June 26, 2020

Legal Updates

MNRE modifies Scheme for 'Development of Solar Parks and Ultra Mega Solar Power Projects'

Ministry of New and Renewable Energy ("**MNRE**") vide O.M. dated 15.06.2020 has issued modification in the scheme dated 21.03.2017 for "Development of Solar Parks and Ultra Mega Solar Power Projects" read with its subsequent modifications ("**Scheme**"). Presently, there are 7 modes under which the Scheme is implemented. Vide the said O.M., MNRE has introduced a new mode, Mode-8, namely Ultra Mega Renewable Energy Power Parks ("**UMREPPs**") whereby the solar power park developer ("**SPPD**") of the UMREPP may be any central public sector undertaking ("**PSU**"), state PSU, state government organisation or their subsidiaries, or a joint venture between two or more of the above entities. In this regard, the state government *inter alia* will provide necessary assistance to the SPPDs in identification and acquisition of land and facilitation in obtaining required clearances for setting up of UMREPPs.

MNRE issues Guidelines for 'Installation of Innovative Stand-alone Solar Pumps'

MNRE vide O.M. dated 22.06.2020 has issued guidelines for installation of innovative standalone solar pumps. MNRE has been supporting installation of standalone solar pumps in the country under off-grid and decentralized solar PV programme and had issued updated specifications in this regard on 17.07.2019. At present, under the MNRE Scheme, solar pumps fulfilling the MNRE specifications can be installed; however, in order to promote innovation in technology, MNRE has decided to permit installation of innovative standalone solar pumps in test mode.

These guidelines are applicable for all Indian innovators/manufacturers/service providers, who wish to install innovative standalone solar pumps in the country under schemes operated by the MNRE. The guidelines provide the procedure for inviting applications for the innovation, the evaluation and demonstration of the innovation, and their adoption by MNRE.

MoC issues Operational Methodology for Computation of National Coal Index

Ministry of Coal ("**MoC**") vide notification dated 17.06.2020 has issued operational manual of national coal index ("**NCI**") with technical guidelines to be followed at different stages of compilation of NCI and also representative prices in conformity with the standard operating procedure issued by MoC. The operational methodology may be used for computing NCI from the month of May, 2020 onwards.

CERC passes order determining Forbearance and Floor Price for the REC framework

Central Electricity Regulatory Commission ("**CERC**") vide order dated 17.06.2020 in *Suo Motu Petition No. 05/SM/2020* has determined the floor price of renewable energy certificate ("**REC**") for both solar REC and non-solar REC as INR 0. The forbearance price for solar REC as well as non-solar REC has been fixed at INR 1000. While determining the floor price and forbearance price, CERC opined that the proposed floor price and forbearance price have been arrived at on the basis of the principles specified in the CERC (Terms and Conditions for recognition and issuance of Renewable Energy Certificate for Renewable Energy Generation) Regulations, 2010 ("**REC Regulations**"). CERC noted that such prices must reflect the current market situation. While referring to the order dated 31.03.2020 regarding the declining trends in the tariff of wind and solar projects, CERC noted that this has necessitated review of floor and forbearance prices for RECs.

The forbearance price and floor price as determined will be effective from 01.07.2020, to remain in force till 30.06.2021 or until further orders of CERC. CERC directed its staff to undertake review of REC mechanism in the light of the prevailing market developments. CERC also clarified that the forbearance price and floor price as determined for non-solar RECs will be applicable to non-solar RECs issued on or after 01.04.2017. For non-solar RECs issued prior to 01.04.2017, the trading would take place in accordance with CERC's letter dated 28.05.2018 and will be subject to the final decision of the Hon'ble Supreme Court in Civil Appeal No. 4801/2018.

CERC issues Suo Motu Order for continuation of prevailing principles of Transmission Corridor Allocation for RTM

CERC in *Suo Motu Petition No. 12/SM/2020* has passed an order dated 14.06.2020 regarding transmission corridor allocation for the period beyond 14.06.2020 for real-time market for electricity in India ("**RTM**"). In view of the successful trading during the period from 01.06.2020 to 12.06.2020 by way of a web-based fully automated RTM clearing engine developed at the National Load Despatch Centre ("**NLDC**"), CERC has decided to continue with the same principle and methodology of transmission corridor allocation among the power exchanges for RTM beyond 14.06.2020, as provided in the order dated 28.05.2020 in *Petition No.10/SM/2020*. Accordingly, CERC directed NLDC and power exchanges to give effect to the decisions of CERC for smooth implementation of RTM. CERC further directed NLDC to compile and examine complete record of transactions under RTM for every month, including time block-wise available transfer capability, initial market clearing volumes of the power exchanges, events of transmission congestion, cleared volumes in the power exchanges, performance of software and communication and to submit a monthly report to the CERC. CERC clarified that in case of any difficulty in implementation of the above direction, NLDC may approach CERC for review of the principle and methodology of transmission corridor allocation to ensure smooth and effective implementation of RTM.

CERC allows capital cost to developer on provisional basis for installation of Flue Gas Desulphurization

CERC vide order dated 22.06.2020 in *Petition No. 168/MP/2019 - Coastal Gujarat Power Limited (CGPL) versus Gujarat Urja Vikas Nigam Ltd & Ors.*, has *inter alia* determined the capital cost on provisional basis to be incurred by the petitioner on account of installation of flue gas desulphurization ("**FGD**"), as per revised environmental norms introduced by the Ministry of Environment, Forest and Climate Change. While noting that bids for installation of FGD system have been floated by other generating stations as well and these may lead to change in prices of FGD system in the international market, CERC observed that it needs to take into account the recommendations of Central Electricity Authority ("**CEA**") and the discovered cost through open competitive bidding process and then take a view as to reasonableness of costs while approving costs of installation of FGD system. Further, relying on similar decisions in *Sasan Power Limited (Petition No. 446/MP/2019)* and *Sembcorp Energy India Limited (Petition No. 209/MP/2019*), CERC provisionally allowed O&M expenditure @ 2% of the capital cost of FGD system and directed the petitioner to submit the O&M expenses relating to FGD system on actual basis at the time of filling the petition for determination of tariff on commissioning of the FGD system.

CERC notifies Terms and Conditions for Tariff determination from Renewable Energy Sources Regulations, 2020

CERC vide notification dated 23.06.2020 has notified the CERC (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2020 ("**Regulations**") w.e.f. 01.07.2020. Unless reviewed earlier, the Regulations will remain in force up till 31.03.2023. The Regulations provide for determination of 'generic tariff' on an annual basis for small hydro project, biomass power project with rankine cycle technology, non-fossil fuel based co-generation project, biomass gasifier based power project, and biogas based power project; and 'project specific tariff' on a case to case basis for solar PV power projects, floating solar projects, solar thermal power projects, wind power, biomass gasifier based power projects and biogas based power projects, municipal solid waste based power projects and refuse derived fuel based power projects, renewable hybrid energy projects, and any other project based on new renewable energy sources or technologies approved by MNRE.

CERC issues statutory advice to MoP on tariff based competitive bidding for transmission services

On 22.06.2020, CERC has issued statutory advice to the Ministry of Power for appropriate modifications in the standard bidding guidelines for tariff based competitive bidding ("**TBCB**") of transmission projects. CERC has opined that it has closely examined the issues raised before it during adjudication of disputes and modifications suggested by it will result in smooth execution of transmission projects. CERC has *inter alia* made suggestions w.r.t (i) penalty for delay on part of transmission licensee to be limited to liquidated damages, without any impact on tariff for entire contract period; (ii) provision of foreclosure of project with pre-determined compensation formula in the event of the project being abandoned; (iii) composition of committee comprising of representatives of CEA, lead long-term transmission customer and central transmission utility for verification and inspection of TBCB transmission projects; (iv) power of committee to certify the completeness of transmission system, where deemed commercial operation date has been claimed under provisions of transmission service agreement; (v) option of bidding as a project instead of special purpose vehicle; (vi) restriction on fee for bid process coordinator, etc.

MERC grants relief of extension of time while holding 'disruption of supply chain due to Covid-19' as *force majeure* event; rejects arguments of 'frustration of contract'

Maharashtra Electricity Regulatory Commission ("**MERC**"), vide order dated 20.06.2020 in *Case No. 78 of 2020 - M/s. ACME Heergarh Powertech Pvt. Ltd. v. Maharashtra State Electricity Distribution Co. Ltd.* has held that disruption in global supply chain due to outbreak of Covid-19 and imposition of consequential lockdown in India is an event of '*force majeure'* and since the petitioner's suppliers have been affected on account of spread of Covid-19, causing delay in supply of material to the petitioner, the petitioner is affected by *force majeure* event and it is eligible for relief under the *force majeure* article of the power purchase agreement ("**PPA**") executed with the Maharashtra State Electricity Distribution Co. Ltd. ("**MSEDCL**"). MERC, however, rejected the argument of petitioner that due to the ensuing delay in delivery of solar modules and inverters from China, it had become impossible for the petitioner to perform its obligations within the prescribed timeline of 24 months (and even with the maximum allowed limit of time extension up to 30 months). MERC while rejecting the argument of frustration of contact held that once *force majeure* event has been upheld, only relief available is that the affected party is exempted from its obligation for that period without any compensation in tariff. Further, MERC held that the petitioner is not entitled to termination of contract on account of prolonged *force majeure* in the absence of any such provision under the PPA.

Accordingly, MERC directed MSEDCL to extend due date of financial closure and schedule commissioning date of the project for a period starting from notice of *force majeure* i.e. 21.02.2020 till restoration of supply chain and Government of India withdrawing lockdown imposed on account of Covid-19, plus 30 days. MSEDCL was directed to ascertain the exact period for relief under *force majeure* after lockdown is completely lifted.

KERC allows relief to Adani project on account of *force majeure* events delaying fulfilment of Conditions Precedent

Karnataka Electricity Regulatory Commission ("**KERC**") has, vide order dated 19.06.2020 in *OP No. 205/2017 – M/s Adani Green Energy (UP) Ltd. v. Gulbarga Electricity Supply Company Ltd.*, allowed the petition filed by M/s Adani Green Energy (UP) Ltd. ("**AGEL**") and held that AGEL was prevented from performing its obligation under the PPA executed with Gulbarga Electricity Supply Company Ltd. ("**GESCOM**") due to '*force majeure*' events affecting it and therefore, it was not liable to pay any damages to GESCOM under the PPA. Though the project was commissioned on time, AGEL could not achieve the timeline fixed for fulfilling one of the conditions precedent ("**CP**"), i.e. the production of documents evidencing clear title and the possession of the extent of land required for the project in the name of AGEL.

KERC noted that under government order dated 05.10.2016 issued by the Government of Karnataka ("**GoK**"), Karnataka Renewable Energy Development Ltd. ("**KREDL**") was required to follow the procedure stated in circular dated 22.02.2016 issued by the GoK, which prescribes a definite timeframe of 60 days for obtaining an order under Section 109 of the Karnataka Land Revenue Act, 1964 ("**KLR Act**"). KERC noted that AGEL had applied to KREDL at least 60 days before the date on which the CPs were required to be fulfilled and had identified the extent of land sufficient to establish the solar power project. The KERC further noted that the proceedings before the Deputy Commissioner, Mysuru, started pursuant to the application filed by AGEL for conversion of lands and to sub-lease the same to it, had not yet attained finality; however, the same should have culminated within 60 days from the date of filing of proper application by AGEL. In light of the same, the KERC held that such enormous delay in not yet taking a final view on the application of the AGEL should be treated as a '*force majeure*' event under the PPA.

Accordingly, KERC held that AGEL was not liable to pay any damages under Article 4.3 of the PPA and directed GESCOM to refund the amount of Rs. 12 lakhs recovered towards damages to AGEL within eight weeks from the date of the order; and directed that in the event of default, the said amount shall carry interest at the rate of 8% p.a. from the date of default till the date of payment.

India launches its first Gas Trading Platform

India launched its first gas exchange, i.e. India Gas Exchange ("**IGX**"), commencing operations from 15.06.2020, which is incorporated under India's energy market platform i.e. Indian Energy Exchange. IGX has been launched aiming at enabling transparent and competitive natural gas price discovery and growth in share of natural gas in the country. IGX will facilitate multiple buyers and sellers to trade in spot and forward contracts at designated physical hubs. It is a neutral and transparent marketplace where both buyers and sellers will trade gas as the underlying commodity. The contracts traded at IGX will be for compulsory specific physical delivery and such contracts will be non-transferable in nature and without any netting-off.

TRAI launches channel selector app to facilitate viewing and modification of TV channel subscription by subscribers

Telecom Regulatory Authority of India ("**TRAI**") has launched a TV channel selector app on 25.06.2020 to provide a reliable and transparent system to subscribers to view / modify their TV channel subscription. TRAI decided to develop an app which will fetch data from distribution platform operators ("**DPOs**") through application program interface developed by TRAI. The app allows consumers to, *inter alia*: (i) check their own subscription; (ii) view all channels and bouquets provided by their DPO; (iii) choose only the channels of their interest and remove unwanted channels; (iv) get optimized solution / best combination of user-selected channels / bouquets for the same / less price; and (v) modify their existing subscription. The channel selector app has been made available on both Google Play Store and Apple Store. It is presently functional with respect to major direct-to-home operators and multi-system operators and efforts are being made to integrate other service providers on the platform.

NCLT while adjudicating upon existence of default under Section 7 petition, refers parties to arbitration

National Company Law Tribunal, Mumbai Bench ("**NCLT**") vide order dated 09.06.2020 in *CP (IB) No.3077/2019 - Kotak India Venture Fund - I v. Indus Biotech Private Limited* held that if a dispute between parties is arbitrable and has a bearing on the judicial determination of the existence of a default, the Section 7 petition can be referred to arbitration. The order came to be passed in an interim application (*I.A. No. 3597/2019)* filed by corporate debtor Indus Biotech Private Limited ("**Indus**") under Section 8 of the Arbitration and Conciliation Act, 1996 ("**Arbitration Act**") in a proceeding initiated under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("**IBC**").

The NCLT held that while the facts in the matter are undisputed, the real question for determination is whether the provisions of the Arbitration Act prevail over the provisions of IBC, and if so, under what circumstances. The NCLT, on the basis of judicial precedence, held that the status of the Arbitration Act is that of a 'special law' and the language of Section 8 of the Arbitration Act is peremptory and the court is under an obligation to refer parties to arbitration. The NCLT also relied on *Innoventive Industries Limited v ICICI Bank & Anr.* to opine that the IBC mandates adjudicating authorities to ascertain and record to its satisfaction, the occurrence of a default before admitting a petition under Section 7 of the IBC. A mere claim by the financial creditor that the default has occurred shall not suffice. The NCLT held that in the present case, the disputes that form the subject matter of the underlying company petition, viz., valuation of shares, calculation and conversion formula and fixing of qualified initial public offering date, are all arbitrable; therefore, the invocation of arbitral proceedings is justified. It was also opined that an attempt must be made to reconcile the

differences between the parties as no meaningful purpose will be served by pushing the corporate debtor / Indus into CIRP at this stage. Accordingly, the interim application was allowed and the underlying company petition, being incapable of being admitted, was dismissed.

Delhi High Court adjudicates on multiple arbitrations in one contract; opines multiplicity ought to be avoided

The High Court of Delhi vide judgment dated 23.06.2020 in *OMP 680/2011 (New No. O.M.P. (COMM) 392/2020) - Gammon India Ltd. & Anr. v. National Highways Authority of India*, while acknowledging the legality of multiple arbitrations before different arbitral tribunals in respect of the same contract, has opined that despite such permissibility, multiplicity ought to be avoided. While relying on the judgment of the Supreme Court in *Dolphin Drilling Ltd. v. ONGC, AIR 2010 SC 1296*, the High Court held that when an arbitration clause is invoked, all disputes which exist at the time of invocation ought to be referred and adjudicated together. If a party does not raise claims which exist on the date of invocation, it ought not to be given another chance to raise it subsequently unless there are legally sustainable grounds. The High Court observed that the constitution of separate arbitral tribunals is a mischief which ought to be avoided, as the intent of parties may also not be *bona fide*. In an attempt to further avoid multiplicity of tribunals and inconsistent/contradictory awards, the High Court issued the following directions:

- In every Section 34 petition, the parties approaching the court ought to disclose whether there are any other proceedings pending or adjudicated in respect of the same contract or series of contracts and if so, along with the stage of the said proceedings and the forum.
- At the time when a Section 34 petition is being heard, parties ought to disclose as to whether any other Section 34 petition in respect of the same contract is pending and if so, seek disposal of the said petitions together in order to avoid conflicting findings.
- In petitions seeking appointment of an arbitrator/constitution of an arbitral tribunal, parties ought to disclose if any tribunal already stands constituted for adjudication of the claims arising out of the same contract or the same series. If such a tribunal has already been constituted, an endeavour can be made by the arbitral institution or the High Court under Section 11 of the Arbitration Act, to refer the matter to the same tribunal or a single tribunal in order to avoid conflicting and irreconcilable findings.
- Appointing authorities under contracts consisting of arbitration clauses ought to avoid appointment or constitution of separate arbitrators/ arbitral tribunals for different claims/disputes arising from the same contract, or same series of contracts.

Corporate compliance relaxations due to COVID – 19

The rampant spread of the virus in the world, and more specifically in India, has called for relaxations in corporate compliance requirements. Click here to access the consolidated note on corporate compliance relaxations amid COVID-19.

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