Legal Updates

Andhra Pradesh High Court observes that non-payment of part of mutually agreed amount after settlement of dispute is not an arbitrable issue under the Arbitration Agreement.

Hon'ble High Court of Andhra Pradesh **("AP High Court")** vide its order dated 28.01.2025 in the case of *M/s Brothers Engineering and Erectors Ltd. and M/s Zorin Infrastructure (Civil Miscellaneous Appeal No. 623 of 2024)* has given an observation that non-payment of part of mutually agreed amount after settlement of dispute is not an arbitrable issue under the Arbitration Agreement **("Agreement").** The AP High Court has upheld the dismissal of an application filed under section 8 of the Arbitration and Conciliation Act, 1996 **("Arbitration Act")** holding that once an amount has been mutually decided by the parties, the dispute itself is resolved and no arbitrable issue remains for consideration. The Court has further given an observation that when an arbitration clause stipulates that 'any dispute' is arbitrable, it should be understood in line with section 8 of the Arbitration Act, to mean 'any dispute' arising out of a contractual agreement.

Learned counsel for the Plaintiff/Respondent submitted that the clause No.17 of the agreement was confined to the execution of the work and not for the payment of amount for the said work. Learned counsel for the Appellants submitted that the payment of amount would arise only under the agreement and so non-payment of amount would be only for not fulfilling the contractual obligations in terms of the agreement and thus, arbitration clause was comprehensive to cover the dispute under the agreement dated 02.08.2011 including the suit dispute. The submission of the learned counsel for the respondent was that the sum claimed for which the suit had been filed was not covered by the arbitration clause and so, the matter was not referable to the arbitration.

AP High Court placing reliance upon the judgment of ***Emaar India Ltd. v. Tarun Aggarwal Projects LLP, (2023) 13 SCC 661*** has observed that the jurisdiction lies with the Tribunal to decide whether a matter is arbitrable or not and the High Court is only granted the power to have a 'second look' on the aspects of non-arbitrability post the award in terms of Section 34 of the Arbitration Act.

However, rarely, as a demurrer the Court may interfere at the Section 8 or Section 11 stage, when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood.

AP High Court observed that in the present case, the non-payment of the money, which was mutually agreed and the mutually agreed amount was not disputed nor denied therefore, the subject matter of the suit would not come within the meaning of 'arbitration agreement' between the parties. The claim was for the remaining amount which was settled between the parties, on which point there was no dispute. The AP High Court therefore held that the subject matter of the case is non-arbitrable under the agreement and dismissed the Appeal filed under Section 37 of the Arbitration Act.

Bombay High Court holds that when the seat and venue are synonymous without any contrary indicia, Court at designated venue in an arbitration agreement can entertain application u/s. 11 of the Arbitration & Conciliation Act.

The core issue raised before the Bombay High Court for adjudication in *Commercial Arbitration Petition No. 227 – Keller Ground Engineering India Pvt. Ltd. vs. Archon Powerinfra India Pvt. Ltd. & ors.* was whether it had the jurisdiction to entertain the subject petition under Section 11 of the Arbitration and Conciliation Act, 1996 (**the Act**). The main objection is based on territorial jurisdiction purportedly being absent. It was Respondent No.1's contention that nothing in the activity envisaged in the Work Orders executed between the Petitioner and Respondents no. 1 and 2 were carried out in the State of Maharashtra and merely because the Arbitration clause refers to Mumbai as the venue of arbitration would not provide the Bombay High Court jurisdiction to exercise powers under Section 11 of the Act.

The Hon'ble Single Bench referred to decision of the Supreme Court in *BGS Soma JV Vs. NHPC (2020) 4 SCC 234* (**BGS Soma**) relied upon by the Petitioner and held that applying the principle laid down in BGS Soma, i.e. when the seat and venue are synonymous without any indicia to the contrary the venue of the arbitration in the present case i.e. Mumbai would be the seat of the arbitration. Thereafter, another Judgement of a Single Bench of the Bombay High Court in the matter of *Honey Bee Multitrading (P) Ltd. Vs. Ruchi Soya Industries Ltd. 2023 SCC OnLine Bom 652* was referred to by the Hon'ble High Court and held that under Section 11 (6A) of the Act, the High Court is required to confine the scope of its review to the existence of an arbitration agreement which was met in the facts of the present case. Further it was observed that there is no indicia present to displace Mumbai as the seat of arbitration nor has any other court been approached to press Section 42 of the Act. In view of the same, it was held that the Bombay High Court is vested with jurisdiction to deal with the present Section 11 Petition.

MoP amends Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects

The Ministry of Power (**MoP**) has amended the tariff based competitive bidding guidelines for procuring power from wind, solar PV, wind-solar hybrid, and firm and dispatchable renewable energy projects with energy storage system. The following four notifications were issued in this regard:

- Amendment to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Solar PV Power Projects vide Resolution No. 48-19/2/2024-NRE dated 12.02.2025.
- Amendment to the Guidelines for Tariff Based Competitive Bidding Process for Procurement Power from Grid Connected Wind Power Projects vide Resolution No. 48-19/2/2024-NRE dated 12.02.2025.
- Amendment to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Solar Hybrid Projects vide Resolution No. 48-19/2/2024-NRE dated 12.02.2025.
- Amendment to the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Firm and Dispatchable Power from Grid Connected Renewable Energy Power Projects with Energy Storage Systems vide Resolution No. 48-19/2/2024-NRE dated 12.02.2025.

In terms of the above notifications, the following amendments have been made to the abovementioned four bidding guidelines:

- The procurers are allowed to specify substations in the interstate and intrastate transmission systems where the renewable energy developers must connect their projects.
- The capacity utilization factor ("**CUF**") requirements for power developers have been revised. If a developer fails to maintain the minimum CUF for two consecutive years after the first contractual year, they will be considered in default. This could result in financial penalties equivalent to 24 months of tariff payments or the remaining contract period, whichever is shorter. If the developer is unable to pay these penalties, the power purchase agreement ("**PPA**") may be terminated, and additional compensation will be required.
- Changes in law is now governed under the Electricity (Timely Recovery of Costs due to Change in Law) Rules, 2021. The amendments define "change in law" as any project-related event occurring seven days before the bid submission deadline.
- PPAs must be signed within 30 days of issuance of letter of award ("**LOA**"), extendable upto 12 months, beyond which the LOA will stand cancelled.
- The distribution licensee or Intermediary Procurer to approach the Appropriate Commission for adoption of tariff within 30 days of discovery of the same.
- Insurance surety bonds have been introduced for earnest money deposits as an alternative to conventional bank guarantee.
- The Procurers are allowed to prescribe the Technical Criteria after carrying out an assessment of multiple project developers that are expected to meet such criteria.
- Use of GPS-enabled Automatic Weather Stations ("**AWS**") for projects has been made mandatory. Availability of the data from such AWS shall be ensured as specified by the appropriate Load Dispatch Centre and other Central Government agencies.
- Any deviation from the Solar/Wind/Wind-solar Hybrid Bidding Guidelines must be approved by the Appropriate Commission before the start of the bidding process and the Appropriate Commission shall approve or require modification to the bid documents within a reasonable time not exceeding 60 days.

The Notifications may be accessed from the following *link*.

APTEL holds that hybrid renewable energy projects are not eligible for concessional transmission charges meant for pure wind and pure solar sources under West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2022

The Hon'ble APTEL("**Tribuna**l"), vide its judgment dated 10.02.2025 in Appeal No. 908 of 2023, has ruled that wind-solar hybrid projects do not qualify as "pure wind" or "pure solar" sources under the West Bengal Electricity Regulatory Commission (Open Access) Regulations, 2022 ("**WBERC OA Regulations, 2022**"), and therefore, are not entitled to concessional transmission charges available to pure renewable energy sources. The Tribunal also held that the 30% Capacity Utilization Factor ("**CUF**") ceiling imposed by West Bengal Electricity Regulatory Commission ("**WBERC**") was not supported by the WBERC OA Regulations, 2022 and could not be applied retrospectively.

A key issue before the Tribunal was whether wind-solar hybrid power qualify as "pure wind" or "pure solar" under Regulation 18.2.1(h) of the WBERC OA Regulations, 2022. The Tribunal examined the Statement of Reasons accompanying the WBERC OA Regulations, 2022, which clarified that concessional transmission charges were granted to pure wind and pure solar sources due to their lower CUF (typically between 17% and 30%). The Tribunal noted that the concessional benefit was introduced to compensate for the high per-unit transmission cost of standalone wind and solar projects, which operate at lower CUFs than conventional power plants and that hybrid RE projects were not included in this concessional category, as the combination of wind and solar results in a higher CUF and more stable generation profile.

The Tribunal also analyzed the meaning of "pure" and relied on Black's Law Dictionary, which defines "pure" as "absolute, complete, unmixed, unqualified" to arrive at the observation that hybrid projects involve a mix of both energy sources, they do not qualify as "pure" under the WBERC OA Regulations, 2022.

Regarding the 30% CUF ceiling imposed by WBERC, Tribunal scrutinized the regulatory justification behind this cap and found that it was not present in the original Regulations but was later introduced through an adjudicatory order. The Tribunal thus observed that this amounted to an amendment of Regulation 18.2.1(h), which was beyond WBERC's authority in an interpretative proceeding, thereby observing that Ld. WBERC could not impose additional conditions that were not part of the original regulatory framework.

APTEL analyzes Competitive Bidding deviations and upholds KSERC's rejection of KSEBL's Power Supply Agreements citing multiple deviations from competitive bidding guidelines

The Tribunal vide its judgment dated 13.02.2025 in Appeal No. 518 of 2023, examined critical issues concerning the Tariff-Based Competitive Bidding process under Section 63 of the Electricity Act, 2003, while adjudicating Kerala State Electricity Board Limited's ("**KSEBL**") challenge against the Kerala State Electricity Regulatory Commission's ("**Ld. KSERC**") order dated 10.05.2023 in OP No. 05 of 2021. In its judgment, Tribunal reaffirmed the fundamental principles of fair, transparent, and competitive tariff discovery, emphasizing the role of regulators in ensuring procurement processes adhere to statutory and policy frameworks.

The dispute centered around Ld. KSERC's refusal to approve three Power Supply Agreements ("**PSAs**") that KSEBL had entered into with Jhabua Power Limited and Jindal India Thermal Power Limited, citing multiple deviations from competitive bidding guidelines, including the selection of bidders other than the lowest bidder, discrepancies in tariff determination, and the lack of prior approval for deviations. Ld. KSERC held that these deviations were against public interest and imposed long-term financial implications on consumers.

The Tribunal observed that tariff discovered through competitive bidding is not automatically binding on regulatory commissions. Section 63 of the Electricity Act, 2003 mandates that regulators adopt the tariff if it has been discovered through a transparent and competitive process. However, this adoption is not mechanical but contingent upon the integrity of the bidding process. Ld. KSERC, in exercising its regulatory authority, found significant procedural irregularities in KSEBL's procurement process, including the selection of bidders who were not the lowest tariff providers and the failure to invite all bidders to match the lowest tariff. KSEBL's splitting of tenders into two separate bids within a short span of 50 days, without obtaining prior regulatory approval, enabled bidders to quote different tariffs for the same generation source, creating a non-level playing field and ultimately leading to higher costs for consumers. Such deviations were not merely procedural lapses but substantial departures from the principles of cost-effective and competitive power procurement.

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