

GATI - विधि

-LAW IN ACTION



Legal Updates

The Lok Sabha has passed the Arbitration and Conciliation (Amendment) Bill, 2021, (“**Bill**”) which seeks to bring forth amendments in the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”). The Bill intends to replace the ordinance issued on 04.11.2020:

- (a) A proviso has been added to Section 36(3) of the Arbitration Act which deals with conditions of stay on the arbitral award. It has been added that if the court is satisfied that *prima facie* the arbitration agreement or contract on the basis of which award has been made or the award by itself, is induced or effected by fraud or corruption, the court shall stay the award unconditionally pending disposal of the challenge under Section 34 to the Arbitration Act. The said amendment is proposed to come into effect retrospectively from 23.10.2015.
- (b) Section 43(J) of the Arbitration Act dealing with norms of accreditation, has been substituted to the extent that the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations. These regulations will be framed by an arbitration council, that is to be set up.
- (c) Eighth Schedule of the Arbitration Act which contained the necessary qualifications for accreditation of arbitrators, introduced in 2019 by way of an amendment to the Arbitration Act, to be omitted.

This Bill has been introduced to address the issue of corrupt practices in securing contracts or arbitral awards, and also to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country.

**Arbitration and
Conciliation
(Amendment) Bill,
2021**

Ministry of Power (“**MoP**”) has notified amendments to the ‘Guidelines for Tariff Based Competitive Bidding Process for procurement of round-the clock power from grid connected renewable energy power projects, complemented with power from any other source or storage’ that were notified on 22.07.2020 (“**Bidding Guidelines**”), as under:

- (a) The term ‘RE Power’, or ‘Renewable Power’, or ‘Renewable Energy Power’, wherever used in the Bidding Guidelines, refer to power from solar power generating systems, wind power generating systems, or a combination thereof, with or without energy storage system (“**ESS**”), commissioned in pursuance of bidding process. It is clarified that ESS charged using a source other than RE power would not qualify as RE power. Further, the ESS offered with a project under these Bidding Guidelines should only be charged from RE power capacity. The same RE power shall either be considered for getting compensation in case of curtailment or for charging of ESS.
- (b) Power purchase agreements containing provisions of *force majeure* i.e. definitions, exclusions, applicability and available relief on account of *force majeure* shall be as per the industry standards. The generator shall intimate the procurer about the occurrence of *force majeure* within 15 (fifteen) days of the start of the *force majeure* and the procurer shall take a decision on his claim within 15 (fifteen) days of the receipt of the intimation.
- (c) With respect of the payment in case of reduced off take, the amendments provide that the generator and the procurer shall follow the forecasting and scheduling process as per the applicable regulations. In case the plant is available to supply power, but the off-take of power is not done by the procurer, the generator shall be eligible for payment from the procurer, corresponding to the reduced off-take, in terms of the formulae provided. For claiming compensation, the generator must sell their power in the power exchange as a price taker. Thus, the compensation would be limited to the difference of the actual generation up to declared capacity subject to a maximum of up to the contracted capacity and the quantum of power scheduled by the procurer.

MOP issues amendments to the ‘Guidelines for Tariff based Competitive Bidding Process for procurement of round-the clock power from grid connected renewable energy power projects, complemented with power from any other source or storage’

The Ministry of New and Renewable Energy (“**MNRE**”) vide its earlier O.M. dated 13.08.2020 had issued instructions for a blanket extension of 5 (five) months on account of COVID-19 without case to case examination and without asking for any documents/evidence for treatment of lockdown due to COVID-19 as *force majeure*.

Pursuant to requests received for further extension beyond 5 (five) months, MNRE has now clarified that a further extension beyond 5 (five) months can be granted by implementing agencies in exceptional cases, after due diligence and careful consideration of the specific circumstances of the case, and if allowed in terms of the provisions of the relevant contract. It is also emphasized that this further extension beyond 5 (five) months will not be granted in a routine manner.

MNRE issues clarification regarding ‘Time Extension in Scheduled Commissioning Date of Renewable Energy (RE) Projects considering disruption due to lockdown due to COVID-19’

Ministry of Petroleum and Natural Gas (“**MoPNG**”) has proposed draft LNG Policy (“**Draft Policy**”) for the purposes of increasing usage of liquefied natural gas (“**LNG**”) for transport and mining.

Government of India has planned to increase the share of natural gas in primary energy basket from 6.3% to 15% by 2030. For this purpose, the Draft Policy aims at providing an integrated approach for the procurement, storage, transportation and use, including sale and marketing of LNG and provides for following strategy and approach:

- A. Upstream
 - (a) LNG terminals and regasification facility- Creation of regasification capacity of 70 MMTPA by 2030 and 100 MMTPA by the year 2040 and creation of free and competitive re-gasification market including on-shore and off-shore facilities;

MoPNG issues Draft LNG Policy

- (b) Virtual pipelines and enabling infrastructure- Creation of virtual pipelines of LNG by transporting it through rail and through LNG truck loading
- B. Midstream
- (a) Dedicated highways with extensive LNG infrastructure- Promotion of dedicated highways/lanes with extensive LNG infrastructure;
 - (b) Gas Exchange- Promotion of sale and marketing of LNG at gas exchange to develop spot and other possible markets for the same for deepening the gas market;
 - (c) Mobile dispensing- Promotion of suitable enabling regulatory environment for mobile dispensing of LNG regarding the safety and technical aspect of the same.
- C. Downstream
- (a) LNG stations- Establishing 1000 LNG stations for ensuring availability of LNG for long haul, heavy duty trucks and other automotive covering all major highways, industrial and commercial centers, etc.
 - (b) Marketing and Sale of LNG- Free provision of marketing and sale of LNG as a vehicular fuel - no restriction on quantity, area or any other parameter except the safety and technical parameters. Provision for entities including city gas distribution (“CGD”) for setting up their own LNG storage and distribution facility.

The Draft Policy has been circulated for comments of all the stakeholders concerned, to be submitted by 04.03.2021.

The Central Electricity Regulatory Commission (“CERC”) issued the CERC (Regulation of Power Supply) (First Amendment) Regulations, 2021 (“**Amendment Regulations**”). Under the Amendment Regulations following amendments, *inter alia*, have been made to the CERC (Regulation of Power Supply) Regulations, 2010 (“**Power Supply Regulations**”):

- (a) The term "*Beneficiary*" is now defined as the person (i) who has been allocated electricity from a central generating station; or (ii) who is being supplied electricity generated from a generating station whose tariff is determined or adopted by CERC; or (iii) who is availing long term access or medium term open access to inter-state transmission system; or (iv) who is a user of the inter-state transmission system. The term "*Defaulting entity*" is now defined as the beneficiary which has defaulted in making payment by due date to a generating company or a transmission licensee or in maintaining letter of credit or any other agreed payment security mechanism in terms of the agreement or the applicable regulations, as the case may be.

Definition of “*due date*” for payment of dues has been added to mean (i) as specified in the CERC (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2020; or (ii) 45th day from date of presentation of bills in respect of generating companies regulated under the CERC (Terms and Conditions of Tariff) Regulations, 2019; or (iii) as per provisions of the respective Agreements for entities not covered under sub-clauses (i) and (ii) above.

- (b) Regulation 3 of the Power Supply Regulations has been amended to enlarge the *Scope and Applicability* by making it applicable to generating station, inter-state transmission system and beneficiary, where there is a specific provision in the agreement between generating company and beneficiary or between transmission licensee and beneficiary, as the case may be, or in any other Regulations of CERC, for regulation of power supply in case of non-payment of outstanding dues or non-maintenance of letter of credit or any other agreed payment security mechanism.
- (c) Notice for regulation of power supply served on the defaulting entity under Regulation 4 of the Power Supply Regulations shall also be posted on the website of the regulating entity at least 3 days in advance of the proposed date of commencement of regulation of power supply.
- (d) CERC (Deviation Settlement Mechanism and related matters) Regulations, 2014 as amended

**Central Electricity
Regulatory
Commission
(Regulation of Power
Supply) (First
Amendment)
Regulations, 2021**

from time to time, and CERC (Open Access in Inter-State Transmission) Regulations, 2008, as amended from time to time or any re-enactment thereof, will now be applicable to the Power Supply Regulations

- (e) Further, regulations on power supply from a hydro generating stations have been amended to ensure that there is no/ minimal loss of energy charge in case of spillage of water.

CERC has issued CERC (Power Market) Regulations, 2021 (“**Regulations**”). The Regulations will come into force on such date as notified by CERC. Some of the salient features of the Regulations are as follow:

- (a) The Regulations, *inter alia*, contain the definition the terms, such as, “Associate”, “Automated audit trail”, “Bid”, “Cartelization”, “Circular Trading”, “Collective Transactions”, “Contingency Contract”, “Day Ahead Contract”, “Gate closure”, “Insider”, “Insider Trading”, “Intraday Contract”, “market”, “Market Coupling”, “Market Manipulation”, “Market Participants”, “Market Splitting”, “Over the Counter (“**OTC**”) Contracts and Market”, “Real-time Contract and Market”, “Settlement Guarantee Fund (“**SGF**”)”, “Term Ahead Contract and Market”, “unpublished price sensitive information”.
- (b) The Regulations shall apply to power exchange, market participants other than power exchange, and OTC market. The Regulations provide for manner of price discovery and scheduling and delivery of transactions for various contracts.
- (c) The Regulations stipulate that the power exchanges shall be established and operated with the objectives to design electricity contracts and facilitate transactions of such contracts and to facilitate extensive, quick and efficient price discovery and dissemination.
- (d) The Regulations stipulate certain criterion, procedures, ownership, charges and governance structure to be fulfilled for registration of power exchange by an applicant. It further prescribes terms for qualifications and disqualifications for appointment as Director on the board of power exchange, the bye-laws, rules, business rules, membership rules, grant and renewal of registration of the Power Exchanges and approval or suspension of contracts by CERC.
- (e) A risk assessment and management committee headed by an independent director of the board, shall be constituted by the power exchange, which shall monitor adherence to the risk management framework by the power exchange.
- (f) The Regulations stipulate for information technology infrastructure and trading system of power exchange to ensure that automated audit trail of bids, matching of bids and execution of transactions will be maintained. the power exchange shall also maintain the congestion amount, market surveillance. the regulations also enumerate procedures for market oversight in order to detect and prevent market manipulation, insider trading, cartelization and abuse of dominant position by any market participant.
- (g) Provision of market coupling is provided for discovery of uniform market clearing price for the day ahead market or real time market or any other market as notified by CERC and for creating simultaneous buyer-seller surplus. In this regard, a designated market coupling operator who shall be responsible for operation and management of market coupling. The provisions with regard to market coupling and market coupling operator in these regulations shall come into effect as and when decided by CERC in accordance with the regulations to be specified separately.
- (h) The Regulation enlists the operational and registration norms and eligibility criteria for registration of OTC platforms, procedure for filing application and grant of registration, documents required, obligation of the OTC platforms and conditions for revocation of licensee.

**CERC issues the
CERC (Power Market)
Regulations, 2021**

Companies (Share Capital and Debentures) Amendment Rules, 2021

The Ministry of Corporate Affairs (“MCA”) has notified the Companies (Share Capital and Debentures) Amendment Rules, 2021 to further amend the Companies (Share Capital and Debentures) Rules, 2014. The amendment adds rule 12A, which specifies the period of notice within which the offer shall be made for which the acceptance shall not be less than 7 (seven) days from the date of offer. Notification dated 11.02.2021 shall come into effect from 01.04.2021.

MCA applies provisions of Companies Act, 2013 to Limited Liability Partnership Act, 2008

MCA has decided to extend certain sections of the Companies Act, 2013 to the Limited Liability Partnership Act, 2008 (“LLP Act, 2008”). This has been done with a view to improve the compliance of Limited Liability Partnerships and to fill in the gaps in the LLP Act, 2008. A total of eight sections of the Companies Act, 2013 which are as follows, will be extended to LLP Act, 2008 with modifications and adaptations:

Section 90 (1) – (11)	Register of significant beneficial owners in a Company
Section 164 (1) – (2)	Disqualification for appointment of directors (designated partners in LLPs context)
Section 165 (1) – (3), (6)	Number of directorships
Section 167 (1) – (3)	Vacation of office of director
Section 206 (5)	Power to call for information, inspect books and conduct inquiries
Section 207 (3)	Conduct of Inspection and inquiry
Section 252 (1) – (3)	Appeal to Tribunal
Section 439 (1) – (4)	Offences to be non-cognizable

Supreme Court clarifies that implementation of Section 10A, introduced vide Insolvency and Bankruptcy Ordinance, 2020 dated 05.06.2020 has retrospective effect

The Supreme Court of India in *Civil Appeal No. 4050 of 2020* titled as *Ramesh Kymal v. M/s Siemens Gamesa Renewable Power Private Ltd.* upheld the order passed by the National Company Law Appellate Tribunal (“NCLAT”) whereby the NCLAT observed that the ordinance dated 05.06.2020 was passed with the objective to suspend operation of Sections 7, 9 and 10 in respect of defaults arising on or after 25.03.2020, i.e., the date on which nationwide lockdown was enforced disrupting normal business operations and impacting the economy globally, shall not operate in respect of all default committed prior to 25.03.2020.

The Supreme Court further observed that the expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the corporate insolvency resolution process in respect of a default which has occurred on or after 25.03.2020 for a period of six months, extendable up to one year as notified. The explanation which has been introduced to remove doubts places the matter beyond doubt by clarifying that the statutory provision shall not apply to any default before 25.03.2020.

A-142, Neeti Bagh
New Delhi – 110 049, India
T: +91 11 4579 2925 F: +91 11 4659 2925
E: mail@neetiniyaman.co
W: www.neetiniyaman.com

Office No. 51, 4th Floor, Nawab Building,
327, Dr. D.N. Road,
Opp. Thomas Cook, Flora Fountain
Mumbai – 400 001, India
T: +91 22 4973 9114

Disclaimer: ‘GATI-विधि: LAW IN ACTION’ is for information purposes only and should not be construed as legal advice or legal opinion. Its contents should not be acted upon without specific professional advice from the legal counsel. All rights reserved.