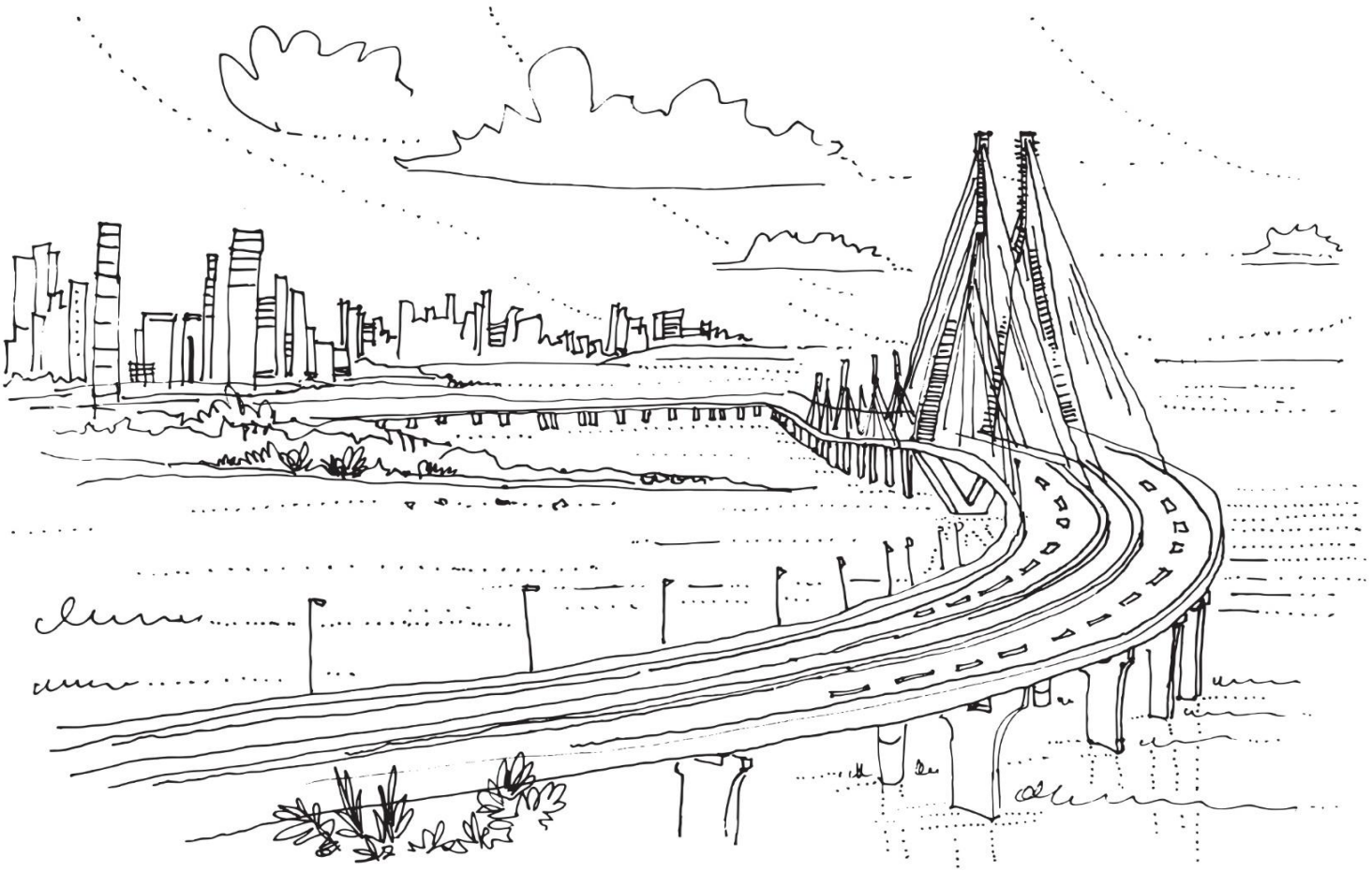
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

March 2020

INFRASTRUCTURE & ENERGY: COVID 19 IMPACT

Infrastructure

Clarifications by the Ministry of Shipping (MoS) to cover COVID-19 under force majeure clause

Background

Considering the debilitating impact of the spread of COVID-19 on various sectors of the economy, Government ministries and departments have been issuing various advisories with a view to apprising stakeholders of available reliefs in this hour of distress. Notably, an office memorandum issued by the Ministry of Finance on February 19, 2020 albeit in respect of the Manual for Procurement of Goods, 2017 clarified that the spread of corona virus would be considered a case of natural calamity and force majeure could be invoked.

What was the direction of the MoS?

Thereafter, on March 24, 2020, the MoS ordered that major port trusts may consider COVID-19 as a valid ground for invoking the force majeure clause on port activities and operations (**MoS Directive**). The MoS also directed the major ports to procure on an emergency basis from the local market, all protective equipment necessary to safeguard people involved in port operation and port related activities from COVID-19. Vide its notification dated March 24, 2020, the Ministry of Home Affairs had imposed a 21 day lockdown in the country. However, vide an addendum to the aforesaid notification, operation of seaports for cargo movement and inter-state movement of goods/cargo for inland and exports was exempted from the lockdown so as to ensure regular supply of goods in the country.

Noting that whilst the major ports need to continue to remain operational during the 21 - day lockdown there would be inevitable delays in fulfilling obligations, the MOS issued the following guidelines on force majeure for major ports on March 31, 2020 (**MoS Guidelines**) after considering representations from various stakeholders:

- Ports can extend period for completion of any project under implementation in PPP mode or otherwise.
- For existing and operational PPP projects, major ports can permit waiver of all penal consequences on a case-to-case basis along with deferment of performance obligations as per the relevant provisions of the Concession Agreement.
- The period of force majeure would start from February 19, 2020 (the date of issue of the office memorandum by the Ministry of Finance)[1] and would end upon issuance of order by the competent authority.

Our view: The nationwide lockdown has caused unprecedented delays and disturbances in port services. This in turn has resulted in the inability of several ports to meet their contractual obligations. By invoking COVID-19 as a force majeure event under contracts, ports would now be absolved of claims arising out of or connected with COVID-19. The MoS Directive and MoS Guidelines give welcome relief and guidance to ports whose operations stand disrupted due to the pandemic.

[1] The MoS Guidelines appear to have erroneously referred to the date of the Office Memorandum issued by the Ministry of Finance as March 19, 2020. Clarity may be sought on when the period of force majeure should begin.

Instructions to all ports in India for dealing with COVID-19

When and by whom were these instructions issued?

- The Directorate General of Shipping (**DGS**) issued a circular dated March 20, 2020, regarding instructions to all major and minor ports for dealing with novel coronavirus (**COVID-19**).
- Addendum No. 1 was issued as on March 21, 2020 whereby an updated infected countries list as provided by Ministry of Health and Family Welfare (**MoHFW**); Government of India was enclosed for uniform compliance by all ports.
- Vide Addendum No. 2 dated March 25, 2020, guidelines were issued for rational use of personal protective equipment (**PPE**).
- Addendum No. 3 was issued on April 1, 2020 to clarify that people should board vessels only at a bare minimum and with appropriate PPE.

Why was it essential to issue these instructions?

- Shipping services are required to continue to be operational to ensure seamless supply of vital goods and essential commodities (including fuel, medical supplies, food grains etc.) as well as to ensure that economic activity of the nation is not disrupted.
- It is equally important to carry out the above without compromising the safety of crew and the port employees.

What were the issued instructions?

- The master of a vessel, before arrival at its first port of call in India, must ascertain the state of health of each person on board the vessel and submit the Maritime Declaration of Health to the concerned health authorities of the port and to the port authorities.
- The Maritime Declaration of Health is required to be forwarded at least 72 hours prior to the arrival of the vessel at the port. If the voyage duration from last port of departure is less than 72 hours, the Maritime Declaration of Health must be informed to the port immediately on departure from the port.
- Information pertaining to temperature chart, individual health declaration etc. must be provided by the master to the local health authorities of the port.
- If the Maritime Declaration of Health is found to be incorrect and not reflecting the factual conditions of health of persons on board the vessel, the master will be liable to be prosecuted as per applicable laws.
- The master must ensure that any suspected person on board the vessel as well as all other persons who may have come in contact with such suspected person, must be isolated at appropriate locations on the vessel as decided by the master.
- If the samples of the suspected persons are tested positive, the vessel is to remain in quarantine and the infected person(s) will be dealt with as per the procedures laid down by the MoHFW. Such vessels must be sanitized as per the extant protocols.
- Vessels arriving from ports of infected countries identified for mandatory quarantine and travel ban by MoHFW, before 14 days of departure from the infected port, or having seafarers embarked on the vessel who have been in infected regions within 14 days of arrival at any Indian port will need to comply with additional measures as provided in the circular.

- Vessels arriving from any port in China must be quarantined for a period of 14 days.
- However, stoppages of a vessel at any port of infected countries only for bunkering purposes shall not be counted for the calculation of 14 days from port of departure.
- Ports which are not able to comply with the additional requirements specified in the circular must not allow the vessels to berth for vessels which have arrived within 14 days from the infected countries.
- Vessels arriving from ports of infected countries within 14 days of departure from the infected port, or having seafarers embarked on the vessel who have been in infected regions within 14 days of arrival at any Indian port must comply with the additional measures as mentioned in Annexure 1 of this circular.
- All vessels and all major and minor ports must comply with the guidance under Annexure 2 of this circular.

Advisories issued on exemption/remission on penalties

The MoS and the DGS respectively issued directions and advisories to ports on exemptions and remissions available in cases where delays in berthing, loading/unloading operations or evacuation/arrival of cargo are occasioned by reasons attributable to lockdown measures.

What is the scope of the advisory issued by the MoS?

On March 31, 2020, the MoS issued the following directives to major ports:

- Major Ports are to ensure that no penalties, demurrage, charges, fee, rentals are levied on any port user (traders, shipping lines, concessionaires, licensees etc.) for any delay in berthing, loading/unloading operations or evacuation/arrival of cargo by reasons attributable to lockdown measures from March 22, 2020 to April 14, 2020.
- Major Ports are to exempt or remit demurrage, ground rent over and above the free period, penal anchorage/berth hire charges and any other performance related penalties that may be levied on port related activities including minimum performance guarantee, wherever applicable.

What is the scope of advisories issued by the DGS?

- On March 29, 2020, the DGS had directed shipping lines to refrain from levying any container detention charge on import/export shipments from March 22, 2020 until April 14, 2020 over and above free time arrangement that is currently agreed and availed as part of any negotiated contractual terms.
- On March 31, 2020, the DGS directed shipping companies or carriers (and their agents by whatever name called) not to charge, levy or recover any demurrage, ground rent beyond allowed free period, storage charges in the port, additional anchorage charge, berth hire charges or vessel demurrage or any performance related penalties on cargo owners/consignees of non-containerized cargo (bulk, brake bulk and liquids cargo) whether LCL (Less than Container Load) or not from March 22, 2020 until April 14, 2020 due to delay in evacuation of cargo causes by reasons attributable to lockdown measures since March 22, 2020. The aforesaid exemption remission would be over and above free time arrangement that is currently agreed and availed as part of any negotiated contractual terms.
- Shipping lines and shipping companies were also advised not to impose any new or additional charge during such period.

Our view: Given the nation-wide lockdown, there are bound to be consignment delays. In this context, the directives and advisories are an important step in ensuring smooth functioning of ports and maintenance of supply chain in the country.

Government suspends toll collection on national highways

In the wake of COVID-19 epidemic in the country, the Ministry of Road Transport & Highways (**MORTH**) has through a letter to the National Highways Authority of India (**NHAI**), requested the NHAI to suspend toll collections across the country. Such suspension was sought to be made effective from March 25, 2020 to April 14, 2020. The MORTH also advised NHAI to follow the Ministry of Home Affairs (**MHA**) guidelines about Toll Plaza Operations. However, it was indicated that maintenance of roads and availability of emergency services at toll plazas will, continue.

Our view: It appears that the suspension of toll has been sought with a view to reduce inconvenience to the supply of emergency services and to save time. However, for movements within states using state highways and local roads (some of which have tolls) would not have the benefit of this notification as state governments and authorities are yet to issue similar notifications.

Relaxations for units/developers/co-developers of Special Economic Zones

What is the background?

In view of the lockdown, the Department of Commerce has provided suitable relaxations on compliances to be met by units/developers/co-developers of Special Economic Zones (**SEZs**).

What are the relaxations?

The compliances which have been relaxed are as follows:

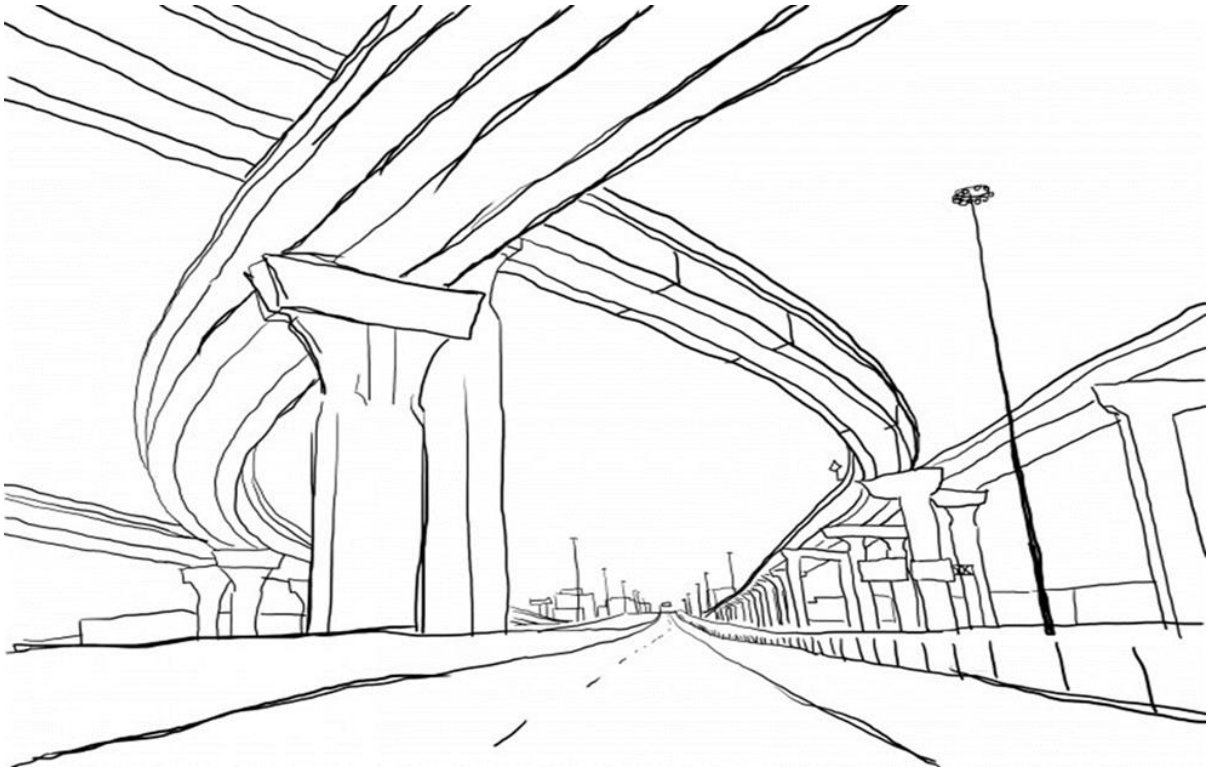
- Requirement to file quarterly progress report attested by Independent Chartered Engineers by developers/ co-developers.
- SOFTEX form to be filed by IT/ITES units.
- Filing of annual performance reports by SEZ units.
- Extension of Letter of Approvals (**LoA**) which may expire, in the cases of:
  - Developers/co-developers who are in the process of developing and operationalising the SEZ;
  - Units which are likely to complete their 5 year block for NFE assessment;
  - Units which are yet to commence operations.

What has the Ministry directed?

The Development Commissioners of SEZs have been directed to ensure that no hardship is caused to developers/co-developer/units and no punitive action is taken in cases where any compliance is not met during this period impacted by the disruption. Further, as may be possible, all extensions of LoAs and other compliances can be facilitated through electronic mode in a time-bound manner. In cases where it is not possible to grant extension through electronic mode or in cases where a physical meeting is required, Development Commissioners have been asked to ensure that the developer/co-developer/units do not face any hardship due to such expiry of validity during the period of disruption.

Ad-hoc interim extension/deferment of the expiry date may be granted without prejudice till June 30, 2020 or further instructions of the Department on the matter, whichever is earlier.

Our view: The relaxations are in line with measures taken by the Government of India with respect to other industries and sectors and would provide much needed relief to the SEZ units/developers/co-developers.



ENERGY

Relief Measures for Power Sector

What is the background?

As the power sector, essential services such as power generation, transmission and distribution units and services have been exempted from the lock-down.

What is the issue?

Due to the lock-down, consumers were unable to pay their dues to the Distribution Companies (**DISCOMs**). This affected the liquidity position of the DISCOMS thereby impairing their ability to pay the generating and transmission companies. In this context, the Ministry of Power announced significant relief measures for the power sector.

What are the relief measures?

The following relief measures have been announced to easy the liquidity problems of DISCOMS:

- Central Public Sector Undertaking generation/transmission companies would continue supply/transmission of electricity even to DISCOMS which have large outstanding dues to the generation/transmission companies and there would be no curtailment of supply to any DISCOM.
- Till May 31, 2020 the payment security mechanism to be maintained by the DISCOMs with the generating companies for dispatch of power would be reduced by 50%.
- Directions were issued to the Central Electricity Regulatory Commission (**CERC**) to provide a moratorium of 3 months to DISCOMs to make payments to generating companies and transmission licensees and not to levy penal rates of late payment surcharge. State Governments were also requested to issue similar directions to State Electricity Regulatory Commissions.

Our view: The measures would provide much needed relief to DISCOMS and are a welcome step, considering the important role played by the power sector. It remains to be seen, how these measures would affect the generating companies and transmission licensees, especially in light of the moratorium on payments by DISCOMs.

Delay in Payments by MPPMCL

Who issued the letter and to whom? When was the letter issued?

- On March 30, 2020, the Madhya Pradesh Power Management Company Limited (**MPPMCL**) issued a letter regarding occurrence of a force majeure event on account of the outbreak of COVID-19 pandemic in the country.

What were the contents of the letter?

The MPPMCL stated as follows:

- The spread of coronavirus along with the nationwide lockdown is an unprecedented and unforeseen situation which should be considered as a natural calamity and a force majeure situation.
- As a result, MPPMCL and its state DISCOMs operating in Madhya Pradesh, are faced with drastic reduction in revenue collections from retail consumers as they are unable to make payment on counters due to the complete lockdown. Additionally, massive disruption in the economic activity is likely to affect a significant proportion of consumers' capacity to pay electricity bills in time.
- As DISCOM's and MPPMCL are at the forefront of the customer's touch point, they would be most affected by the cash flow crunch being faced by the public and communities. Hence, the DISCOMs have come up with a massive campaign for promoting online bill payment modes and are also working on mechanisms to offer special rebates for promoting timely payments.
- The Government of Madhya Pradesh, through a letter dated March 28, 2020, to the Ministry of Power, requested Coal India Limited (**CIL**), National Thermal Power Corporation Limited (**NTPC**) and Railways not to take adverse coercive actions on MPPMCL and Madhya Pradesh Power Generating Company Limited (**MPPGCL**) for delay in payments and to maintain supply of power and coal. Further, they were requested to waive delayed payment surcharge in order to maintain uninterrupted power supply to the consumers.
- For uninterrupted supply of electricity to all the consumers, all out efforts would be made with agencies like Railways, CIL, in order to maintain continuity of supply from their generating and transmission station(s)/ unit(s).
- In light of the above, MPPMCL wrote to several agencies such as NTPC invoking the provisions of force majeure clause under the PPA and notified the nationwide lockdown due to COVID-19 as a force majeure event affecting the performance of obligations of MPPMCL under the PPA with effect from March 24, 2020. As such, no cause of action for breach or liability will arise on account of any impossible performance of PPA, as a consequence of this force majeure event.

Our view: One would have to wait and see whether COVID-19 is accepted by agencies to be a force majeure event. Whilst the office memorandum issued by the Finance Minister should offer guidance and have persuasive value, the contention is likely to be disputed based on the terms of the contracts in question as well as the considerations of impossibility versus commercial hardships.

Power Generation Utilities Notified as Essential Operation Under COVID-19 lockdown

On March 25, 2020, the Ministry of Power issued a notification indicating that power generation was an essential service for securing smooth and uninterrupted power flow across and within states. It was noted that it was critical that power generation utilities under Ministry of Power, ultra-mega power projects and independent power plants (**IPGS**) continue to operate as they supply inter-state electricity to the grid.

What exemptions were sought by the Ministry of Power?

The Ministry of Power requested the Secretaries of Power and other specified bodies of all States and Union Territories' to extend their support through the following:

- Permitting IPGS staff, associated workforce and vehicles to move around and movement of material and field engineers at sites, substations, ash pond, raw water intake points etc. with minimum manpower.
- Allowing minimum staff, required to work for the power plant and offices for ensuring uninterrupted renewable power generation.
- Waive from the confines of Section 144 of the Code of Criminal Procedure, 1973, the national lockdown, curfew or any limitation on the number of people to gather in locations like ash pond, raw water intake, power generation station and other related locations where it may be required for operation and maintenance of activities of generation and associated equipment.
- Make available DG Sets, Electrical Equipment, Maintenance Equipment, Tractors/ Trucks and other required Tools and Plants for maintenance activities along with diesel carrying vehicle for pouring diesel in DG sets.
- Allow round the clock permission to mobilise field staff to be able to reach and access electrical installations of IPGS.

It was requested that the permission be granted to IPGS officers and staff and their vendors all over India. Further, a request was made for permission/passes to be issued for the movement of employees and associated workforce on production of official ID Cards/authorization letter from IPGS officials.

Further, on March 28, 2020, the MOP notified another notification wherein it stated that for generation of power, supply chain of coal and other critical inputs like Chemicals including Acids, Caustic Soda, Gases etc., LDO/HFO and other consumable items needs to be maintained continuously. Accordingly, no restrictions may be imposed on production and movement of such critical materials like intermediate or finished products to or from such power plants. A non-exhaustive list of major critical items including Chemicals & consumables for Power Plants which require inter-state/intra-state movement was provided by the Ministry of Power.

It was indicated that State Governments could also issue similar instructions/permissions/passes/facilitations for State Generating Stations and Independent Power Plants (**IPPs**) which supply power within their respective States.

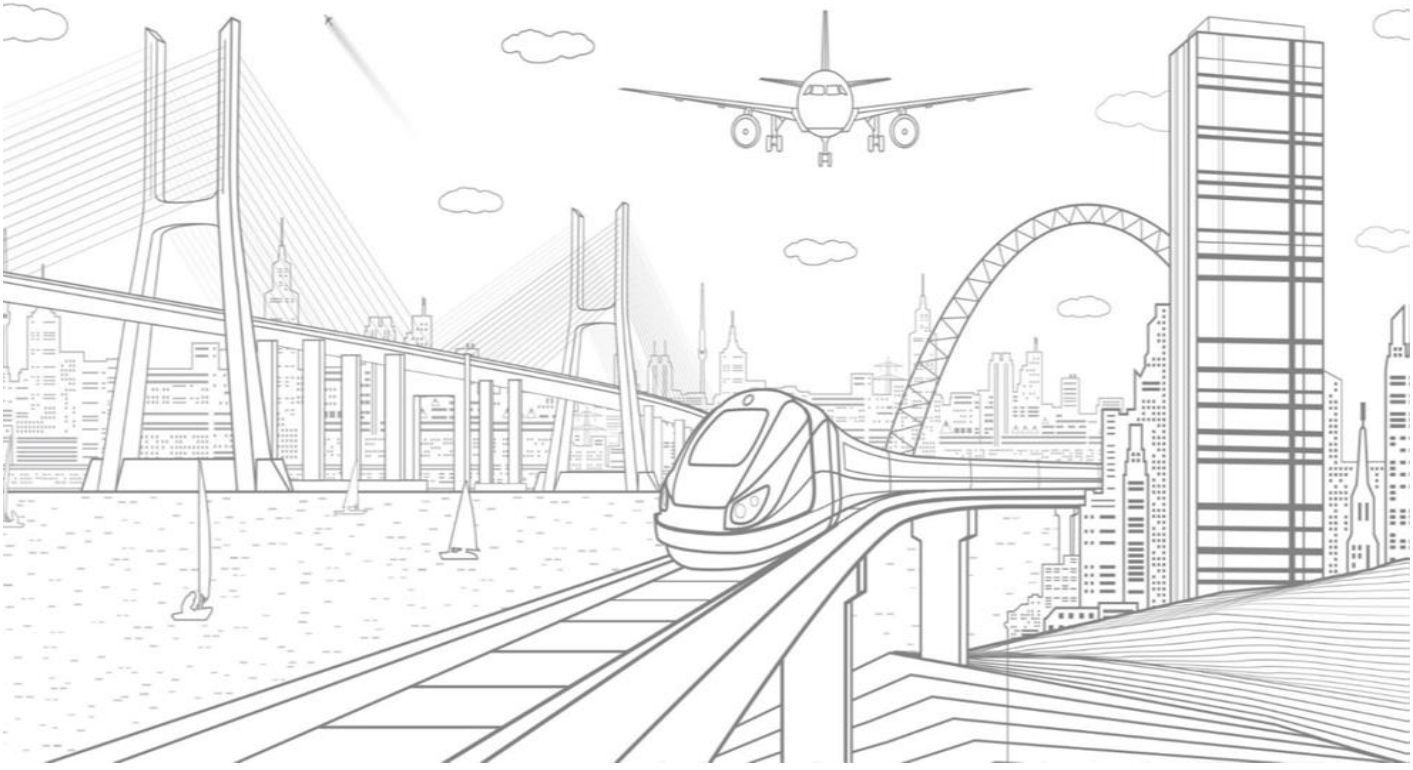
Our view: The aforesaid notifications by the MOP recognize the importance of continuity of power supply and should help ensure the smooth operation and maintenance of power generation facilities.

Retail Electricity Tariff

Through its order dated March 31, 2020, the Maharashtra Electricity Regulatory Commission (**MERC**) whilst determining the aggregate revenue requirement and tariff for Maharashtra State Electricity Distribution Co. Ltd (**MSEDL**) indicated that the following steps were being taken to mitigate the impact of COVID-19 on electricity consumers:

- A practice direction was issued by the MERC on March 26, 2020 suspending meter reading and physical bill distribution work. Utilities were asked to issue bills on average usage basis till the current crisis gets subsided.
- MERC put a moratorium on payment of fixed charges of the electricity bill by consumers under Industrial and Commercial category for the next 3 billing cycles beginning from the lockdown date of March 25, 2020.
- Distribution Licensees are required to borrow/avail additional working capital over and above the Regulations. Further, there will be other additional cost required to be incurred for continuing of operations as well as an additional working capital interest. The MERC accordingly indicated that it will take an appropriate view on the additional expenses that are likely to be incurred by the Distribution Licensees on account of additional Interest on Working
- Capital during the MTR process.

Our view: This should, to some extent, help mitigate the difficulties being faced by electricity consumers in Maharashtra. However, given that commercial activities have nearly ceased, readings based on average usage may lead to higher bills than warranted. This may be balanced by the moratorium on fixed charges.



RENEWABLE ENERGY

Renewable Projects to get extension due to lockdown

As per a Press Information Bureau release dated March 26, 2020, Mr. Anand Kumar, the secretary of Ministry of New and Renewable Energy (**MNRE**) stated in a tweet that all renewable energy projects under implementation would be given extension of time. The extension would be provided after considering the period of lock down and time required to remobilise the work force for such projects.

Our view: Extensions for projects under implementation should come as a major relief to developers. The spread of coronavirus has not only disrupted the supply chain of components used in renewable energy projects but impacted the availability of workforce and only time can tell the extent of the impact of the present situation on projects.

Essential operation of Renewable Power Generation Utilities & permission for material movement

When and by whom was the notification issued?

- On March 26, 2020, the MNRE issued a notice regarding essential operation of renewable power generation utilities (Solar Power Plants, Wind Power Plants, Solar-Wind Hybrid Power Plants, Small Hydro Power Plants, Biomass/Biogas based Power Plants, etc.) and permission for material movement needed by them during the nation-wide lockdown for COVID-19 outbreak. Power Generation (Including Renewable Power Generation) is an essential service, which helps to secure smooth and uninterrupted power flow across and within states.

What are Renewable Energy Generating Stations and what are its functions?

- Renewable Energy Generating Stations (**REGS**) are Renewable Power Generation Plants whether inter-state or intra-state, supplying renewable power to State DISCOMs through Central Power Companies like Solar Energy Corporation of India Limited (**SECI**) and NTPC and other inter-state Renewable Power Generation Plants, including IPPs generating renewable energy.
- REGS includes Solar Power Plants, Wind Power Plants, Solar-Wind Hybrid Power Plants, Small Hydro Power Plants, Biomass/ Biogas based Power Plants, etc.
- They supply inter-state/intra-state electricity to the grid.
- The REGS generate electricity and supply the same to grid even in situations when the conventional power plants may not be running at optimal levels due to logistics constraints with respect to supply fuels like coal, natural gas, diesel, etc.
- Thus, operation of REGS is critical to maintain power supply across the country.

How does MNRE wish to provide uninterrupted operations of REGS?

MNRE requires the support of all the States and Union Territories by carrying out the following:

- Permitting REGS staff, associated workforce and vehicles to move around and movement of material and field engineers at REGS sites, substations, transmission lines and towers, etc. with minimum manpower.

- Allowing minimum staff, required to work for REGS and offices for ensuring uninterrupted renewable power generation.
- Waive from the confines of Section 144 of the Code of Criminal Procedure, 1973, the national lockdown, curfew or any limitation on the number of people to gather in locations like REGS sites, substations, transmission lines and towers, etc. and other related locations where it may be required for operation and maintenance of activities of renewable power generation and associated equipment.
- Make available Batteries/Energy Storage System/Electrical Equipment, Maintenance Equipment, Tractors/Trucks and other required Tools and Plants for maintenance activities.
- Allow round the clock permission to mobilise field staff to be able to reach and access electrical installations of REGS.

Who should the above permissions be granted to and how?

- The Permission must be granted to REGS officers and staff and their vendors all over India.
- Permission/passes must be issued for the movement of employees and associated workforce on production of official ID Cards/authorization letter from REGS officials.

What further action can the State Government take in order to ensure that there is uninterrupted power generation?

The State Government can also issue similar instructions/permissions/passes/facilitations for State Renewable Power Generating Stations (**State GenCos**) and IPPs (generating renewable energy) which supply renewable power within their respective States.

Our view: Once the aforesaid requests of the MNRE are implemented by the States and Union Territories, the same should aid in ensuring uninterrupted power supply throughout the country.

SECI Denies Force Majeure Claim for Insufficient Funds

The Uttar Pradesh Power Corporation Limited (**UPPCL**) had reportedly released a notice stating that the Uttar Pradesh's DISCOMs were facing financial challenges due a substantial reduction in collections amidst the COVID-19 outbreak and the nationwide lockdown imposed by the Central Government on March 24, 2020. The notice reportedly states that the lockdown is likely to affect consumers' ability to pay electricity bills on time, and therefore UPPCL should not be held liable for any breaches under power purchase agreements due its inability to make payments.

The Ministry of Finance had released an Office Memorandum on February 19, 2020 declaring the disruption of supply chains due to the outbreak of the novel coronavirus in China and other countries to be a force majeure event is to be covered under force majeure clauses. It is likely that this memorandum has been relied upon by the UPPCL while issuing the above notice.

However, the Solar Energy Corporation of India (**SECI**) has reportedly written to the UPPCL, invalidating a DISCOM's claim of force majeure restricting its ability to pay its dues under a power sale agreement. The SECI reportedly stated that the claim was not due to factors affecting its capacity to generate power, but due to its inability to collect dues from consumers. SECI has reportedly also stated that the DISCOM's inability to pay for the power supplied by SECI is excluded from the force majeure clause.

Our view: As the letters from either UPPCL or SECI are not publicly available, it may be difficult to comment on the matter as of now. Force majeure is a creature of contract and hence any excusal from performance would depend on the language of the force majeure clause. However, typical force majeure clauses are crafted in a manner such that the obligation seeking to be suspended is affected by the event and payment obligations may not affected by the lockdown orders, considering that the banking system required for payments is still functional. Commercial hardships are not treated the same as impossibility or impracticability of performance.

MNRE allows extension of Scheduled Commissioning Dates of RE projects due to spread of coronavirus

Brief Background

In our previous edition, we discussed the notification dated February 19, 2020 from the Department of Expenditure/Procurement Policy Division of the Ministry of Finance which stated that coronavirus be considered as a case of natural calamity and would thus be covered as a force majeure event. Pursuant to the above notification, the MNRE, through its office memorandum dated March 20, 2020, has allowed for extension in the scheduled commissioning dates (**SCD**) of renewable energy projects.

What is the rationale for the extension?

The MNRE had received several representations from renewable energy project developers and associations requesting the MNRE to consider the disruption of supply chains due to the spread of the coronavirus as force majeure event under the relevant project documents.

Consequently, the MNRE has directed its renewable energy implementing agencies to treat the delay due to the disruption of supply chains as force majeure. Upon production of adequate evidence and documents by the project developers, suitable extensions of time could be granted by the agencies.

The MNRE has also requested State Renewable Energy Departments to treat such a delay as force majeure and issue their own instructions on the subject.

What is the procedure to avail the extension of time?

- Project developers that are claiming the aforesaid disruptions in supply chains and consequent extension in the SCD are required to make formal applications to the SECI/NTPC
- The SECI/NTPC will consider the request and the documentary evidence that has been provided in support of the same and examine the claim objectively. The extension of the SCD will be granted based on the facts and for the appropriate duration.
- The implementing agencies with respect to renewable energy have been instructed to ensure that no double relief is granted in the extension of the SCD, should the SCD already have been extended.

Our view: Following the declaration of the coronavirus as a natural calamity by the Ministry of Finance, the direction issued by the MNRE specifying the disruption of supply chains as grounds for extending SCDs was much needed to support renewable energy project developers in these difficult times. While force majeure clauses contained in project agreements could have invoked if the conditions were satisfied, the MNRE has provided a streamlined route to providing relief.

However, power procurement agencies of various states in the country usually agree to evacuate a pre-agreed upon quantum of power from various producers of energy (both renewable and conventional) to satisfy the demand for power in the concerned state. Extensions in the SCD of renewable energy projects could result in the overlapping in procurement of renewable energy (toward renewable energy obligations) and conventional energy and consequently creating excess supply of power with regard to the demand for the same. Such an excess due to the overlap will most likely result in backing down of power procured from some of these sources and an increase in costs towards the payment of charges levied upon the procurement agencies as they would be constrained to evacuate less power than they had contracted for.

DISCOMs to clear Renewable Energy bills on time

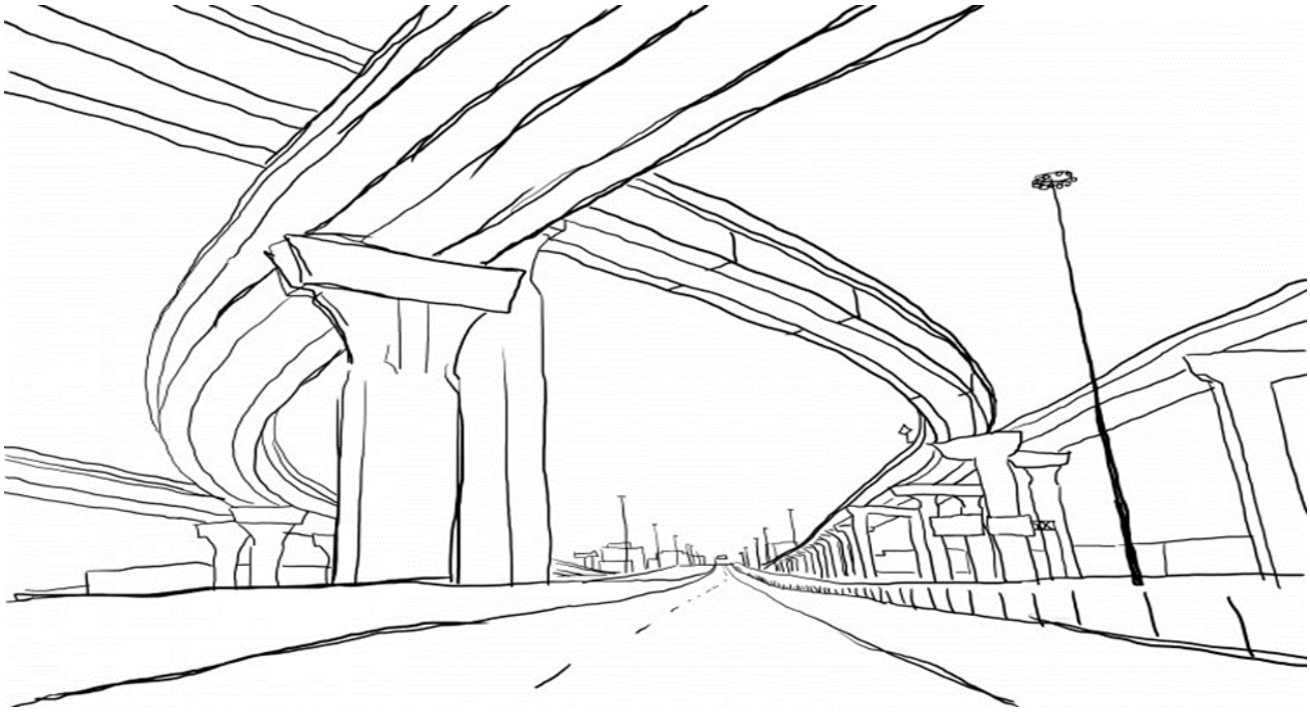
On April 1, 2020 the MNRE issued an Office Memorandum to issue a clarification regarding the payment to REGS during the moratorium provided to DISCOMs by Ministry of Power.

The Ministry of Power had recently issued instructions, whereby it provided for a moratorium period to DISCOMs in order to make payments to electricity generating companies due to COVID-19. Thereafter, MNRE had received representations from the Renewable Energy industry that certain State DISCOMs, had been curtailing Renewable Energy Power in some states partially and others completely, by stating that the current situation is a force majeure condition.

As such MNRE issued the following clarifications:

- **Must-Run status to Renewable Energy Projects:** REGS were granted 'must-run' status and was to remain unchanged during the lockdown period.
- **Regular Payment to Renewable Energy Generating Stations:** Payments to Renewable Energy Generators are to be made on a regular basis, as was being carried out prior to lockdown (as per the procedure established since August 1, 2019).

Our view: The aforesaid clarifications should offer some relief to stakeholders in the renewable energy industry. This should also be seen in the backdrop of reduced consumer demands by reason of the restrictions on activities imposed by the lockdown orders of various State Governments followed by the Central Government. Thermal plants may be affected as the DISCOMs may choose not the draw from them in order to comply with these instructions.



Other allied areas

CPCB Releases Guidelines for Treatment of Waste Generated During Treatment/Diagnosis/Quarantine of COVID-19 Patients

Brief background:

The Solid Waste Management Rules, 2016 (SWM Rules, 2016) and the Biomedical Waste Management Rules, 2016 (BMWM Rules, 2016) govern management, handling, treatment, and disposal of general solid waste and biomedical waste. Given the outbreak of COVID-19 and in response to queries by Urban Local Bodies (ULB), the Central Pollution Control Board (CPCB) has framed the guidelines for 'Handling, Treatment and Disposal of Waste Generated during the treatment/diagnosis/quarantine of COVID-19 Patients' (COVID-19 Guidelines or Guidelines).

Which stakeholders are required to follow the COVID-19 Guidelines?

The Guidelines are required to be followed by isolation wards, quarantine centers, sample collection centers, laboratories, ULBs, and common biomedical waste treatment and disposal facilities (**CBWTF**), and hospitals.

What are the key COVID-19 Guidelines?

- **COVID-19 Isolation Wards:**

  Healthcare facilities with isolation wards are required to:

  - Keep separate color coded bins/bags/containers in wards and maintain proper segregation of waste as per BMWM Rules, 2016.
  - Collect and store biomedical waste separately prior to handing over the same CBWTF. Use a dedicated collection bin labelled as "COVID-19" to store COVID-19 waste and keep separately in temporary storage room prior to handing over to authorized staff of CBWTF. Biomedical waste collected in such isolation wards can also be lifted directly from ward into CBWTF collection van.
  - In addition to mandatory labelling, bags/containers used for collecting biomedical waste from COVID-19 wards should be labelled as "COVID-19 Waste" so as to enable CBWTFs to identify the waste easily for priority treatment and disposal immediately upon the receipt.
  - General waste not having contamination should be disposed as solid waste as per SWM Rules, 2016.
  - The (inner and outer) surface of containers/bins/trolleys used for storage of COVID-19 waste should be disinfected with 1% sodium hypochlorite solution daily.
  - Report opening or operation of COVID-19 ward and COVID ICU ward to State Pollution Control Boards (**SPCB**s) and respective CBWTF located in the area.
  - Depute dedicated sanitation workers separately for biomedical waste and general solid waste so that waste can be collected and transferred timely to temporary waste storage area.

- **Sample Collection Centers and Laboratories for COVID-19 Suspected Patients:**

  - Report opening or operation of COVID-19 sample collection centers and laboratories to concerned SPCB. Guidelines stated above for isolation wards would also be suitably applicable in in case of test centers and laboratories.

- **Responsibilities of Persons Operating Quarantine Camps/Homes or Home-Care Facilities:**
  - General solid waste (household waste) generated from quarantine centers or camps is to be handed over to the waste collector identified by ULBs or as per the prevailing local method of disposing general solid waste.
  - Biomedical waste if any generated from quarantine centers/camps is to be collected separately in yellow colored bags (suitable for biomedical waste collection) provided by ULBs. These bags can be placed in separate and dedicated dustbins of appropriate size.
  - Persons operating Quarantine camps/centers are to call the CBWTF operator to collect biomedical waste as and when it gets generated. Contact details of CBWTFs are to be made available with local authorities.
  - Persons taking care of quarantine home/Homecare are to deposit biomedical waste if any generated from suspected or recovered COVID-19 patients, by following any of the methods as may be arranged by ULBs.
  - Biomedical waste generated from quarantine camps/quarantine-homes/homecare would be treated as 'domestic hazardous waste' as defined under SWM Rules, 2016, and are to be disposed as per provisions under BMWM Rules, 2016 and the COVID-19 Guidelines.
- **Responsibilities of CBWTFs:**
  - Report to SPCBs/Pollution Control Centers (**PCC**s) about receiving of waste from COVID-19 isolation wards / quarantine camps / quarantined homes / COVID-19 testing centers;
  - Operators of CBWTFs are to ensure regular sanitization of workers involved in handling and collection of biomedical waste;
  - Workers are to be provided with adequate personal protective equipment including three-layer masks, splash proof aprons/gowns, nitrile gloves, gum boots and safety goggles. No workers showing symptoms of illness are to work at the facility and adequate leave is to be provided to these workers along with protection of their salary;
  - Dedicated vehicles are to be used to collect COVID-19 ward waste. The vehicle should be sanitized with sodium hypochlorite or any appropriate chemical disinfectant after every trip;
  - COVID-19 waste should be disposed-off immediately upon receipt at facility and in case it is required to treat and dispose greater quantities of biomedical waste generated from COVID-19 treatment, the CBWTF may operate their facilities for extra hours, after providing information to SPCBs/PCCs;
  - Operators of CBWTFs are required to maintain separate records for collection, treatment and disposal of COVID-19 waste.

- **Duties of SPCBs/PCCs:**
  - To maintain records of COVID-19 treatment wards/quarantine centers/quarantines homes in respective States;
  - To ensure proper collection and disposal of biomedical waste as per BMW Rules, 2016 and the COVID-19 Guidelines;

- In case of States not having CBWTFs, rural or remote areas not having access to CBWTFs, the existing captive facilities of any hospital may be identified for disposal of COVID19 waste as per provisions under BMWM Rules, 2016 and COVID-19 Guidelines.
- Coordinate with CBWTFs and ULBs in establishing adequate collection and disposal of COVID19 waste.
- In case of generation of large volume of yellow color coded (incinerable) COVID-19 waste, permit incineration the same by ensuring separate arrangement for handling and waste feeding.

- **Duties of ULBs:**
  - Information on each quarantine camp/quarantine homes/homecare is to be made available with local administration and an updated list is to be provided to SPCBs from time to time;
  - In case of quarantine camps, ULBs are to ensure that biomedical waste is collected directly by CBWTFs identified by the ULB. Waste from quarantine camps is to be lifted by CBWTFs on call basis as and when the biomedical waste gets generated. Contact details of CBWTF operators is to be provided at quarantine camps;
  - ULBs are to engage CBWTF operators for ultimate disposal of biomedical waste collected from quarantine home/home care or waste deposition centers or from doorsteps as may be required depending on local situation and an agreement between the ULB and the CBWTF is to be entered into in this regard.

Our view: The Government has provided detailed steps in order to properly dispose and treat medical and general waste. The proper treatment of waste is important as it ensures that hazardous materials are properly dealt with so as to not harm the community at large. With the outbreak of COVID-19, this treatment and disposal becomes doubly essential as the contagion is known to survive on surfaces for a long period of time. Concerns if any would arise from the overcrowding of hospitals, treatment facilities and testing centers and the ability of the stakeholders to cope with the same. This would also need to be seen in the backdrop of the move of the State Governments to requisition private facilities for us as quarantine and isolation facilities. The timely release of guidelines and procedures such as these is an essential measure in containing the spread of the disease.

Madras High Court Allows Packaged Water Manufacturing Without License until July 31, 2020

Brief background:

Reportedly, the Madras High Court (**HC**) in January 2020, had directed the closure of all private water manufacturing units (**WPU**) that did not possess valid license to exploit groundwater and a No Objection Certificate from the Public Works Department, in the State of Tamil Nadu. However, in light of the difficulties faced by the State in terms of a shortage of packaged drinking water during the outbreak of COVID-19, the HC has temporarily lifted this ban vide an order dated March 23, 2020 (**Order**).

What are key features of the Order?

- The State Government will permit all WPUs to temporarily work and operate without the required license/NOC in safe/semi critical firkhas (*revenue blocks*).
- WPUs in eligible areas (non-critical areas with respect to groundwater depletion) will be allowed to work immediately, subject to the condition that 15% of their daily output is handed over free of cost to the District Collector / nominated officer in the concerned area at the nominated and designated place for the purpose of free distribution to the public. The transport of the water has to be undertaken by the WPU itself.
- In critical and over-exploited areas, applications are to be considered on a case to case basis expeditiously. Eligible WPUs may also be allowed to start operation in critical and over-exploited areas subject to providing 15% of their daily output towards free distribution.
- The HC has allowed the State Government and other concerned authorities of Tamil Nadu to issue necessary orders to create a temporary scheme up to July 31, 2020 with suitable conditions for allowing water packing units to continue production of packaged drinking water. A district level monitoring committee will supervise the implementation of the scheme.

Our view: The droughts in the State of Tamil Nadu and over-exploitation of the groundwater in the State were well documented and led to the original ban imposed by the HC. The temporary lifting of this ban will no doubt bring relief to the citizens in the State of Tamil Nadu. However, allowing the exploitation of groundwater without license and required NOC in itself does present concerns about the environmental impact of the depletion of the groundwater table in critical areas, and the safety of the packaged water.

Infrastructure and Energy: Other Regulatory Developments

Infrastructure

Supreme Court Judgement on ex-post facto Environmental Clearance

The Supreme Court (**SC**) *vide* judgment dated April 1, 2020, held that ex-post facto environmental clearance (**EC**) were unsustainable in law.

What were the facts of the case?

- The Ministry of Environment and Forests (**MoEF**) issued a circular on May 14, 2002, which envisaged grant of ex post facto ECs, subject to a graded contribution into an earmarked fund based on the investment cost of the project (**May 14 Circular**).
- Some of the respondents in the present case had challenged the May 14 Circular in the High Court of Gujarat. Subsequently the proceedings were transferred to the National Green Tribunal (**NGT**).
- The NGT *vide* its judgement dated January 8, 2016 held that the law did not permit the grant of an ex post facto clearance and that the May 14 Circular was an internal communication and did not override the provisions of the Environment Impact Assessment (**EIA**) notification dated January 27, 1994 which were issued in exercise of statutory powers conferred under the Environment (Protection) Act, 1986.
- Pursuant to the decision of the NGT, the MoEF and certain industrial units appealed before the SC.

What was the issue before the SC?

- Whether in view of the requirement of a prior EC under the EIA notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the May 14 Circular?

What were the contentions of the Parties?

Appellants

The Appellants *inter alia* submitted the following:

- The NGT did not have the jurisdiction to entertain the petition filed by the respondents.
- The EIA notification of 1994 omits the expression "prior" and was contrasted with the EIA notification dated September 14, 2006 which stipulates the requirement of a "prior" EC. While a prior EC is mandatory under the notification dated September 14, 2006, it was not under the earlier notification dated January 27, 1994.
- Once an EC has been granted for a much larger capacity after conducting a prior public hearing, the question as to whether the first EC for a lesser capacity was valid, is of no significance.
- A public hearing was not mandatory under the EIA notification of 1994. Clause 4 of the explanatory note conferred a discretion to call for a hearing in case of projects that may cause large scale displacement or with severe environmental ramifications.
- The requirement of an ex post facto public hearing was introduced by an amendment in 1997 to the EIA notification of 1994. The legality of an ex post facto public hearing was upheld by the SC in *Lafarge Umiam Mining Pvt Ltd vs. Union of India*[2].

Respondents

[2] *(2011) 7 SCC 338*

The Respondents *inter alia* submitted the following:

- The May 14 Circular was illegal because environmental jurisprudence did not recognise any concept of ex post facto clearances. Any ex post facto approval was void and the benefit of the circular cannot be given to such an industry. In this regard, reliance was placed upon the decision of the SC in *Common Cause vs. Union of India*[3].
- The May 14 Circular did not mention its source or authority of law. The source of the circular was not traceable to Section 3 of the Environment (Protection) Act, 1986 because the circular did not protect or improve the quality of the environment. The circular allowed defaulters to get ex post facto clearances and did not encourage compliance with the law.
- Whether in view of the requirement of a prior EC under the EIA notification of 1994, a provision for an ex post facto EC to industrial units could be validly made by means of the May 14 Circular?

What was the decision of the Supreme Court?

- The SC, while referring to its earlier decision in the case of *Tamil Nadu Pollution Control Board vs. Sterlite Industries (I) Limited*[4], held that the May 14 Circular was an administrative act and was beyond the scope of Section 3 of the Environment (Protection) Act, 1986 (**EPA**). Thereby, NGT had the power to decide its legitimacy.
- After analysing the EIA notification of 1994, the Court observed that when the EIA notification of 1994 mandates a prior EC, it proscribes a post activity approval or an ex post facto permission. What is sought to be achieved by the administrative May 14 Circular was contrary to the statutory notification dated January 27, 1994.
- The SC while referring to its earlier decision in the case of *Common Cause vs. Union of India*, observed that the concept of an ex post facto EC was in derogation of the fundamental principles of environmental jurisprudence and was an anathema to the EIA notification dated January 27, 1994. It was detrimental to the environment and could lead to irreparable degradation.
- The SC while observing that environment law cannot countenance the notion of an ex post facto clearance as it would be contrary to both the precautionary principle as well as the need for sustainable development, held that the May 14 circular was unsustainable in law.

Our view: The aforesaid decision clearly establishes the illegality of ex-post facto environmental clearances, and in our submission is in line with the intent with the EPA. Importantly, the SC adopted a balanced approach and set aside the direction of the NGT for closure of operations of units for having operated without environmental clearances in the past without ordering a closure of operations. Instead, penalties equivalent to INR 10 crores each were imposed on the units. Going forward, developers of infrastructure and other industrial facilities would need to obtain an EC prior to commencing works. The judgment is a reminder to industry that the Apex Court would not condone non-compliance of environmental laws, which laws would be applied stringently.

[3] *(2017) 9 SCC 499*
[4] *2019 SCC Online SC 221*

ENERGY

APTEL Judgement on COD Extension

The Appellate Tribunal for Electricity (**APTEL**) *vide* judgment dated February 28, 2020 allowed an appeal filed by Azure Sunrise Private Limited (**Appellant**) against the order of the Karnataka Electricity Regulatory Commission (**KERC**), whereby the KERC had reduced the approved extension of time granted by the distribution licensee, Chamundeshwari Electricity Supply Corporation Limited (**CESCOM**).

(CESCOM and KERC are hereinafter collectively referred to as **Respondents**)

What were the facts of the case?

- The Appellant was a special purpose vehicle set up by Azure Power India Private Limited for developing a 50 MW capacity of solar PV power plant in Rangenahalli village.
- A power purchase agreement (**PPA**) was executed between Appellant and CESCOM. Both the original executed copies of the PPA were retained by the CESCOM and no original copy was provided to the Appellant as the same was to be sent to the KERC for approval.
- The Appellant was unable to fulfil its obligations under the 'Conditions Precedent' without an effective, executable and valid PPA as approved by the KERC.
- The Appellant was provided the effective, executable and valid PPA after delay of about 137 days from the date of the signing of the PPA by the Appellant, delay being solely due to CESCOM's acts/omissions.
- CESCOM granted a 137 day extension to the Appellant to fulfil the 'Conditions Precedent' and Effective Date of the PPA was changed as the date on which the KERC gave its approval. The associated change in timelines was affected by a supplemental agreement executed between Appellant and CESCOM, which was sent to the KERC for its approval.
- Pursuant to the supplemental agreement, the KERC directed CESCOM to incorporate a revised lower tariff as penalty for delay in commissioning of the project. In response to the direction by the KERC, CESCOM retracted the extension of 137 days given to the Appellant.
- The Appellant filed a petition before the KERC, following which the State Commission reduced the 137 days extension to 25 days.

What were the issues?

Some of the key issues formulated by APTEL were as follows:

- Whether the applicable tariff in a PPA, which is pursuant to a competitive bidding process, can unilaterally and arbitrarily be reduced/revised without reference to the terms of the PPA?
- Whether the KERC, having approved the terms of the PPA, can sit in judgement on contractual issues already decided by the parties, when the same are not the subject matter of any dispute before it?
- Whether, after receiving the approval of the KERC to the terms of the PPA, the DISCOMs are obliged to obtain the approval of the KERC thereafter in all contractual decisions, including those related to extension of time under the PPA?
- Whether an extension of time, once given by the DISCOM, on which the parties have relied on to invest in and perform the project, can be retrospectively revised by the KERC to the detriment of the power producer?

- Whether the KERC has the suo moto powers to override the decisions taken by the DISCOM in matters of extension of time even where such matters have not been raised before the KERC?

What were the submissions of the parties?

Appellant

- The extension of 137 days was due to CESCOM'S failure to provide an original duly approved PPA.
- The Appellant could not have taken any steps in execution of project without original duly approved PPA.
- There could not have been any revision/reduction of the applicable tariff of INR 6.89 per unit under the PPA and there was no provision in the PPA or the supplemental PPA for reduction/revision of the tariff from the bid tariff rate.
- By granting 25 days extension, the KERC agreed that an executable PPA is a pre-requisite requirement.
- A PPA becomes an enforceable document only after approval of the KERC.
- KERC cannot intervene in contractual decisions between the DISCOMS and generating companies.
- Extension of 137 days would not constitute as an alteration/modification of the PPA.
- CESCOM cannot claim damages as no loss has been suffered.

Respondents

- CESCOM was not responsible for the delay caused in obtaining approval by commission.
- Non-receipt of executed PPA did not prevent Appellant from taking *bona fide* steps towards effective implementation of the project.
- PPA to become enforceable/ binding only upon the approval of commission, was never an issue before the KERC or the APTEL.

What was finally decided by APTEL?

- While going through the impugned order of the KERC, the APTEL noticed that the KERC itself had held that its decision conveyed vide a letter addressed to the CESCOM, to incorporate the reduced tariff was erroneous and not valid in law. However, the KERC intervened in the extension of time and reduced the same to 25 days from the granted extension of 137 days.
- The facts and circumstances of the case placed before the KERC and the adjudication done by the KERC were in contravention to each other and neither reduction in extension of time nor the reduction in tariff was justified.
- In the lights of the facts and submissions made by parties, the KERC's order to reduce the extended time and tariff along with imposition of liquidated damages was held to be not sustainable in the eyes of law was set

Our view: The decision of the APTEL will help protect developers who are faced with similar problems of delay in achievement of COD due to acts/omissions of DISCOMS and State Regulatory Commissions. This is a positive step to minimize financial risks to projects.

India And Sweden Announce Co-Funding Program For Smart Grids

On March 4, 2020, India and Sweden announced the India-Sweden Collaborative Industrial Research & Development Program at India Smart Utilities Week (*an international conference and exhibition on smart grids and smart cities)*. As part of this program, the Department of Science & Technology (**DST**) and the Swedish Energy Agency (**SEA**) signed a 'Protocol of Cooperation' (**Smart Grid Protocol**) designed to utilize Sweden's expertise in smart grids to address challenges in India.

What are Smart Grids?

As per the National Smart Grid Mission (driven by the Ministry of Power, India), a Smart Grid can be defined to mean, "*an electrical grid with automation, communication and IT systems that can monitor power flows from points of generation to points of consumption (even down to appliances level) and control the power flow or curtail the load to match generation in real time or near real time.*"

Smart Grids are especially beneficial to the integration of renewable energy with the existing conventional sources of power generation. As renewable energy tends to be variable and intermittent, a mechanism is required to deal with the uncertainty and variation in supply so as to maintain the grid's stability. They are meant to create an efficient electricity delivery system that can also be utilized to distribute electricity to remote places in India. Adoption of Smart Grids would require efficient transmission and distribution systems along with participation and integration at the consumer level. The core idea is to monitor in real time (or as close to real time as possible) the patterns of supply and consumption to reduce energy losses.

Details of pilot projects sanctioned by the National Smart Grid Mission which have been completed or are under implementation can be found here: **https://www.nsgm.gov.in/en/content/sg-pilot.**

What are the key features of Smart Grid Protocol?

- The Smart Grid Protocol envisages a collective investment of USD 5 million, with the SEA contributing USD 2.6 million (over the course of 4 years) and the DST contributing to the remaining USD 2.4 million.
- The investment is to be directed into digitally enabling clean energy integration, industrial development projects, and innovation in new products, processes or technologies.
- A funding mechanism is to be created by the DST and SEA through which support may be sought for joint research and development projects.
- The collaboration aims to develop technologies that can be commercialized in a time frame of two years.

Our view: India's diversity in terms of geography and purchasing power, and its distinct rural-urban divide provides a substantial challenge to ensuring supply of and access to power for all its citizens. Here, ensuring the supply of power broadly has two considerations: (i) the actual quantum of the supply of electricity which can be tackled by commissioning of new power projects (renewable and conventional both); and (ii) the efficiency of the delivery through the distribution and transmission systems. The potential normalization of Smart Grids attempts to bolster the latter of these two considerations, targeting minimal loss of energy as a means of increasing the supply. While India may be years away from completely adopting Smart Grids, the government's recognition of the inefficiency of the current grid systems, evidenced through indigenous efforts in research and development and international collaborations to transplant expertise paints an optimistic picture. Further, smart grids can address issues around the unreliability of renewable energy, which is desirable considering the current push towards renewable energy generation.

Public Procurement Order

When and by whom was the Order issued? What was its purpose?

- On March 17, 2020 the Ministry of Power issued an order (**March Order**) prescribing the minimum local content in respect to the distribution sector procurement which would guide the procuring entities.
- The March Order was in furtherance of the Public Procurement (Preference to Make in India) Order, 2017 (**Make in India Order**) issued by the Department of Promotion of Industry and International Trade (**DPIIT**).

What was the Make in India Order?

- The main purpose of the Make in India Order was to encourage **Make in India** to promote manufacturing and production of goods and services in India with a view to enhancing income and employment.
- All procuring entities were required to abide by the guidelines issued in the Make in India Order in respect of procurement in the Power Distribution Sector.
- The March Order specified minimum local content requirements for electrical equipment used in the distribution sector and 33/11 kV and below sub-stations constructed on turnkey/EPC Contract basis.

How were grievances due to violation of the March Order handled?

- A Standing Committee constituted by the MOP would examine the grievances arising out of alleged violations of the Make in India Order by procuring agencies and suggest appropriate actions for the grievances.
- A complaint fee of the higher of INR 2,00,000 or 1% of the value of the local item being procured (subject to a maximum of INR 5,00,000) is to be deposited whilst lodging a grievance.
- In case the complaint is found to be incorrect, the complaint fee was to be forfeited. In case, the complaint is upheld and found to be substantially correct, deposited fee of the complainant was to be refunded without any interest.

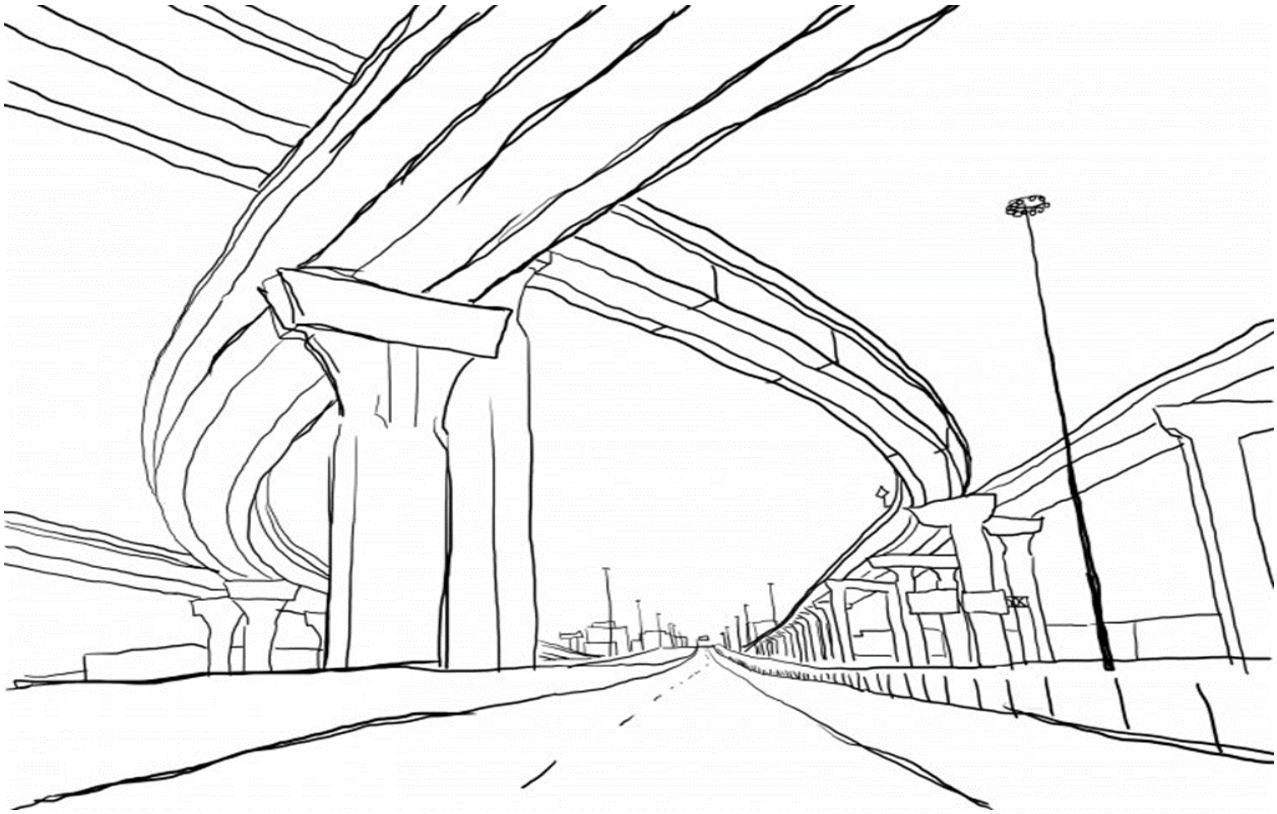
Our view: The March Order accords clarity to the minimum local content requirements and should bolster the Make in India initiative. This should also discourage developers from using imported cells and modules to develop projects under the domestic content requirement category. Given the current climate, disruptions in supply chains and reduced international trade, self-reliance may emerge as one of the key fallouts of this crisis and these measures would pave the way for such an objective.

The Mineral Laws (Amendment) Bill, 2020

ELP's January 2020 Infrastructure and Energy Digest had analyzed the provisions of the Mineral Laws (Amendment) Ordinance, 2020 (**Ordinance**) which was promulgated on January 10, 2020. Amendments to Mines and Minerals (Development and Regulation) Act, 1957 and the Coal Mines (**Special Provisions**) Act, 2015 were made vide the Ordinance.

On March 13, 2020, the Mineral Laws (Amendment) Act, 2020 (**Amendment Act**) received the assent of the President. The Amendment Act has been brought into force retrospectively with effect from January 10, 2010 (*the date of the Ordinance*).

Our view: Please refer to our January 2020 Infrastructure and Energy Digest for the detailed analysis of the amendments.



RENEWABLE ENERGY

CERC adjudicates on tariff for inter-State Transmission System (ISTS) wind power projects

The CERC vide its order dated March 18, 2020 (**Order**) in a petition filed by NTPC Limited (**Petitioner**), adjudicated on the determination of tariff for wind power projects.

Consideration was given by the CERC to the "Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects" dated December 8, 2017 issued by the Ministry of Power (**Tariff Bidding Guidelines**) and the CERC (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2020 (**Trading Licence Regulations**).

What was the background of the petition?

Before the CERC, the Petitioner submitted as follows:

- It had issued, in compliance with the Tariff Bidding Guidelines, a Request for Selection (**RfS**) along with draft PPA and Power Sale Agreement (**PSA**) for setting up wind power projects.
- A final tariff had been arrived at after completion of an e-Reverse auction and the capacity allotted was determined.
- Pursuant to letters of intent and allocation of capacity, the Petitioner entered into PPAs with the special purpose vehicles formed by successful bidders.
- Certain buying utilities/distribution licensees failed to obtain requisite approvals from the respective State Electricity Regulatory Commissions within the time frame stipulated under the PPA and PSA.
- Accordingly, non-fulfilment of condition precedent under the PPA/PSA and consequent cancellation of PPAs by distribution companies resulted.
- Therefore, the Petitioner had, in respect of 250 MW wind power projects and in the interest of Buying Utilities/Distribution Licensees, agreed to sell entire 250 MW of wind power at the pooled tariff (INR 2.77/kWh plus trading margin of INR 0.07/kWh) covered through competitive bid process.

What were the prayers of the Petitioner?

The Petitioner sought the following reliefs from the CERC:

- Adoption of tariff discovered in the competitive bid process for generation and sale of 200 MW wind power project to be established by Sprng Vayu Vidyut Private Limited and sold to Punjab State Power Corporation Limited (**respondents**).
- Exemption from compliance with Clause 5.1.1 of the Tariff Bidding Guidelines which require a procurer to inform the Appropriate Commission about the initiation of bidding.

What was the decision of the CERC?

Whilst observing that the Petitioner had selected bidders and tariffs in accordance with the Tariff Bidding Guidelines, the CERC directed as follows:

- It ratified the tariff proposed by the Petitioner, subject to compliance with relevant provisions of the Trading License Regulations in respect of trading margin.

- It granted exemption to the Petitioner from complying with Clause 5.1.1 of the Tariff Bidding Guidelines. However, it directed the Petitioner to observe necessary compliance with the Tariff Bidding Guidelines in the future.

Our view: Cancellation or suspension of projects entails huge losses, not only for the procurer, but also for the successful bidder/project developer, the various agencies involved and the consumers. However, in certain cases (such as the case covered by the Order), tariff through competitive bid process become workable propositions for the parties involved.

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