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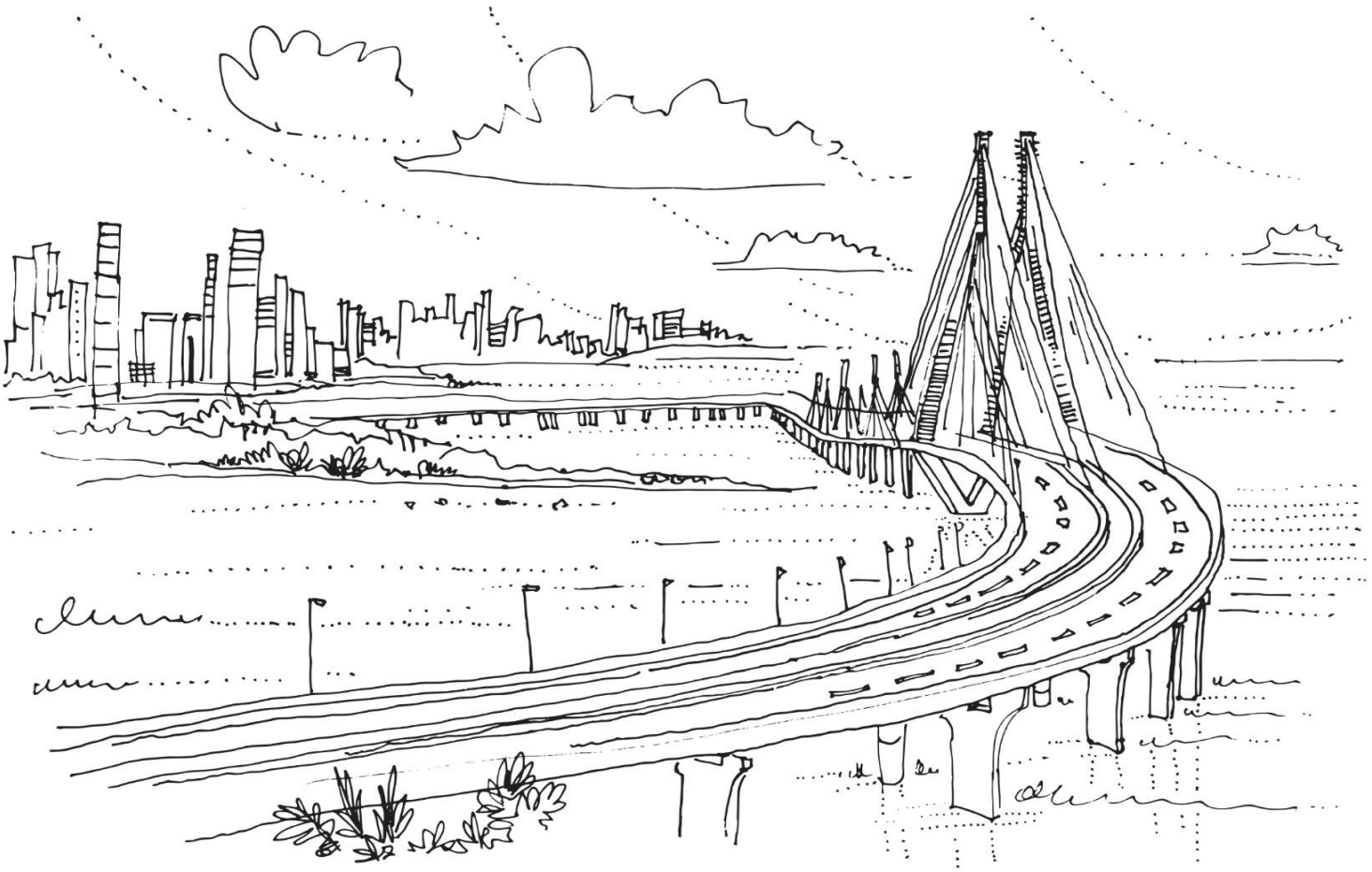

Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

November 2019

INFRASTRUCTURE

Case Study - Hindustan Construction Company Limited and Anr. v. Union of India and Ors[1]

Why is the decision so important?

On 27 November 2019, the Supreme Court of India (**SC**), delivered a seminal verdict in the case of *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.* wherein, inter alia[2], the constitutional validity of Section 87 of the Arbitration and Conciliation Act, 1996 (Act) was challenged.

Award holders in India have historically had an arduous time realizing the proceeds of an award when awards are challenged by award debtors and the enforcement proceedings are automatically stayed. **By the present decision, the SC, under the Act, has given means to an award holder to secure a part or whole of the award amount pending the outcome of the petition to set aside the award under the Act.** The award debtor, pending the outcome of the challenge to the award, is compelled to file an application for stay against the enforcement of the award wherein it may be required to deposit the award amount in court. This position which was made available through the Arbitration and Conciliation (Amendment) Act, 2015 (**2015 Amendment Act**) has now been extended to even those matters which commenced prior to 23 October 2015.

What is the background of the case?

1996

A key issue under the Act was that a petition for setting aside the award, filed under section 34 by an award debtor, meant an automatic stay against the enforcement of the award[3]. This seemed antithetical to the nature of arbitration, i.e., a speedy and efficacious alternate dispute resolution mechanism. Therefore, an award holder could not realize the amounts under an award, until the setting aside petition was finally disposed.

2015

The above dichotomy, amongst others, was sought to be rectified by 2015 Amendment Act whereby under section 36(3) the award debtor was now required to make a specific application seeking a stay against the enforcement of the award. The said stay could be granted by the court subject to conditions including deposit of the award amount. Soon after the 2015 Amendment Act came into force, questions arose as to the applicability of the 2015 Amendment Act i.e. whether it was applicable retrospectively or prospectively. In the ensuing months companies that had received arbitral awards in their favor were unsure if the awards were enforceable or would suffer the fate of an automatic stay. Thus, section 26 of the 2015 Amendment Act, which dealt with the applicability thereof came under judicial scrutiny in various courts across the country.

2017

In the meanwhile, the ambiguity was noted by the Srikrishna Committee Report [4]in 2017. The said report recommended that certainty ought to be brought about by clarifying that the 2015 Amendment Act was prospective in nature.

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[1] WP (Civil) No. 1074 of 2019

[2] At the outset, this decision involved other facets including a challenge to the provisions of the Insolvency and Bankruptcy Code, 2016. However, we will not venture into that realm in the present discussion.

[3] *National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.,* 2004 1 SCC 540 – While the judgment held that the mere filing of an application under Section 34 of the Act operates as an automatic stay on the operation of the award, the judgment also observed that a recommendation had been made by the relevant Ministry to the Parliament to amend the language of Section 34 because an automatic stay would be against the principles of an efficient alternate dispute resolution system.

4 Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India – available at http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

The Supreme Court's decision in BCCI[5]

Before a legislative clarification on the applicability of the 2015 Amendment Act could be made, the SC in *BCCI v. Kochi Cricket Private Limited (BCCI*) clarified that while the 2015 Amendment Act was prospective in nature, the change brought about in the position vis-à-vis the erstwhile automatic stay against enforcement, was retrospectively applicable. Thus, even for arbitrations pre-dating October 23, 2015, the award holder could not be simply shut out by a pending setting aside petition against the award.

2019

Unfortunately, despite the observation of the SC in *BCCI*, the legislature, enacted the Arbitration and Conciliation (Amendment) Act, 2019 (**2019 Amendment Act**), repealing section 26 of the 2015 Amendment Act and clarifying through section 87 that the 2015 Amendment Act was prospectively applicable only. This meant that those companies which (in pending matters) had relied upon the *BCCI* decision to claim benefit of the section 36(3) of the Act and the provisions for enforcement, were forced to reevaluate their positions.

The Issue before the SC

These companies (**Petitioners**) hence moved the SC, by way of a writ, challenging the constitutionality of section 87 introduced by the 2019 Amendment Act, the repeal of section 26 of the 2015 Amendment, as also certain provisions of IBC.

What was the verdict and reasoning?

The SC agreed with the Petitioners that the reading of the unamended Act leads to the conclusion that there was a conscious deviation from the UNCITRAL Model Law by not allowing two bites at the cherry to an award debtor, i.e., one during setting aside proceedings under section 34 and one during enforcement proceedings under section 36. The SC read section 35 (which deals with finality of an award) along with section 34 and 36 to state that it was never intended that a setting aside petition would automatically stay enforcement.

This obviously was a complete departure from the earlier position that had been stated by the SC itself. In *NALCO*[6], *Fiza*[7] and *National Buildings*[8] the SC had held that a setting aside petition would inherently stay the enforcement of an award. Thus, in the decision under discussion, while coming to its conclusion as above, the SC expressly overruled these decisions.[9]

The SC also relied upon section 9, which enables a party to apply for interim reliefs after making of the award but before it is enforced, in support of the conclusion that the award is enforceable and there is no automatic stay against enforcement upon the filing of a setting aside petition. The SC clarified that even under the Act, there was never any automatic stay intended and that the 2015 Amendment Act was merely clarificatory in this regard. By extension, the SC implied that the 2015 Amendment Act was therefore retrospectively applicable.

The SC clarified that having held that there was no automatic stay under the unamended Act, the 2015 Amendment Act was only introduced to clarify such position. Therefore, section 87 was contrary to the object sought to be achieved by the 2015 Amendment Act as it sought to make the 2015 Amendment Act only applicable from 23 October 2015. Further, the legislature without referring to the *BCCI* decision which had pointed out the pitfalls of introducing such a provision, had brought into play a provision that was manifestly arbitrary, without adequately determining principle, and contrary to public interest. The SC agreed with the Petitioner that the introduction of section 87 resurrects the mischief sought to be corrected by the 2015 Amendment Act and was therefore unconstitutional. The SC hence found the introduction of section 87 and the repeal of section 26 of the 2015 Amendment Act to be violative of Article 14 of the Constitution of India.

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5 *BCCI v. Kochi Cricket Private Limited*, (2018) 6 SCC 287
6 *National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.*, (2004) 1 SCC 250
7 *Fiza Developers and Inter-trade Pvt. Ltd. V. AMCI (India) Pvt. Ltd.*, (2009) 17 SCC 796
8 *National Buildings Construction Corporation Ltd. V. Lloyds Insulation India Ltd.*, (2005) 2 SCC 367
9 The SC clarified that the said decisions were only overruled on this limited aspect.

The SC then clarified that the position in *BCCI* continues to hold good as on date, i.e., by filing a setting aside petition there would be no automatic stay against the enforcement of any arbitral award, irrespective of when the arbitration was commenced.

Our view: It is well known that over INR 38,000 crores is held up in litigation in the roads sector itself as the sums due under arbitral awards have not been deposited on account of automatic stay available to the award debtor by simply filing a setting aside petition under section 34. This malady is spread across various other sectors as well and not just limited to cases where the governmental agencies are award debtors. The decision of the SC will therefore provide much needed relief to award holders who no longer need to wait the average six to seven years before realizing the awarded amounts. In the short term, this would perhaps inject much needed liquidity in strained sectors and alleviate the balance sheets of several companies. However, the key takeaway is the paradigm shift in the attitude and approach of the judiciary towards arbitration in India which bodes well for the future of arbitration in India.

CEA approves amendments in NHAI TOT Model

On November 26, 2019 the Cabinet Committee on Economic Affairs (**CEA**) approved the proposed amendments in the Toll Operate Transfer (**TOT**) Model developed by the National Highways Authority of India (**NHAI**). These amendments are aimed at monetizing existing operational projects that have a 1-year history of revenue generation through tolls. The Ministry of Road Transport and Highways or the NHAI will approve projects for monetization on a case to case basis.

What is the TOT model?

- The TOT model was developed in order to raise funds from the monetization of existing operational projects.
- Under the TOT model, investors make lump sum payments to the NHAI, for the right to collect toll on these projects for long terms.
- The investors are assigned the right to collect tolls and operate the project for a pre-determined term in order to recover their investments.
- The TOT model was proposed to monetize projects that had been developed under other Public Private Partnership models.
- The aim of the NHAI is to reduce the investors' uncertainty in the existing TOT model and allow the NHAI to more efficiently monetize its existing assets.
- The additional funds received from the investments of the private sector are to be utilized for the operation and maintenance requirements of highways in India.

What are the changes proposed?

- The current TOT model considered existing projects that have been generating revenue for a minimum period of two years.
- The proposed amendments have reduced this period to 1 year of revenue generation so as to expand the ambit of the TOT model in order to make the proposition more attractive to investors.
- As such, 75 projects have been identified for monetization under the TOT model, which will be bundled under 10 separate bids.
- This is aimed at attracting the economies of scale of the private sector.

- Another significant change that has been reportedly proposed in the existing model is that the NHAI now would have the power to vary the concession period of the projects to 15-30 years as opposed to the present concession period of 30 years.

Our view: In light of the lack of privatization of public sector undertakings, the TOT model would allow the government to raise funds from the private sector, while addressing the reluctance of investors to back a project from scratch. This should serve as one of the avenues to address the shortage of funds plaguing the infrastructure sector in India. Should the proceeds of the TOT investments be utilized efficiently to further develop the existing road infrastructure and implement fresh projects, the same would pose as an attractive model for the investors. The widening of the ambit of the TOT model appears to be welcome attempt at maximizing the utility of existing projects.

Proposed Recycling of Ships Bill, 2019 (Bill) and accession to the Hong Kong International Convention for Safe and Environmentally Sound Recycling of Ships, 2009 (Convention)

The Bill and accession to the Convention was introduced in Lok Sabha on November 25, 2019.

What are the objectives of the Bill?

- The Bill aims to provide for the regulation of the recycling of ships by setting certain standards and laying down the statutory mechanism for enforcement of such standards.
- The Ship-Breaking Code, 2013 governs the ship recycling activity in India and lays down the standards for environmental protection and workers' safety. However, the aforesaid code does not provide penalties for contravention of the provisions thereof or deal with the restrictions and prohibitions on use of hazardous materials on ships. The Bill seeks to fill in such lacuna.

What is the extent of applicability of the Bill?

- The Bill shall apply to:
  - Any existing ship which is registered in India,
  - A new ship which is required to be registered in India, wherever it may be;
  - Ships that enter a port, shipyard or offshore terminal or a place in India over which India has, or may have, exclusive jurisdiction with respect to control of pollution;
  - Any warship, naval auxiliary or other ship owned or operated by an Administration and used on Government non-commercial service; and
  - Ship recycling facilities operating in India.
- The Bill exempts:
  - Any warship, naval auxiliary, or other ships owned or operated by the Government and used for Government non-commercial purpose;
  - Ships of less than 500 gross tonnage.

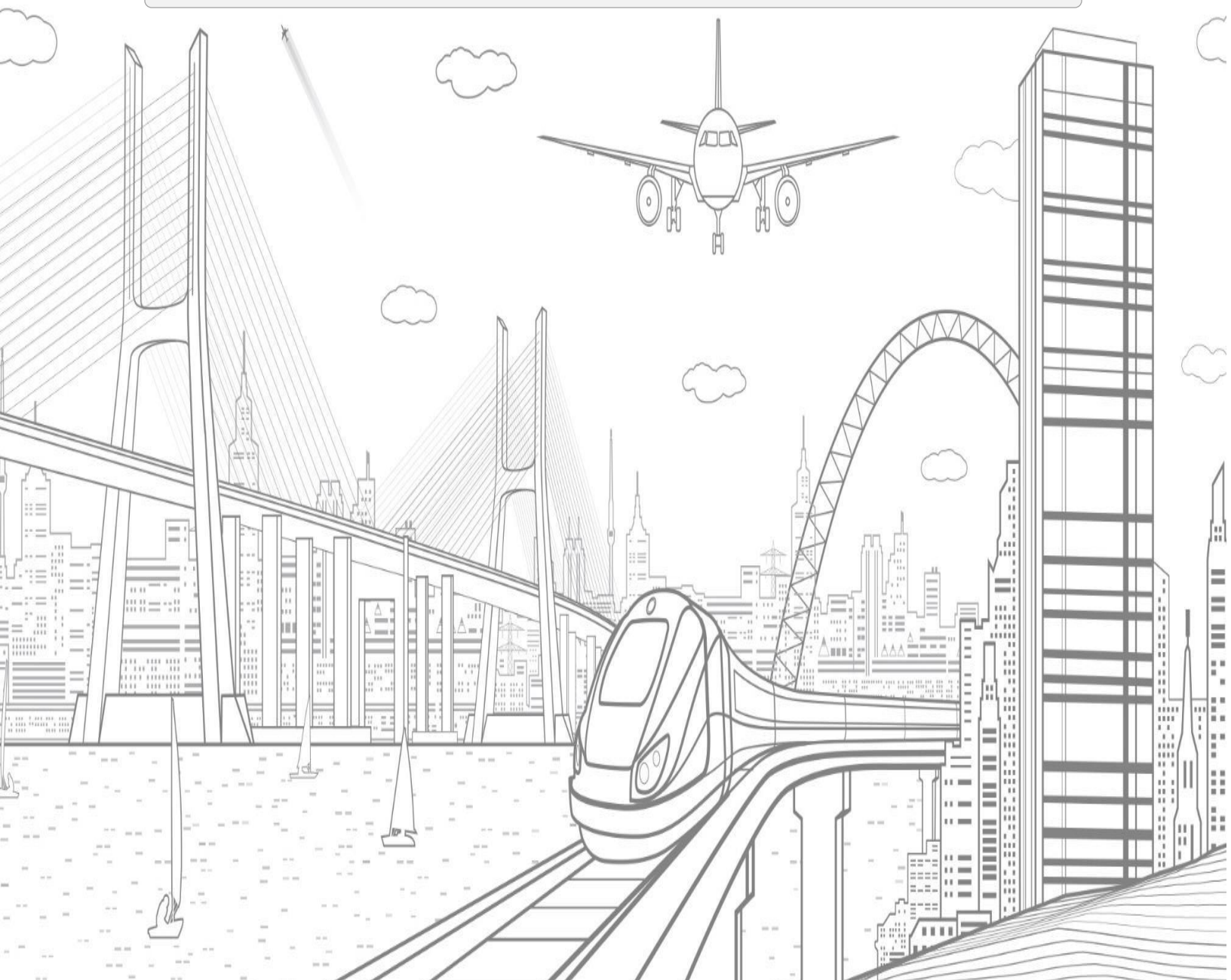
What are the provisions in the Bill relating to the restrictions on use of hazardous material?

- The Bill restricts and prohibits the use or installation of hazardous material by the ship. The owner of every new ship is required to make an application to the National Authority for a certificate on inventory of hazardous materials within a period of 5 years from the date of commencement of this Bill, which shall be issued or renewed for such period, not exceeding 5 years.

What is the process for re-cycling a ship under the Bill?

- A proposed Ship Recycler can recycle a ship after a certificate of authorisation has been obtained by the ship recycler for ship recycling facility from the Competent Authority or an organisation recognised by it.
- As per the Bill, the owner of a ship who intends to recycle his ship can do so after making an application to the National Authority for a ready for recycling certificate and the Ship Recycler is allowed to recycle any ship after preparing a ship recycling plan in accordance with the Bill.

Our view: Given that the Bill proposes to prohibit the use or installation of hazardous materials and to enable ships to be recycled only in authorized ship recycling facilities, the same should reduce concerns on environmental safety and deter violations by ship owners.



ENERGY

Order by APERC on delayed payment to AP discom

The Andhra Pradesh Electricity Regulatory Commission (**APERC**) vide its order dated November 16, 2019 (**Order**), directed the Andhra Pradesh Southern Power Distribution Company Limited (**APSPDCL**) to make payment of interest on delayed payments to a developer of a biomass power project at Hyderabad.

What is the background in which the order has been issued?

- A petition was filed by M/s. Satya Maharshi Power Corporation Limited (**Petitioner**) against APSPDCL and others (**Respondents**) for claiming payment of interest on delayed payment of power bills for the financial years 2016-2017 and 2017-2018 in terms of a Power Purchase Agreement dated May 10, 2004[10] (**PPA**).
- The Petitioner had supplied energy to APSPDCL pursuant to the PPA.
- Alleging delayed payments on the part of the Respondents, the Petitioner invoked billing and payment terms under the PPA for claiming interest on the delayed payments from the Respondents.

What were the arguments of the Respondents?

- The Respondents did not dispute the fact of delayed payments.
- However, citing heavy losses as a reason for delayed payment under the PPA, APSPDCL requested a reduction in the Petitioner's claim for interest on grounds of public interest.

How was the decision taken by APERC?

- Considering the surrender by the Petitioner of a part of the claim regarding the interest, APERC directed the Respondents to pay INR 45 lakhs towards full and final settlement of the Petitioner's claim for interest.
- Failure on the part of the Respondents to pay the entire accrued interest liability would make them liable to pay the entire interest liability (as opposed to the reduced amount arrived pursuant to the settlement).

What was the background leading to the decision by APERC?

- The APERC relied upon Clause 5.2 under Article 5 "Billing and Payment" of the PPA which provided that the Respondents would be liable to pay interest at a rate of 10% per annum as per existing nationalized bank rate on any payments made beyond the due date of payment.
- The Respondents did not dispute the fact of delayed payment.

Our view: Delayed payments by distribution companies have plagued the power sector. Recognizing this, the Central Government had vide its order effective August 1, 2019 provided that power would be despatched by the Regional Load Despatch Centres (**RLDC**) and National Load Despatch Centres (**NLDC**) only after they are informed by the generating company and/distribution companies that a Letter of Credit for the desired payment security mechanism has been opened and copies are made available to the concerned generating company.

It may however be noted that the Andhra Pradesh High Court had recently stayed proceedings by the Central Government against electricity distribution companies in Andhra Pradesh which were not providing letters of credit to power generators.

In this backdrop, the Order upholding the right of the Petitioner to claim interest on delayed payments serves as a check on distribution companies as delayed payments or non-payments to generators would be penalized.

[10] The order refers to the date of the PPA as May 10, 2004. However, as per the details of hearings available at: http://aperc.gov.in/admin/upload/APERCHearings09072019.pdf, the PPA is dated as of May 10, 2019.

RENEWABLE ENERGY

Grant of additional 9 months for availing waiver of inter-state transmission charges

The Ministry of Power (**MoP**) has vide its order dated November 6, 2019 (**New Order**), extended the time period for availing waiver of inter-state transmission charges and losses on transmission of electricity generated from solar and wind sources of energy, previously laid down in its order dated February 13, 2018 (Earlier Order).

What was the time period for availing waiver under the earlier order?

Waiver was previously available for projects based on solar and wind resources commissioned till March 31, 2022.

What are the terms of the waiver under the new order?

- The deadline for waiver has been extended to include projects based on solar and wind resources commissioned till March 31, 2022
- The following terms of waiver previously notified by the MoP vide the earlier order[11] remain unchanged:
  - The waiver is available for 25 years from the date of commissioning of the solar and wind projects.
  - The waiver is applicable to all entities, including distribution companies for compliance of their renewable purchase obligation.
  - The waiver is available exclusively to solar and wind projects awarded through competitive bidding process in accordance with guidelines issued by the Central Government.

Our view: The New Order which serves to amend the Earlier Order by extending the deadline for exemption from inter-state transmission charges until December 31, 2022 reinforces the intent of the MoP to encourage renewable sources of energy.

AP Government amends Wind – Solar Hybrid Power Policy 2018

On November 18, 2019, the Government of Andhra Pradesh (**AP Government**) amended its Wind – Solar Hybrid Power Policy 2018 (**AP Power Policy**). This amendment was in response to a statutory audit which reported an abnormal spurt in the cost of purchasing power. The AP Government has made the amendments in order to address the deteriorating financial position of the state's power distribution companies (**APDISCOMS**).

What are the key amendments made?

- **Transmission and Distribution charges for wheeling of power**

  Before the amendments, the AP Power Policy provided incentives in the form of exemption of payment of the transmission and distribution charges (only for connectivity to the nearest Central Transmission Utility (**CTU**) via the State Transmission Utility (**STU**) network) for inter- state wheeling of power. Subsequent to the amendment, the Andhra Pradesh Electricity Regulatory Commission (**APERC**) would now determine the

[11] Subsequently notified by the Central Electricity Regulatory Commission (CERC) on March 27, 2019, vide the CERC (Sharing of inter-State Transmission Charges and Losses) (Sixth Amendment) Regulations, 2019

transmission and distribution charges to be paid to the concerned distribution / transmission licensees for connectivity to the nearest CTU via STU network for inter- state wheeling of power and via STU for intra-state wheeling of power.

- **Energy banking**

  The earlier AP Power Policy provided for the 100% banking of energy throughout the year and that the unutilized banked energy would be purchased by the APDISCOMs at a rate determined by the APERC. However, these provisions have been removed by the amendment to the AP Power Policy.

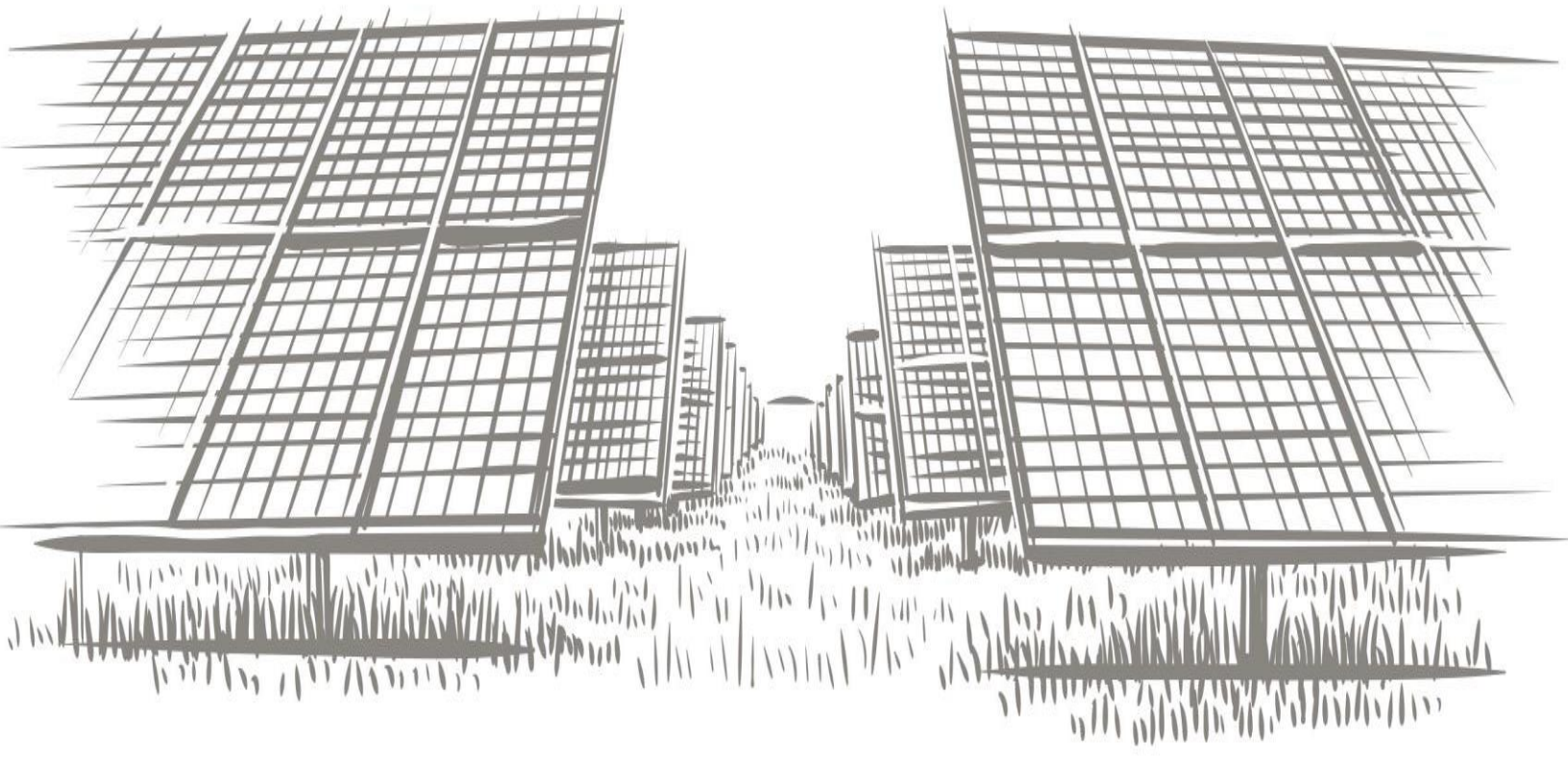
- **Tariff costs**

  The earlier AP Power Policy provided that the APDISCOMs would procure around 2,000 MW of solar power capacity in a phased manner within the next 5 years depending on the requirement in the state. The APDISCOMs would enter into long term PPA of 25 years with developers who are selected based on a competitive procurement process and at a tariff rate discovered by this process. However, the amendment states that, the aforementioned tariff discovered as such (or determined through any other process) for renewable energy projects will not exceed the difference between pooled variable cost and balancing cost. The APERC will now determine the pooled variable cost and the balancing costs.

- **Land**

  The amendment states that all land allotment done by the AP Government will be done only on a lease-hold basis. The earlier AP Power Policy provided that the District Collector would hand over land to the Non-conventional Energy Development Corporation of Andhra Pradesh Limited (NREDCAP) which would in turn enter into lease agreement with the developer collecting lease rentals for 25 years at 10% of the value of land with 10% increase every five years from the date of commissioning of the project.

Our view: With the withdrawal of the above incentives provided to the renewable energy developers and the uncertainty generated by the AP Government's attempts to unliterally modify executed power purchase agreements, the above amendments may further hurt investor sentiment. However, one can hope that the amendments do offer the intended and much needed relief to the APDISCOMS.



ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

109 A, 1st Floor, Dalamal Towers
Free Press Journal Road, Nariman Point
Mumbai 400 021
T: +91 22 6636 7000

NEW DELHI

801 A, 8th Floor, Konnectus Tower, Bhavbhuti Marg
Opp. Ajmeri Gate Railway Station, Nr. Minto Bridge
New Delhi 110 001
T: +91 11 4152 8400

AHMEDABAD

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/8

PUNE

202, 2nd Floor, Vascon Eco Tower
Baner Pashan Road
Pune 411 045
T: +91 20 4912 7400

BENGALURU

6th Floor, Rockline Centre
54, Richmond Road
Bengaluru 560 025
T: +91 80 4168 5530/1

CHENNAI

No 18, BBC Homes, Flat-7 Block A
South Boag Road
Chennai 600 017
T: +91 44 4210 4863

elplaw.in

insights@elp-in.com

/elplaw.in

/ELPIndia

/company/economic-law-practice