Edition VI

Legacy® LAW OFFICES

# The Legacy Outreach

April- June 2022

## In This Edition


*Women on Corporate Boards in India: Paving the way for a better tomorrow.*

*Tender Clause of Acceptance/ Rejection of Bid without reason cannot be made arbitrarily*

*Relevant Developments in Law Summarized.*

*Popular Ocean Freight meets Unpopular GST: The Mohit Minerals Judgment*

*Highlights of the New Labor Reforms in India.*

*Legacy Updates*

*Consent of both parties necessary to remand matter to arbitration for fresh decision: Supreme Court*

*The Line Of Control at Generalibus Specialia*

*A Note on Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022*

# Women on Corporate Boards in India: Paving the way for a better tomorrow.

**Introduction**

Gender diversity on corporate boards is an important issue for corporate governance, as it has evolved from being a recommended management practice to a regulatory requirement applicable by law.[1] Gender discrimination in the corporate hierarchy can be observed through the fact that top level executive positions are, more often than not, occupied by male candidates.[2] The number of women occupying senior positions is dismally low – only 17% of women occupy board positions in corporate India, while only 11% hold leadership roles.[3] This adversely affects the incoming generation of women employees from various standpoints such as recruitment, retention, and development because a male-dominated culture has been established at the workplace. To alleviate these issues, the Indian government decided to look at corporate governance as a mechanism for increasing gender diversity in the workplace. This Article's objective is to analyze the corporate governance system in India by examining the legislative provisions regarding women on boards (WOB). In particular, Section 149 of the Companies Act 2013 shall be examined, followed by a critical analysis of whether this provision has led to achieving the desired legislative intent of increasing gender diversity in the boardroom.

**Legislation**

The Companies Act 2013 (hereinafter referred to as 'the Act') is applicable for governing, consolidating, and amending all the laws relating to companies. Section 149(1) of the Companies Act 2013 provides for the mandatory appointment of women on the company's Board of Directors. The provision is reproduced below for ready reference:

*"149. Company to have Board of Directors. – (1) every company shall have a Board of Directors consisting of individuals as directors and shall have –*
*(a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and*
*(b) a maximum of fifteen directors:*

*Provided that a company may appoint more than fifteen directors after passing a special resolution:*
*Provided further that such class or classes of companies as may be prescribed, shall have at least one woman director*."[4]

As evident from the second proviso of Section 149(1), companies are required to appoint at least one woman director on the Board of Directors. This provision signifies the advent of a groundbreaking and landmark change in corporate governance, because it puts the onus of compliance upon the companies. Now, Indian companies have to mandatorily appoint women directors, leading to increased gender diversity on corporate boards.

As per Companies (Appointment and Qualification of Directors) Rules 2014, the mandatory requirement of appointment of women directors applies to listed companies as well as to other companies having a paid-up share capital of at least Rs. 100 crores or turnover of at least Rs. 300 crores.[5] The said provision was also incorporated in clause 49 of the Listing Agreement prescribed by SEBI, but the implementation of the gender diversity provision was postponed until 1 April 2015.[6]

Section 172 of the Companies Act states that both the company and every officer of the company can be punished with a fine of at least rupees fifty thousand, which may extend to rupees five lakhs in case of any contravention regarding the appointment of directors. [7] In the case of M/s. Soumag Electronics Limited vs. The Deputy Registrar of Companies, the Madras High Court held that failure to appoint a woman director would cause the company to be liable for the penalty specified under Section 172 of the Companies Act.[8]

**Impact and Critical Analysis**

While the introduction of Section 149 of the Companies Act is a welcome move, its implementation still remains a hurdle as it poses the risk of misuse.

Many academicians and industry experts have criticized Section 149 as a hollow provision in the wake of family-based appointment of women directors, i.e., male directors already on the Board who have appointed their wives/spouses merely to fulfil the mandatory compliance criteria laid down by the provision.[9] This does not bode well for increasing gender diversity on corporate boards; on the contrary, it highlights the power held by male directors and leads to ineffective corporate governance. Such hollow appointments hamper the growth and development of genuine women senior executives who were adequately qualified for director positions. And due to the fact that women have been appointed as directors merely by virtue of their familial ties, they often do not possess the required skillset for being a member of the Board of Directors. Thus, this type of misuse of the provision has led to ineffective corporate governance, despite the fact that corporate governance and company culture actually stood to benefit from the appointment of women directors.

**Conclusion**

This Article sought to highlight the role of women directors in the corporate governance system in India by providing a critical analysis of the relevant laws in the said field. Through a study of the aforementioned discussion, it is stated in conclusion that companies need to ensure that Section 149 of the Companies Act is not exploited through hollow/token appointments, but is actually utilized to its full potential through meaningful and deserved appointments of women directors. This would in turn lead to attaining a critical mass of women directors on corporate boards, which would serve as motivation for other women employees to contribute their best work for corporate organizations. Systematic exclusion of women from corporate boards needs to be eliminated in order to ensure that sub-optimal board performance is avoided and that women are well involved in the functioning of the Board.

**References:**

1.Umakanth Varottil, 'The Reform Decade: Corporate and Commercial Law in India, Chapter 16: A Report on Gender Diversity in Corporate Baords' (2022) EBC Publishing Pvt Ltd Lucknow.

2. Natasha Ann Lacoste and María Pabón López, 'Women Leaders in the Areas of Higher Education, the Legal Profession and corporate Boards : Continued Challenges and Opportunities in the United States' (2013) 9(1) Socio-Legal Rev. 60.

3. Divya J Shekhar, 'Women hold 17% of board positions in corporate India, but only 11% leadership roles' (Forbes India, 08 December 2020).

4. The Companies Act 2013, Section 149.

5. The Companies (Appointment and Qualification of Directors) Rules 2014.

6. SEBI Listing Agreement, Clause 49.

7. The Companies Act 2013, Section 172.

9. M/s. Soumag Electronics Limited vs. The Deputy Registrar of Companies, 2016 SCC OnLine Mad 1035

10. Umakanth Varottil, 'The Reform Decade: Corporate and Commercial Law in India, Chapter 16: A Report on Gender Diversity in Corporate Baords' (2022) EBC Publishing Pvt Ltd Lucknow

## Tender Clause of Acceptance/ Rejection of Bid without reason cannot be made arbitrarily

The petitioner, in this case [1] , was aggrieved by the decision of the tendering authority to avail the services of another vendor and argued that cancellation of the tender/ bid document issued vides Bid No. GeM/2021/B/1424866 dated 12.08.2021 is bad in law and unsustainable. The petitioner also sought relief by way of a direction to the respondent authority to continue with the tendering process.

**Facts**

The petitioner had been providing taxi services to respondent number 1, Doordarshan Kendra, New Delhi from 2015 which was later extended and the petitioner continued to provide services till March 2021. The respondent thereafter floated a tender on the GeM portal for the requisition of vehicles on monthly basis and the petitioner emerged as the L1 bidder.

Respondent number 1, however, cancelled the said tendering process in the first week of December 2021 while the petitioner continued to provide services in the meanwhile. Respondent number 1 thereafter informed the petitioner that its services were not required any further effective January 1, 2022. The respondent also proceeded to avail services of a new vendor which was challenged as arbitrary and not following any due process.

**Decision**

On the issue of whether the respondents are justified in deciding to discontinue the services of the petitioner w.e.f. 01.01.2022 and; in replacing the petitioner as the service provider with another private player M/s City Cabs Co. without following a transparent method of selection, the court held that "the conduct of the respondents in this regard has been unfair, whimsical and premised on an adverse inference drawn against the petitioner, behind the petitioner's back" and lack of any notice to the petitioner in this regard has resulted in a breach of the principles of natural justice, which cannot be sustained.

The court reiterated that any adverse conclusion against the petitioner cannot be taken behind its back without putting the petitioner to notice, and called for its explanation and such a conclusion "suffers from the vice of arbitrariness, and this conduct of the respondents is completely whimsical, and in breach of the principles of natural justice".

It was held by the court that the replacement of one service provider with another ad hoc service provider, without justification, cannot be permitted, particularly when there is no justifiable reason brought on record for the same.

**References:**

1. M/s Kuldeep Tourist Taxi Service v. Doordarshan Kendra & Ors., W.P. (C) 168/2022.

## Relevant Developments in Law Summarized

- **Bhaven Construction Th. Authorized Signatory, Premjibhai K. Shah v. Executive Engineer, Sardar Sarovar Narmada Nigam Ltd. and Anr. (SC) (Arbitration and Conciliation Act, 1996):**

  Under ordinary circumstances, an arbitral award cannot be interfered with by exercising the discretionary powers under Article 226 of the Constitution.

- **Lords Inn Hotels and Developers Ltd v. Raysons Residency Pvt Ltd. (Gujarat HC):**

  In a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the High Court cannot go into the disputed questions of facts. As they contain issues of arbitrarility, they can be determined by the Arbitration Tribunal itself.

- **Priya Rishi Bhutia v. Vardhaman Engineers & Builders Ors. (Bombay HC) (Arbitration and Conciliation Act)**

  Held that a mere pendency of a civil suit cannot act as a bar to an arbitration petition under Section 11 of the Arbitration and Conciliation Act in so far as the same is withdrawn prior to the filing of the statement of issues.

- **Dhanpreet Singh and Anr. v. State of Punjab (Punjab HC) (Industrial Disputes Act)**

  The provisions of the Factories Act, 1948, are not in substitution to the Indian Penal Code, 1860 or any other Act, but are supplemental to them. Therefore, the provisions of the former will not override any other Act.

- **Buy Now, Pay Later no more: RBI**

  Vide RBI circular issued in June 2022, banks can no longer load prepaid instruments under the 'Buy Now, Pay Later (BNPL)' scheme. This decision was taken in lieu of the increasing popularity of the schemes which was enabling the NBFCs to issue loans to unsuitable borrowers, thereby making it difficult for the RBI to regulate them.

- **Electric Vehicle Subsidies must continue till 2023: Niti Aayog**

  According to the Niti Aayog's latest report, the government subsidies on electric vehicles must continue till 2023 to aid in the increase of demand. other key factors for achieving this goal were specified to be the reduction of battery costs by 8% CAGR and increase in vehicle power by 20%.

## Popular Ocean Freight meets Unpopular GST: The Mohit Minerals Judgment

"*As does success, so shall law prevail.*"

The recent judgment in the case of M/s Mohit Minerals Pvt. Ltd. & Ors v. Union of India & Anr, brought the issue of tax imposition on ocean freights to the forefront. Ocean freights which are considered to be an efficient and cost-effective way of transporting goods across countries are governed by Section 3 of the Customs & Tariff Act, 1975 (CT Act). They are adopted by a significant percentage of importers for transporting enormous quantities of merchandise. Certain statistics even specify that the shipping of goods or ocean freights consists of approximately 90% of the world's trade, which in itself proves the method to be a crucial aspect of most retail businesses.

In India, ocean freights are at a booming pace to such an extent that by June 2021, export rates had risen to approximately USD 35.2 billion leaving the exporters with no shipping space to incorporate any more merchandise. The popularity of shipping in India can also be estimated from the fact that even during Covid, the export rates were at a record high, being 34% more than that in 2019.

According to the Indian tax regime, ocean freights are considered to be an exception under Section 5 of the Integrated Goods and Services Tax Act, 2017 (IGST Act), and are governed by the Customs and Tariff Act (CT Act), 1975 under Section 3.

On 28.07.2017, the Government of India issued Notification No. 10/2017, whereby ocean freights, while continuing to be taxable under the CT Act, were brought under the ambit of Section 5 of the IGST Act, 2017 as being chargeable on a reverse charge basis in accordance with the goods that were being transported. It is pertinent to mention that a 'reverse charge', as suggested by the term and in the context of the IGST Act, merely meant that the liability to pay tax was no longer on the supplier of goods, but on the recipient.

It is further needful to note that prior to the issuance of the notification, statutory interpretation of the term 'recipient' under the IGST Act did not include the importers of goods in CIF contracts as the transportation costs in such contracts were borne by the exporters. Therefore, by the effect of the government's overreach of power, importers were made liable to pay tax, even though they would not qualify within the established definition of 'recipients'. This overreach was an apparent misuse of powers, which only legally extended to specify the categories of the people that could be taxed under the Act and did not entitle the authorities to enact an entire delegated 'legislation en excessive' in the form of an impugned notification.

Another outplay that further disgruntled the importers, was the factum of their sudden liability to pay double tax, that is, one under the CT Act, 1975 in the form of an import value, and a further new tax, on the freight element of goods, which in reality was already included under the former law.

The case of M/S Mohit Minerals Pvt. Ltd. Through Director v. Union of India & Anr. was thus filed to challenge the notification on the aforementioned grounds, wherein the Hon'ble High Court of Gujarat found valid ground in the Petitioner's plea and struck down the notification as being ultra vires of the IGST Act. The Union, on being aggrieved by the decision, approached the Hon'ble Supreme Court on the lookout for a favourable order.

However, the Supreme Court upheld the judgment to the dismay of the Union and gave much due relief to importers in its directions to the Union to refund the already paid amount under the impugned notification.

As aforementioned, ocean freights being the most prevalent method of transportation of goods are popular primarily for the reason of the ability of importers to attain such goods without being subjected to unnecessary and enormous financial pains. This fact, while a godsend to the importers was a curse to the Government had been rendered a stranger to the agreements with microscopic taxation rates on ginormous quantities of merchandise.

A misstep on part of the government, as is considered to be a human quality, was to adopt a short-cut, where instead of enacting full-fletched detailed legislation, the Union used its delegated power in excess and issued the impugned notification. Thus, while the government was anticipating a treasure grove at the end of the road, it was rather met with a pit of increased liability. To further the blow to the Government's decision, the Hon'ble Supreme Court made a shrewd observation that any recommendations made by the GST Council in the exercise of its power under Article 279A of the Constitution merely held an advisory value and could not be held to be a mandate in every circumstance. This observation put the council under the purview and forced it to rethink every recommendation as being governed by law and constitutional policy.
The decision of the Hon'ble Apex Court also acted as an affirmation of the fact that in cases of taxation laws, the rules of interpretation would be strict and would not benefit either of the parties, whether it be the assessee or the authority.

The benefit although was not all in favour of the petitioners, as the judgment of the Hon'ble Court made endeavours to expand the ambit of the term 'recipient' to include cross-border supply which may have the effect of an increase in the tax liability of the assesses in the long run.

It may thus be right to claim that wherever the question of tax liability arises, the Union and the authority must make it a point to follow the legislations *ne quid mimis*, as that is the sole principal on which the judiciary will stand.

## New Labor Reforms in India: A Summarized View

In 2002, the Second National Commission on Labor issued specific recommendations relating to Labour laws and their numerous legislations. These recommendations were issued on account of the insurmountable ambiguity of the legislations available on a central and state level and their individual applications.

The recommendations were finally considered by the Ministry of Labor & Employment in 2019, whereafter, it introduced bills on labour code, namely the Code on Wages, Industrial Relations Code, Social Security Code and the Occupational Safety, Health and Working Conditions Code, to consolidate 29 out of the 40 Central Labour Legislations that were existing in India.

In July 2022, these bills were enacted in the form of 5 codes, namely, the Code on Wages, Industrial Relations Code, Social Security Code and the Occupational Safety, Health and the Working Conditions Code.

A brief of the major impacts and provisions introduced by the codes has been provided hereinafter:

- Increase in Working Hours: According to the code, establishments will now be allowed to increase their working hours to 12 hours, provided that they change their working days to 4 in a week with 3 mandatory offs. While the total working hours for an employee remain unchanged, a provision of 3 mandatory offs may bring certain benefits to a few sectors.

- Minimum Workers for Retrenchment without Central Permission: According to the Industrial Disputes Act, 1947, any establishment which hired 100 or more employees required permission from appropriate authorities for any retrenchment, lay-offs or closure. However, the new code (The Industrial Relations Code) has increased this number to 300. This amendment was made in response to numerous complaints and concerns about the earlier number creating exit barriers and adding to their inability to add to the workforce as per the demand.
- Recognition to Trade Unions: The new Code seeks to give due recognition to the Trade Unions in the form of provisions to help the latter in making negotiations with the employers, which was absent in the previous Act. This provision will help increase the importance of Trade Unions as representational organisations for the labour force.
- Recognition of the Rights of Contract Labor: Contract labour was abolished in India by the enforcement of the Contract Labour (Regulation and Abolition) Act, 1970, however, instead of putting a hold on the practice, this enactment rather left contractual labour without any rights or a procedure to enforce them, thereof. With the enactment of the new labour code, contractual labour has been given recognition through the inclusion of the definitions of short–term labour or fixed-term employment.
- Increased PF Contribution: The new labour codes have proposed to effectively increase the PF contribution to the employer by at least 50% of the gross pay. This move may cause a decrease in the in-hand salary which may further burden the employees.
- Encashment of leaves: Before the enactment of the labour code, encashment of leaves was not a mandate, the reform has an added provision where the employer would be made liable to pay the leave encashment of 15 days of the worker with a balance of 30 days being carried forward to the next year.

**Analysis**

The Constitution of India enlists matters pertaining to labour and employment laws as Entry no. 22, 24, and 25 of List - III of the Seventh Schedule, thus making it a subject under the Concurrent List. Before the enactment of the new codes, labour laws in India were rarely touched at a central level, even though a majority of the population has always been described to be between the ages of 20 – 30, which was a challenge due to the increasing ambiguity within the different enactments. Another challenge faced by the laws was the fact that the majority of such employer establishments were either not covered by the statutes or blatantly refused to abide by the provisions mentioned therein.

The present reforms have thus been enacted with a lot of these challenges under consideration with the additional concern over future or present mandates to work-from-home. The provisions within the codes extend to all kinds of establishments, whether systematized or un-systematized. Furthermore, these codes have an additional advantage of seeking to ascertain a balance between the rights of the employers and employees to maintain a smooth transition. This purpose is also highlighted by the intention expressed by the legislature where it has been stated that “the central challenge to the labour regulation was to provide sufficient rights to workers while creating an enabling environment that could facilitate firm output and growth, leading to job creation”.

While the codes and their provisions are subject to adoption by different States, new labour reforms are an appreciative approach to balancing employer and employee rights.

Legacy Updates

## To Infinty & Beyond: The New Promotions

With effect from July 1, the following members of Legacy Law Offices, Delhi, have been promoted:

**Mr. Ishan Khanna:** Promoted to the position of a Partner at Legacy Law Offices, Delhi.

**Mr. Ankit Konwar**: Promoted to the position of a Principal Associate Advocate at Legacy Law Offices, Delhi.

## Consent of both parties required for remanding the matter to an arbitration under section 34 of Arbitration act for fresh decision

In accordance with the decision of the Hon'ble Supreme Court in the case of Mutha Constructions v. Strategic Brand Solutions (I) Pvt Ltd [1], if both parties give consent, the matter may be remanded to the same arbitrator with directions to pass a fresh and reasoned order. This decision was taken after the Petitioners argued that merely because the parties gave consent for the dispute to be re-referred to arbitration, it could not be implied that the same arbitrator may be appointed to pass a fresh order. The Petitioners also argued that Section 34 of the Arbitration and Conciliation Act, 1996 ("the Arbitration Act") [2] did not provide the power to remand the dispute.

The Hon'ble Supreme Court, however, conceded with the decision of the Hon'ble High Court of Bombay in the same case, where it was held that when once consent was given, the Court could take the decision to re-appoint the same arbitrator.

When the dispute of whether the order of the hon'ble Single Judge Bench of the Bombay High Court should be modified to record that the consent given by parties did not mean to include the consent to remand the matter, the Supreme Court held that

*"Once the learned Single Judge who passed the order dated 30.04.2019 was of the opinion that the order dated 30.04.2019 was a consent order the matter ends there.*

*... When both the parties agreed to set aside the award and to remit the matter to the learned Sole Arbitrator for fresh reasoned Award, it is not open to contend that the matter may not be and/or ought not to have been remanded to the same sole arbitrator".[3].*

*Thus, the crux of the matter can be understood to mean that when consent under any form, is given by both the parties to a dispute, the Court has the discretion to refer the matter to the Same Arbitrator.*

Unless circumstances dictate, the parties cannot dispute either such reference or the factum of the absence of law.

**References:**

[1] Mutha Constructions v. Strategic Brand Solutions (I) Pvt Ltd, 2022 LiveLaw (SC) 163.
[2] The Arbitration and Conciliation Act, 1996, Section 34, No. 26, Acts of Parliament, 1996 (India).
[3] *Supra* at 1.

## The Line of Control at Generaliabus Specialia

Time and again, the Arbitration and Conciliation Act, 1996 (Act of 1996) has been designated to be a detailed and well-thought-out law with provisions defining and regulating almost all aspects. One such befitting example of the vastness of the Act is Section 7 which delineates the different forms of arbitration agreements and goes on to include the factum that even a reference to arbitration in a contract is an arbitration agreement in itself.

However, like every other legislation that forms a part of the law of the land, the Act of 1996 is also governed by certain principles and rules, which restrict as well as extend its applicability. These rules may vary from the fundamental rights enumerated in the Constitution to the fundamental practices adopted by the Courts across India.

Generalibus specialia non-derogant is a legal maxim specifying the superiority of special laws and states that in case of a dispute between a special and general law, the former will prevail. This maxim is followed as a rule by the Indian judiciary and has been reiterated in various landmark judgments of the Hon'ble Supreme Court, including the case of Suresh Nanda v. C.B.I, (2008) SCC 3 (674).

Thus, any law which governs a definite aspect of a process or sector will have supremacy over a general law which seeks to govern all such sectors.

The Micro, Small, and Medium Enterprises Development Act, 2006 (MSMED Act) is a 'special act' enacted for the purpose of facilitating the promotion and development of micro, small, and medium enterprises (MSMEs) and has been in force since 02.10.2006. It signifies the difference between the 3 enterprises and further lays down the provisions for the establishment of an MSME Facilitation Council which has the power to conduct conciliation proceedings in matters of dispute concerning any MSME.

Recently, in a petition filed before the Hon'ble Punjab and Haryana High Court [1], the question of whether the MSMED Act would dominate over the Act of 1996 was brought into issue. In the petition filed under Section 14 of the Act of 1996, the Petitioner prayed for the cancellation of the mandate of the sole arbitrator appointed by the Haryana Micro and Small Enterprises Facilitation Council (HPMSEFC).

The facts laid before the Hon'ble Court specified that the Petitioner and Respondent were in business wherein the latter was a supplier of plywood and other wooden material while the Petitioner was a manufacturer of cardboard boxes used for storage in the logistics industry. The Respondent, an enterprise registered under the MSMED Act submitted that the Petitioner had defaulted in making a payment in 2016 against which a claim was filed before the HPMSEFC and conciliation proceedings were initiated. The matter was thereafter referred for arbitration and a Sole Arbitrator was appointed.

The Petitioner specified that a notice was received on 08.06.2020 asking for the appearance of parties for arbitration which was due to be held on 20.06.2020. On account of this, the Petitioner filed an application under Section 12 of the Act of 1996 seeking a valid disclosure of impartiality, wherein he also raised an objection to the appointment of said Arbitrator in absence of a clause for arbitration.

Dismissal of the application by the Arbitrator on 20.06.2020 led the Petitioner to approach the High Court for resolution.

The grounds forming the petition specified that the appointment of a Sole Arbitrator was unlawful in terms of Section 18 (3) of the MSMED Act, which stated that arbitration concerning disputes under the Act could only be conducted either by the MSME Facilitation Council or may be referred to an institution or a Centre for arbitration. The Petitioner further submitted that the Sole Arbitrator appointed by the HMSEFC was arbitrary and that a declaration under Section 12 of the Act of 1996, which was not given in the present case, was imperative. The final ground raised by the Petitioner was that the invoices based on which the dispute was raised and further proceedings were conducted, were drawn in 2016, thus making all such proceedings barred by limitation.

As against the aforementioned grounds, the Respondent submitted that the absence of an arbitration clause was not a sine qua non to them due to their registration under the MSMED Act in terms of Section 18.

It was also specified that even though the matters between the parties were ongoing since 2019, the Petitioner never raised the ground of limitation before either of the authority and was now estopped against raising the issue of limitation. The Respondent further went on to allege that the Petitioner was guilty of concealment on account of their failure to apprise the Court about the pendency of another matter before the District Court of Gurugram wherein a challenge to the arbitration proceedings, forming the subject matter of the petition, had led to the passing of a stay order over the pronouncement of judgment.

After weighing the submissions made by both the parties, the Hon'ble Punjab and Haryana High Court held that the MSMED Act, being a Special Act should prevail and have overriding effect over the Act of 1996, in so much so that even in a case where there is an absence of arbitration agreement between the parties, a party which is registered under the MSMED Act will have the right to approach a competent authority for making its claim.

This is due to the presence of a non-obstante clause at the beginning of Section 18.

It was further held that the factum of Petitioner's deliberate omission to mention the presence and pendency of other proceedings before a different court makes a case of active concealment of facts, which in itself forms sufficient ground to dismiss the petition.

It can thus be stated that the Arbitration and Conciliation Act, of 1996 is no stranger to the principle of *generalibus specialia non-derogant* and cannot cross the line of control drawn by any special act. The aforementioned decision is a rightful exercise of judicial power and further ascertains the fact that in case of any conundrum between a general and a special law, the latter will be the victor.

**Reference:**

1. M/S SGM Packaging Industries v. M/s Goyal Plywood LLP, ARB No. 86 of 2020 (O&M) decided on 10.06.2020.

## A Note on Electricity ( Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022

The Ministry of Power, Government of India, notified the Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules, 2022 on June 6, 2022, with the end goal of ensuring access to affordable, reliable, sustainable and green energy for all. The Rules shall be applicable for the generation, purchase and consumption of green energy including the energy from Waste-to-Energy plants.

The Rules specifically define Green Energy as electrical energy which is drawn up from renewable sources of energy that also include hydro and storage or any other technology. It also includes any mechanism that utilises green energy to replace fossil fuels including the production of green hydrogen or green ammonia.

The salient aspects of the Rules are as follows:

**Renewable Purchase Obligation**

The Rules specified that there shall be a uniform renewable purchase obligation on all obligated entities. The entities (whether obligated or not) may elect to generate, purchase and consume renewable energy as per their requirements by any of the following methods:

- There is no limit on the entities for the installation of power plants through renewable energy sources for their own consumption. These plants can be installed anywhere throughout the territory of India and power shall be transmitted by using open access.
- Through obtaining renewable Energy through Open Access from any Developer either directly or through a trading licensee or through power markets.
- By requisition from Distribution Licensee
    - Discretion of the entity to purchase green energy either up to a certain percentage of the consumption or its entire consumption and can also place requisition for this with their distribution licensee.
    - The consumer may purchase more renewable energy voluntarily and this in steps of 25% and going up to 100%.
    - Appropriate Commission for determining the tax on green energy, which will include:
        - The average pooled power purchase cost of renewable energy.
        - Cross-subsidy charges.
        - Service charges cover the prudent cost of the distribution licensee.
    - Requisition for green energy from a distribution licensee shall be for a minimum period of 1 year
    - Quantum of green energy shall be pre-specified for at least 1 year.
    - Accounting of renewable energy supplied at the distribution licensee level shall be on a monthly basis
- By consuming green energy from captive power plants.

**Green Energy Open Access**

It reduces the limit on the minimum contracted demand or sanctioned load to access green energy through the open access process.

*Earlier Limit - 1MW*
*Reduced Limit - 100KW*

The limit of 100kw for captive consumers of green energy has also been removed. Reasonable restrictions like 'minimum number of time blocks, which shall not be more than twelve-time blocks to avoid high variation in demand to be met by the distribution licensee.

**Nodal Agency**

The Rules lay down that a Central Nodal Agency will be set up to operate a single-window green energy open access system for renewable energy.

There will be a set up of a centralised registry for all Green Energy Open Access consumers by the Nodal Agency. The Appropriate Commission shall notify the appropriate Load Despatch Centre as the nodal agency for the grant of green energy open access for a short term.

**Procedure for Grant of Green Energy Open Access**

- Within a period of 60 days from the commencement of these rules, the central nodal agency shall prepare a common application format for the Green Energy Open Access in consultation with the Forum of Regulators.

- The concerned nodal agency shall, by an order in writing, approve the applications for the Green Energy Open Access within a period of 15 days failing which it shall be deemed to have been approved subject to fulfilment of technical requirements.

**Banking**

The Rules permit banking at least on a monthly basis upon payment of appropriate charges to the distribution licensee and the appropriate commission will determine the applicable charges

Permitted quantum of backed energy- at least 30% of total monthly consumption of electricity from the distribution licensee.

**Charges to be Levied for Open Access**

The charges to be levied on Green Energy Open Access consumers shall be as follows:

- Transmission charges;
- Wheeling charges;
- Cross subsidy Surcharge;
- Standby charges wherever applicable;

Cross subsidy Charge will be according to the provisions of tariff policy notified by the Central Government:

- Cross subsidy charge for a consumer purchasing green energy from a generating plant should not be increased during 12 years from the date of operating of the generating plant by more than 50% of the surcharge fixed for the year in which open access is granted
- An additional surcharge shall not be applicable for Green Energy Open Access Consumers if fixed charges are already being paid by such consumer
- Cross subsidy surcharge and additional surcharge shall not be applicable in case power is produced from a Waste-to-Energy plant.
- The Cross subsidy surcharge and additional surcharge will not be charged if the green energy is used for the production of green hydrogen and green ammonia.
- Standby Charges- if applicable will be specified by the State Commission
- (if applicable stand by charges will not be more than 10% of the energy charges applicable to the consumer tariff category)

- Sub Charges- will not be applicable if the Green Energy Open Access Consumers have given notice, in advance at least 24 hours before the time of delivery of power.

**Green Certificate**

The Distribution Licensee shall give Green Certificate on yearly basis to the consumers for the green energy supplied by the licensee to the consumer.

**Rating**

It is at the discretion of the State Commission to introduce the concept of rating the consumer of the distribution licensee, based on the per cent of green energy purchased by such consumer.

*Edition VI*

Legacy®
LAW OFFICES

## Contributors to This Edition

**Manijit K. Dewan**
Associate Director
E: manijit.dewan@legacylawoffices.com

**Aamir Zafar Khan**
Senior Associate Advocate
E: aamirzafar.khan@legacylawoffices.com

**Chiranjeeb P Mohanty**
Associate Advocate
E: chiranjeebp.mohanty@legacylawoffices.com

**Jitendra Kumar**
Associate Advocate
E: jitendra.kumar@legacylawoffices.com

**Vidhi Koolwal**
Associate Advocate
E: vidhi.koolwal@legacylawoffices.com

## Disclaimer

This newsletter has been sent to you for informational purposes only and is intended merely to highlight certain issues. The information and/or observations contained in this or any other newsletter do not constitute legal advice and should not be acted upon in any specific situation without appropriate legal consultation.

The views expressed in this or any other newsletter do not necessarily constitute the final opinion of Legacy Law Offices on the issues reported herein.

## Contact Us:

**DELHI**
Legacy House, D-18,
Nehru Enclave, Kalkaji,
New Delhi- 110019, India
T +91 114 1752507-08
F +91 114 1752509

**CHANDIGARH**
Legacy House, #333,
Sector 4, MDC,
Panchkula- 134114, India
T +91 172 2559332 -33
F +91 172 2559335

**Also at**
| Solan | Kurukshetra | Mumbai |
Representative Offices at Saudi Arabia

www.legacylawoffices.com