariff shall be 01.04.2025 and a time of day tariff shall be made effective immediately after installation of smart meters for the smart meters consumers. The time of day tariff specified by the State Commission for commercial and industrial consumers during peak periods of the day shall not be less than 1.2 times the normal tariff and for other consumers, it shall not be less than 1.1 times the normal tariff. Further, the tariff for solar hours of the day specified by the State Commission shall be at least 20% less than the normal tariff for that category of consumers. the duration of peak hours shall not be more than solar hours (8 hours in a day) as notified by the State Commission or SLDC.
5. Rule 8B has been inserted to provide that the tariff of each category of consumers shall be displayed on the distribution licensee's website and any change in tariff excluding fuel surcharges and other charges shall be notified to the consumer, at least one month ahead of time, via distribution licensee's website as well as through energy bills/SMS/mobile apps.

MoP extends the COD for the power projects eligible for Inter State Transmission (ISTS) Charges waiver

Ministry of Power vide notification dated 09.06.2023 has extended the time for commissioning for the Solar, Wind, Hydro PSP and BESS plants eligible for waiver of Inter State Transmission ("ISTS") Charges and having scheduled date of commissioning on or before 30.6.2025. The extension to be granted after due consideration on the said accounts, namely;

- a. Force Majeure; or
- b. for delay on the part of the transmission providers in providing the transmission even having taken the requisite steps in time; or
- c. delays on the part of any Government Agency; and
- d. the power plant is commissioned before the extended date;

The waiver of ISTS Charges on the transmission of electricity from the abovementioned generation plants will be applicable to them as if the said plants had been commissioned before 30.06.2023.

The RE generation capacity eligible for ISTS Charge waiver and where extension in CoD is granted by competent authority, the commencement and the period of LTA shall also get extended according, and same will be deemed that the period of ISTS waiver is extended by the said period. The extension in CoD shall be granted for a period of 6 months at a time and not more than 2 times.

MoP vide notification dated 21.06.2023 had amended the Standard Bidding Documents ("SBD") comprising of Request of Proposal and Transmission Service Agreement for procurement of Inter-State Transmission Services ("ISTS") through Tariff Based Competitive Bidding process. Para

2.1.2 of the Standard RfP document stands revised with the following technical requirements to be met by the Bidding Company or Lead Member of Bidding Consortium as under:

- i. Experience in the development of projects in the Infrastructure Sector in the last five(5) years with aggregate capital expenditure. Provided that the capital expenditure incurred on the projects that have been commissioned/completed at least 7 days prior to the Bid deadline. The capital expenditure shall be as capitalized and reflected in the audited book of accounts of the Technically Evaluated Entity. Where an identifiable part of a project has been put into commercial operation, the capital expenditure on such part of the project shall be considered. The entity must have either executed such project itself or must have held directly or indirectly at least 26 % of the shareholding in the company that has executed the project(s) from the date of financial closure of the project(s) till the time of commissioning/completion of such project(s).

OR

- ii. Must be experienced in the construction of projects in the Infrastructure Sector. The entity must have actually received certain aggregate payments from its client(s) for construction works fully completed during the last 5 financial years. Provided that the payment received on projects that have been commissioned/completed at least 7 days prior to the Bid deadline shall be considered. The construction work shall not include the cost of land, supply of goods or equipment except when such goods or equipment form part of a turn key construction contract/EPC contract for the project. Where different individual contracts are signed between entities for the same project, the cumulative payment received under such individual contracts shall be considered for meeting the qualification requirement.

The Amendment further provides that the aggregate capital cost of projects/aggregate payments received for the projects to be calculated as per the table below;

a. **HVAC System:**

Voltage Level	For transmission line (irrespective of conductor per phase)	For transformation capacity.
Below 220 kV	0.5 Cr/Km	0.25 Cr/MVA
220 kV	0.8 Cr/Km	0.15 Cr/MVA
400 kV	2.0 Cr/Km	0.12 Cr/MVA
765 kV & above	4.0 Cr/Km	0.1 Cr/MVA

b. **HVDC System:**

Voltage Level	For transmission line (irrespective of conductor per phase)	For HVDC Terminal Station
800 kV (LCC)	3.8 Cr/Km	1.45 Cr/MV

In case a project involves more than one voltage level, the requirement shall be total requirement of all voltage levels involved. The minimum required aggregate capital cost of projects/aggregate payments received for projects shall be Rs. 500 Cr.

Individual project experience to be calculated @ 20% of the above calculated aggregate capital cost of projects/ aggregate payments received for the projects. However, the minimum individual project experience shall be Rs. 100 Crore. Further, the bidder shall furnish documentary evidence duly certified by the authorised signatory of the Bidder who has been issued Power of Attorney in support of their technical capacity as defined in Clause 2.1.2 of the RfP

MNRE revises dispute resolution mechanism to consider disputes between RE power developers / EPC contractors and REIAs

Ministry of New and Renewable Energy (“**MNRE**”) has issued an order dated 07.06.2023 in supersession of the earlier orders issued by MNRE regarding setting up of a dispute resolution mechanism to consider disputes between renewable energy (“**RE**”) power developers / engineering, procurement, construction (“**EPC**”) contractors and Solar Energy Corporation of India (“**SECI**”) / National Thermal Power Corporation Limited (“**NTPC**”) / National Hydroelectric Power Corporation Private Limited (“**NHPC**”) / Satluj Jal Vidyut Nigam Limited (“**SJVN**”) / any other RE implementing agency (“**REIA**”)(including SECI, NTPC, NHPC and SJVN) designated by MNRE beyond contractual agreements. The order now provides:

1. A dispute resolution committee (“**DRC**”) to be set up with the approval of Minister, MNRE comprising of three (3) members of eminent persons of impeccable integrity, located in national capital region of Delhi.
2. The mechanism of DRC will be applicable for all RE schemes / programmes / projects being implemented through/by REIA and for contractual agreements between REIA and the EPC contractor, executing RE projects owned by REIA, provided REIA undertakes to abide by the decision coming out of this mechanism.
3. In case of all disputes, the application shall have to first made to the REIA who shall pass speaking orders on such requests. Aggrieved parties may appeal to the DRC.
4. DRC shall consider appeals against decision given by REIA on disputes involving (i) requests for time extension due to force majeure events, (ii) requests for extension of time not covered under the terms of the contract, and (iii) disputes other than those pertaining to extension of time between REIA and RE developers/ EPC contractors.
5. DRC shall examine all cases referred to it, not later than twenty-one (21) days from the date of reference.
6. Recommendations of the DRC along with MNRE’s observations shall be placed before the Minister, MNRE, for final decision.

MNRE extends timeline for Solar Park Scheme

Ministry of New and Renewable Energy (“**MNRE**”) vide its O.M. dated 16.06.2023 has extended the timeline for Solar Park Scheme dated 21.03.2017, up to FY 2025-26 i.e. 31.03.2026 without any additional financial implication

CERC issues Third Amendment to CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020

Central Electricity Regulatory Commission (“**CERC**”) vide draft notification dated 12.06.2023 has issued the third amendment to the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020 (“**the Principal Regulations**”), which shall come into effect from such date as the CERC may notify.

The following proviso has been inserted under sub-clause (d) of Clause (3) of Regulation 5 of the Principal Regulations:

“Provided that % of Yearly Transmission Charges shall be 30% or more in accordance with subclause (a) of clause (1) of Regulation 6 of these regulations.”

The following provision has been inserted under sub-clause (a) of Clause (1) of Regulation 6 of the Principal Regulations:

“Provided that where an interregional HVDC transmission system planned to supply power to a particular region is operated to carry power in reverse direction due to system requirements, the percentage Yearly Transmission Charges of such transmission system to be considered in the regional component and the National component shall be calculated as follows:

$$\sum_{k=1}^n \frac{\text{Maximum power flow in reverse direction (in MW) in any time block on } k\text{th day} \times 100}{\text{Capacity of HVDC transmission system in forward direction (MW) X number of days in a month}}$$

The Amendment Regulations can be accessed via the [link](#) attached herewith

**GERC notifies the
Draft Gujarat
Electricity
Regulatory
Commission
(Terms and
Conditions for
Green Open
Access)
Regulations, 2023.**

GERC vide notification dated 23.06.2023 has notified the Draft Gujarat Electricity Regulatory Commission (Terms and Conditions for Green Open Access) Regulations (“**Draft Regulations**”) with an object to provide non-discriminatory Open Access for Renewable Energy for the use of Intra-State Transmission Systems (“**ISTS**”) or distribution systems in State including such ISTS or distribution systems which are incidental to Inter-State Transmission of electricity, methodology for the determination of Open Access Charges and Banking Charges etc. for Green Energy Open Access (“**GEOA**”) consumers.

The Draft Regulations inter alia make provisions for Criterion for Allowing GEOA, GEOA categorization on basis of duration of use, eligibility criteria and application procedure for GEOA as well as Day Ahead GEOA Transactions, curtailment priority and dispute resolution, metering, and reactive energy charge. Per the Draft Regulations, the Gujarat State Load Despatch Centre shall operate as the State Nodal Agency. The allotment priority holds Distribution licensee to have highest priority over other GEOA consumers. Aspects of energy accounting and charges payable by the GEOA consumers have also been dealt with in detail.

The Commission has now invited the comments of stakeholders by 26.07.2023 and the public hearing is scheduled for 08.08.2023. The Draft Regulations can be accessed here: <https://gercin.org/news/?cat=34763>

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