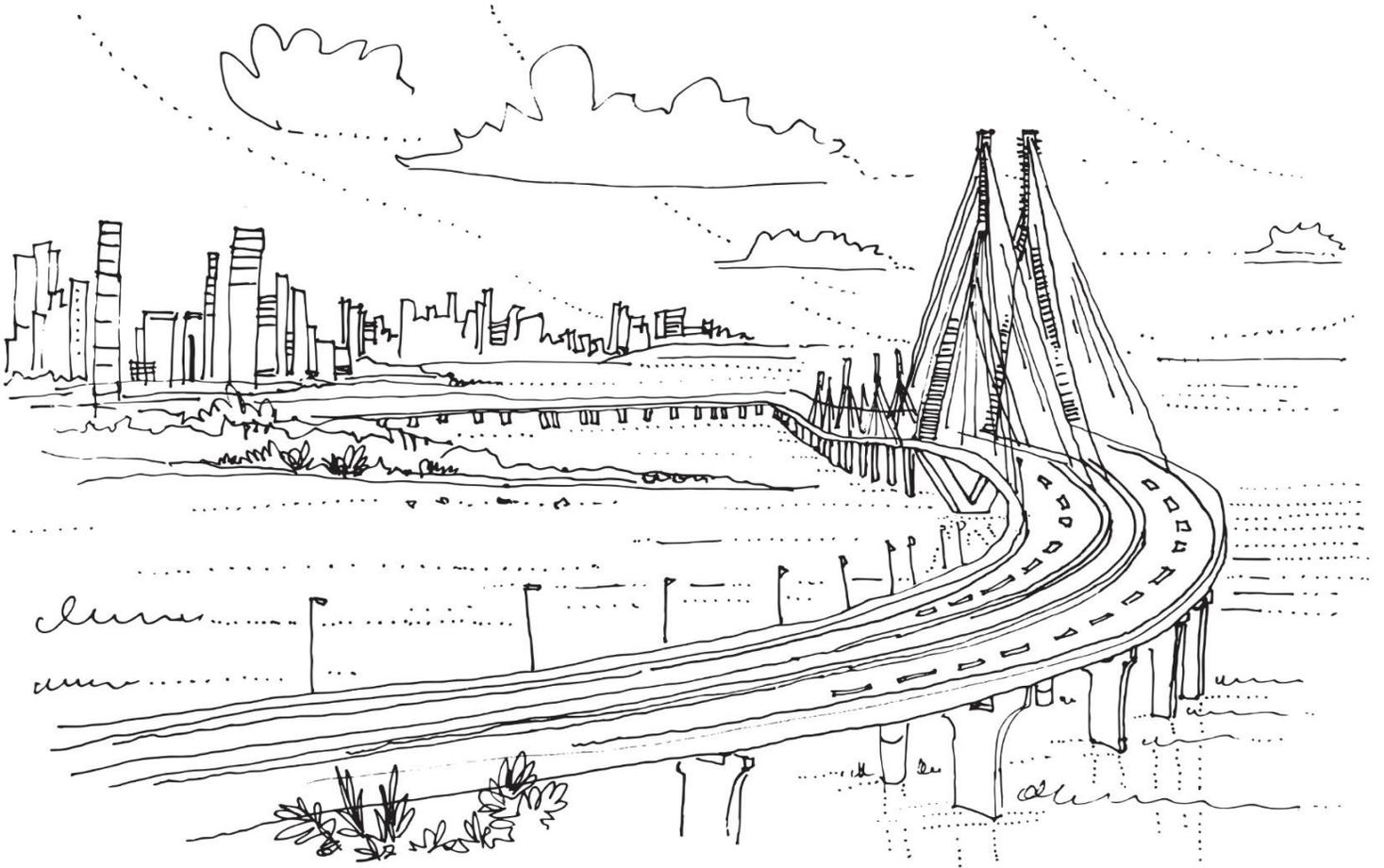




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

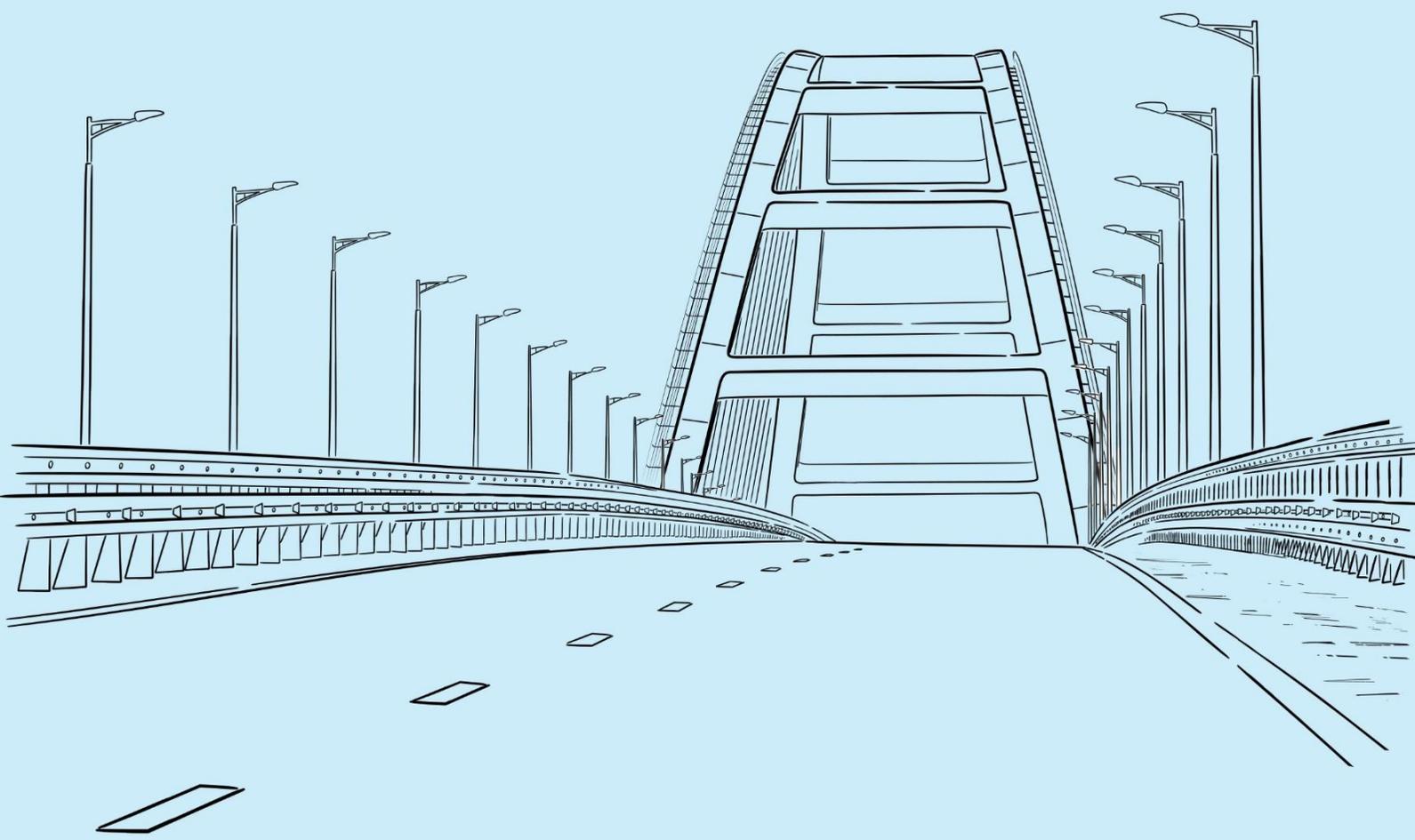


# **Infrastructure and Energy Digest**

## **Overview of Legal and Regulatory Developments**

April 2020

# INFRASTRUCTURE & ENERGY: COVID 19 IMPACT



## Infrastructure

### *Operation and Maintenance of Inter-State Transmission Network*

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#### **Background:**

Vide a letter dated April 17, 2020, the Ministry of Power (**MoP**) passed instructions regarding operation and maintenance of inter-state transmission network on 24x7 basis as well as construction activities that are being carried out by the Power Grid Corporation of India Limited (**PGCIL**) and other private inter-state transmission utilities during the nation-wide lockdown.

The letter was issued pursuant to an order dated April 15, 2020 passed by the Ministry of Home Affairs (**MHA**). It indicated vide such order that laying/erection of transmission lines would be allowed as an additional activity, subject to adherence of social distancing in offices, workplaces, factories and establishment as well as other sectoral requirements

#### **What were the main instructions that were issued by the MoP?**

- The MoP had issued a letter dated March 25, 2020 wherein it requested support/permission during the lockdown period (which at the time was March 25, 2020 until April 14, 2020) in order to carry out certain activities so that inter-state transmission services could be made available on 24x7 basis in order to ensure continuity of power supply to the consumers.
- Vide the letter dated April 17, 2020, the MoP requested for continued support till May 3, 2020 to ensure smooth operation and functioning of inter-state and intra-state transmission networks in the country and also to laying/erection of transmission lines being carried out by PGCIL and other private inter-state transmission utilities during the nation-wide lockdown. It was clarified that social distancing norms and other guidelines prescribed by the Government would need to be adhered to.

**Our view:** The aforesaid directive should ensure smooth and uninterrupted power flow across and within states.

## Remission of Charges and Force Majeure for Ports

### Background

Given the prevalent circumstances and the severe disruption in the logistic chain, the Ministry of Shipping (**MOS**) issued an order regarding remission of charges and force majeure for Major Ports on April 21, 2020. Such order supersedes the MOS order dated March 31, 2020. Major Ports have been directed to ensure strict implementation of such order by port users including public private partnership (**PPP**) concessionaires, CFS, ICD, shipping lines, etc. If required, ports can invoke relevant provisions of agreements and take appropriate action.

Further, the Order can only be extended to port related activities, industries and commercial establishments. It would not apply to any captive user, Central or State Government entities, local bodies, PSUs, CPSEs.

### What were the directions issued by the MOS?

#### ▪ Remission of Charges to Port Users

- **Storage Charges:** Ports should allow free storage time to all port users for the lockdown period.
- **Lease Rentals, Licence Fees Related Charges:** Ports should allow deferment of annual lease rentals and licence fees on pro-rata basis, without any interest, if requested by lessee/licensee for April, May and June. This would be applicable only for the annual lease rental and licence fee to be received by the port for 2020.
- **Other Charges, Penalties, etc.:** Ports should ensure that no penal charges, demurrages, detention charges, dwell time charges, anchorage charges, penal berth hire charges, performance related penalties etc. are levied on any port user (i.e. traders, importer, exporters, shipping lines, concessionaires, licensees, CFS, etc.) for any delay in berthing, loading/unloading operations or evacuation/arrival of cargo during the lockdown period and an additional 30 day recovery period.
- **Additional Land for storage:** If requisite additional land is available within the port area, the port is required to make all efforts to provide the additional storage land to port users, on temporary basis, without any charges, rentals, fee, etc. until June 30, 2020 on 'as is where is' basis.

#### ▪ Remission of Charges to PPP Concessionaire

On account of the drop in cargo volume at several berths/terminals in Major Ports, the MOS stipulated that ports should extend the following to PPP concessionaire:

- **Revenue Share, Royalty and Equipment Hire Related Charges:** Ports are to allow deferment of revenue, royalty and equipment hire charges without any interest, if requested by concessionaire, for April, May and June. The deferred amount is to be paid by the concessionaire after the end of the interest free period of 3 months (reckoned month to month i.e. the charges due in April, 2020 are to be paid in August, 2020) or alternatively, through 6-monthly equated installments at an interest rate equal to the Reserve Bank of India's 91- days Treasury Bill, (Primary) yield rate (as on the due date of the initially deferred amount) after expiry of interest free period.
- **Lease Rentals, Licence Fees Related Charges:** Ports should allow waiver of lease rentals, licence fees and similar charges for April, May and June to the extent the volume of cargo dropped compared to monthly average cargo volume for the last calendar year.
- **Minimum Guaranteed Throughput (MGT) Obligations:** The MGT obligations, if any, are to be computed, for the respective year, without considering the lockdown period and cargo volume handled during such period.

- **Performance Standard Related Obligations:** Ports cannot levy any penalty or charges for any shortfall in any performance standards such as gross berth output, transit storage dwell time, turnaround time for delivery store receipt operations, non-transshipment requirements, etc. for the lockdown period and an additional period of 30 days.
- **Additional Land for Storage:** If requisite additional area is available within the port, the port is to provide additional storage area to PPP concessionaires, on a temporary basis, without any charges, rentals, fee etc. until June 30, 2020 on ‘as is where is’ basis.

- **Vessel Related Charges from Shipping Lines**

If a request is made by vessel operators prior to May 30, 2020, ports have been directed to allow interest free, 60 days deferment of marine dues/ vessel related charges to Indian coastal vessels. Ports are also to obtain requisite Bank Guarantee, as security, from coastal vessel operators for the same.

- **Force Majeure**

Vide order dated March 20, 2020 and a letter dated March 24, 2020, the MoS had intimated to the Major Ports that the COVID-19 pandemic is to be considered as a ‘natural calamity’ that would entitle invocation of ‘force majeure’ provisions in as much as obligations under various contracts (involving the Major Ports) are concerned. However, noting that the aforesaid directions do not impact or dilute the fact that each Major Port needs to remain operational during the COVID-19 pandemic and continue cargo operations, the MoS issued the following directions:

- The period for completion of any Project under implementation in PPP mode or otherwise, is to be extended by the Ports. This is not applicable to Mumbai Port Trust and Mormugao Port Trust.
- For PPP projects under implementation, the 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. This is not applicable to Mumbai Port Trust and Mormugao Port Trust.
- The period of Force Majeure would start from the date of order of the Ministry of Finance (i.e. February 19, 2020) and would end when the competent authority so orders.

- The order is also to be followed by Kamarajar Port Limited.

**Our view:** The aforesaid remissions should offer relief to logistic companies and help rebuild the logistic supply chain and to several port concessionaires. Interestingly, the MoS has permitted invocation of force majeure on the grounds of natural calamity, which would be covered in concession agreements as a non-political event, instead of basing it on the lockdown that could be considered as a political event. Political force majeure events usually require authorities to share the costs of force majeure subject to contract terms. Therefore, concessionaires may not get reliefs in relation to costs. However, the impact of COVID-19 precedes and may extend beyond the lockdown period. Hence, arguably the concessionaires could claim suspension of obligations for a longer time than that of the lockdown.

## *Issuance of Guidelines for sailors at Indian ports*

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### What is the background?

On April 21, 2020, the MHA revised the lockdown restrictions to enable sign-on and sign-off of Indian seafarers at Indian ports. Subsequently, a detailed Standard Operation Procedure (**SOP**) and protocol was issued by the Directorate General of Shipping, Mumbai (**DGS**) on April 22, 2020.

### What is the scope of the DGS Guidelines?

#### ▪ Sign-on Guidelines

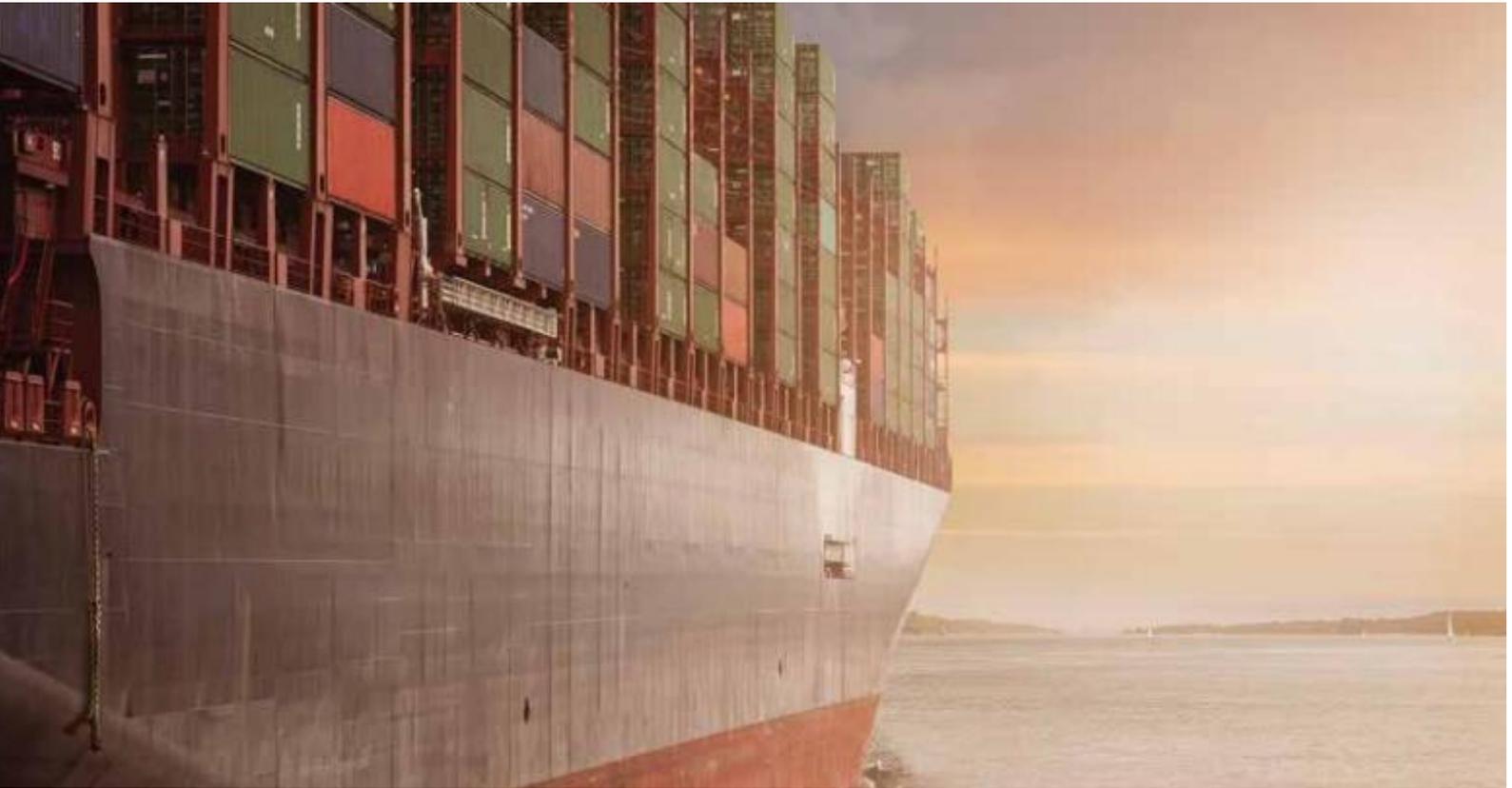
- The ship owner/Recruitment and Placement Service (**RPS**) agency is to identify the Indian seafarers for joining a vessel.
- The seafarers are to submit their travel and contact history for the last 28 days to the ship owner /RPS agency in the prescribed manner. The ship owner/RPS is to submit such form to a DGS approved medical examiner.
- The seafarer may be called for a standard medical examination as per the guidelines prescribed for this purpose.
- If the sign-on is processed, the local authority in the area where the seafarer resides will be intimated about his clearance for sign-on and for issue of a transit pass from the place of residence to the place of embarkation on the shipping vessel.
- The transit pass for such movement by road would be issued by the Government of the State/Union Territory where the seafarer resides.
- The transit pass would be issued for a fixed route and with specified validity and will have to be strictly adhered.
- Social distancing and other hygiene norms as per standard health protocol would need to be followed by the vehicle transporting the seafarer.
- At the port of embarkation, the seafarer would be tested for COVID-19.
- On completion of formalities by the ship owner/RGS and a negative COVID-19 report, the seafarer would be ready for signing on and can be placed on board.

#### ▪ Sign-off Guidelines

- The master of a vessel is required to ascertain the health of each person on board the vessel and submit the Maritime Declaration of Health to the health authorities of the port and port authorities.
- The seafarer is to wear necessary PPE masks, hand gloves on arrival and undergo the COVID-19 test.
- The seafarer is to be kept in quarantine facility by the port/ State Health Authorities till the time test reports of the seafarer are received.
- The procedures laid down by the Ministry of Health and Family Welfare to be observed if seafarer has tested positive for COVID-19.
- A seafarer arriving on a vessel from any foreign port is to be kept in quarantine for 14 days of departure from foreign port.

- In case of seafarer having tested negative, local authority will be intimated about his/ her clearance for sign-off, and for issue of transit pass to the place of his residence.
- Such transit pass for seafarer and driver may be issued by the local authorities where the seafarer disembarks.
- The transit pass will be issued for fixed route and with specified validity and will have to be adhered to strictly.
- The ship owner/RPS agency is to ensure that the vehicle being used for travel is properly sanitized, PPE masks, hand gloves and sanitizers are made available for driver and seafarer and social distancing requirements are complied with.

**Our view:** Given that ship to shore interactions and crew changes were severely impacted, the aforesaid guidelines should bring some relief. However, it would be important to ensure that the safety of all concerned is borne in mind and all the prescribed guidelines are strictly adhered to.



## ENERGY

### *MNRE grants renewable energy projects 'must run' status; directs status to remain unchanged for lockdown period*

#### Background

As per Regulation 5.2 (u) of the Indian Electricity Grid Code, 2010, State Load Despatch Centres (**SLDC**) and Regional Load Despatch Centres (**RLDC**) are required to make all efforts to ensure that all available solar and wind power is evacuated. The generating stations are to be treated as 'must run' i.e. the power they produce is required to always be evacuated. The SLDC/RLDC may only back down the power evacuated from the solar/wind generator due to concerns relating to grid safety and if the safety of any equipment or personnel is endangered. In this respect, the Ministry of Renewable Energy (**MNRE**) has issued notifications on April 1, 2020 and April 4, 2020.

#### What are the key directives?

- By its notification dated April 1, 2020, the MNRE took cognizance of the fact that certain state distribution companies (**DISCOMs**) were curtailing power from renewable energy (**RE**) projects. In the wake of COVID-19, the Ministry of Power (**MoP**) had directed that a 3 month moratorium period be provided to DISCOMs for making payments to electricity generating companies. Citing such orders, DISCOMs started curtailing power from RE generators in such states and claiming that a force majeure had occurred. The MNRE clarified that the must run status of the RE generators is unaffected by this moratorium and directed the DISCOMs to continue regular payments. The MNRE also stated that as the RE power is only a fraction of the total electricity generated in India, the payments are to be made regularly.
- By its notification dated April 4, 2020, the MNRE reiterated that the must run status of the RE companies should remain unaffected during the entirety of the lockdown period imposed due to the outbreak of COVID-19. The MNRE stated that there cannot be any curtailment of power except due to reasons attributable to grid safety and any curtailment would amount to deemed generation for the purposes of payments.

**Our view:** The notifications issued by the MNRE are in response to certain state DISCOMs curtailing power from RE generators citing force majeure. The clarifications issued by the MNRE ought to bring relief to RE generators and they also showcase the protection and promotion offered to the RE sector in India during the subsisting lockdown situation. While some financial relief has been extended to DISCOMs, it remains to be seen how they balance the substantially lowered demand for electricity during the lockdown, especially from industry and commercial users, with obligations in the nature of the above mentioned must run status and other provisions guaranteeing evacuation of electricity. It may be noted that although DISCOMs claimed force majeure in order to suspend their payment obligations and off-take powers from RE generators, it has been held that commercial hardship cannot be equated to impossibility or hindrance to performance. The MoP notification however deems the current situation as a force majeure giving some relief to DISCOMs.

## CERC Order on Late Payment Surcharge

### Background

- On April 3, 2020, the Central Electricity Regulatory Commission (**CERC**) passed an order in suo motu petition number 6/SM/2020. The order was passed in relation to the implementation of the Government of India dated March 23, 2020 regarding reduction of Late Payment Surcharge (**LPS**).
- Vide a letter dated March 28, 2020, the MoP had directed that the CERC may specify a reduced rate of LPS for payments which become delayed beyond a period of 45 days (from the date of presentation of the bill) during the period from March 24, 2020 to June 30, 2020 (**Prescribed Period**) to generating companies by treating the restrictions placed as a force majeure. The reduced LPS would be applicable for delayed payments till June 30, 2020. Further, the LPS could not be more than the cost that the generating companies or transmission licensees would have to bear because of the delayed payment.
- It was also stipulated by the MoP that for generating companies and transmission licensees whose tariff was determined by the CERC, the DISCOMS may claim the relief from its obligations, regarding the rate at which LPS is to be paid, as per the force majeure provisions given in the respective power purchase agreements (**PPAs**).

The CERC had amended the Central Electricity Regulatory Commission (Power Market) Regulations, 2010 vide the Central Electricity Regulatory Commission (Power Market) (Second Amendment) Regulations, 2019 (Amendment Regulations) dated December 12, 2019. The Amendment Regulations were aimed to introduce the concept of 'Real-Time Markets' for transactions of 'Real-Time Contracts' through power exchanges. The Amendment Regulations were scheduled to come into force on April 1, 2020. However, the CERC vide notification dated March 20, 2020 has postponed the commencement date of the Amendment Regulations to June 1, 2020.

### What did the CERC stipulate?

- After taking into consideration the directions of the Ministry of Power and Reserve Bank of India's circulars, CERC passed the following directions:
  - If any delayed payment by the DISCOMs to the generating companies and inter-State Transmission licensees (beyond 45 days from the date of the presentation of the bills) falls between the Prescribed Period, the concerned DISCOMs would have to make the payment with LPS at the reduced rate of 12% per annum that would translate into 1% per month. The original LPS levied was 1.5% per month.
  - It was clarified that if the period of 45 days beyond the due date of the presentation of the bill by the generating companies or inter-State transmission licensees, as the case may be, falls before March 24, 2020 or after June 30, 2020, the concerned DISCOM would be liable to pay the LPS as per the erstwhile rate.
  - The MoP also clarified that the beneficiaries of the generating stations and long term customers of the inter-State transmission systems would continue to avail rebates under the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 if the payments are made to the generating companies and the transmission licensees within the timeline specified in the said regulations.
  - As for generating companies whose tariff have been determined under Section 63 of the Electricity Act, 2003 (**Electricity Act**), relief on the LPS for payment which become delayed beyond 45 days (from the date of presentation of the bill) during the Prescribed Period may be claimed in terms of the force majeure provisions of the respective PPAs.

- In case of inter-state transmission licensees whose tariff has been adopted under Section 63 of the Electricity Act, LPS would be governed in accordance with the provisions of Transmission Service Agreements read with Central Electricity Regulatory Commission (Sharing of Transmission Charges and Losses) Regulations, 2010.

**Our view:** The Order is in line with the relief measures announced earlier by the Ministry of Power. Although the LPS has been reduced, it remains to be seen how much such reduction benefits the DISCOMs as liquidity is a severe challenge on account of the present situation. However, the interest of the DISCOMs needs to be balanced with the interest of the power generators and there are arguments that although the DISCOMs face a liquidity crisis, power generators are facing an existential crisis by reason of the impact of COVID-19.

## Levy of Late Payment Surcharge on DISCOMs

### Background

- On April 6, 2020, the MoP issued a clarification to address issues arising out of levy of delayed/late payment surcharge on DISCOMs.
- The clarification issued by the MoP comes in furtherance of previous directions issued by the MoP, after considering the inability of DISCOMs to make payments to generating companies and transmission licensees owing to the unprecedented situation warranted by COVID-19.
- Previous directions of the MoP were briefly as follows:
  - On March 27, 2020, the MoP clarified that the requirement of prepayment or giving letter of credit before scheduling of power would be for 50% of the cost of power.
  - On March 28, 2020, the MoP had directed the CERC to provide relief to DISCOMs, by specifying a reduced rate of LPS for DISCOMs, besides enabling DISCOMs to claim relief regarding LPS rate, as per force majeure provisions in the PPAs.

### What are the clarifications issued by the MoP?

With a view to put to rest certain misconceptions arising out of its previous directions, the MoP clarified that:

- There continues to be an obligation to pay for power within 45 days of presentation of the bill or as provided in the PPA.
- LPS will apply at reduced rate (to be notified by the CERC) only for the period between March 24, 2020 and June 30, 2020.
- LPS at the reduced rate will not apply on payments which were already overdue before March 24, 2020.
- After June 30, 2020, LPS will be payable at the rates given in the PPA/regulations.
- Obligation to pay for capacity charges and transmission charges will continue as per the PPA.

**Our view:** The clarification issued by the MoP in furtherance of its previous directives is a positive step in tackling impediments in cash flows in the power sector as a result of the present situation. However, as recognized by the MoP, there would also be a need to ensure liquidity in the power sector and DISCOMs may need to raise funds, where required.

## Extension of effective dates of Approved List of Models and Manufacturers

### What exemptions were sought by the Ministry of Power?

- The MNRE had issued the “Approved Models and Manufacturers of Solar Photovoltaic Modules (Requirements for Compulsory Registration) Order, 2019” (**ALMM Order**) on January 2, 2019. The objective of the order was to ensure that solar PV cells and modules are actually made in units in which production has been claimed.
- The ALMM Order provides for enlistment of eligible models and manufacturers of solar PV cells and modules complying with the BIS standards. Pursuant to the ALMM Order, the Approved List of Models and Manufacturers (**ALMM**) is published. The ALMM consists of List-I (specifying models and manufacturers of Solar PV modules) and List-II (specifying models and manufacturers of Solar PV cells). As per the ALMM Order, the effective date of operationalizing both the lists, was March 31, 2020.

### What extension has been provided?

The MNRE through an office memorandum dated April 7, 2020 has extended the effective date of both the lists from March 31, 2020 to September 30, 2020. This has been done due to the temporary disruptions due to COVID-19 and the resulting lockdown.

Once the lists come into effect, all Government/Government assisted projects, projects under Government schemes and programs, installed in the country, including projects set-up for sale of electricity to Government under specified guidelines, would have to mandatorily source their modules and cells from the manufacturers listed in the ALMM Order.

**Our view:** The extension has provided a much-needed respite to developers of solar PV cells and modules, considering the major disruptions caused by the COVID-19 pandemic. It remains to be seen if the effective dates would be extended further in case the current extraordinary circumstances persist. Even beyond the lockdown, supply chain disruptions may still create difficulties. If so, it would also be important to see how the MNRE’s intent to protect consumer interests and ensure larger energy security in the country is safeguarded.



## Blanket Extension for Renewable Energy Projects

### Background

On April 17, 2020, the MNRE issued an office memorandum (**OM**) regarding extension of time in Scheduled Commissioning Date of RE Projects considering disruption due to lockdown due to COVID-19. The blanket extension provided in this OM will be automatic and therefore, a case to case examination and procurement of evidence would not be necessary.

### What are the features of the OM?

- All implementing agencies of the MNRE will treat the lockdown due to COVID-19, as Force Majeure.
- The implementing agencies may grant extension of time for RE projects equivalent to the period of the lockdown and an additional 30 days for normalization after end of such lockdown.
- The State Renewable Energy Departments (including agencies under Power/Energy Departments of States, dealing in renewable energy) may also treat the lockdown, as Force Majeure and may consider granting appropriate time extension.
- The extension on account of disruption in supply of RE equipment prior to lockdown will continue to be governed in accordance with MNRE's office memorandum dated March 20, 2020 (O.M. No. 283/18/2020-GRID SOLAR)<sup>1</sup>.

**Our view:** This is a positive move by the MNRE in providing relief to renewable energy developers. The normalization period of 30 days after the end of the lockdown would give the developers an opportunity for re-organizing equipment and laborers for smooth functioning of the project. However, the notification also mentions that the developers would have to apply for relief despite the MNRE's direction to the implementing agencies.



<sup>1</sup> We had examined this memorandum in the March edition.

## Construction Activities in Power Plants

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### Background

Vide a letter dated April 20, 2020, the MoP passed instructions regarding construction activities in power plants during the nationwide lockdown. The letter was issued pursuant to an order dated April 15, 2020 passed by the MHA which stipulated that construction of all kinds of industrial projects in rural areas, i.e., outside the limits of municipal corporations and municipalities was allowed to be carried out with effect from April 20, 2020. This was also applicable to the ongoing construction activities in Thermal/Hydro Power Generation Projects outside the limits of Urban Local Bodies (**ULBs**).

### What were the main instructions that were issued by the MoP?

- The MoP requested State authorities to allow all the construction activities in Thermal/Hydro Power Generation Projects outside the limits of municipal corporations and municipalities as per the order passed by the MHA.
- It was also requested that intra-state and inter-state movement of construction materials, equipment, spares & consumables etc., for under construction power projects be allowed.
- While resumption of project works at sites could be carried out, all mandatory precautions and norms of social distancing as well the advisories issued by MHA and Ministry of Health and Family welfare from time to time with regard to COVID-19 were required to be adhered to.

**Our view:** The MoP letter provides a breather by clarifying the nature of construction activities that can be undertaken. However, it may be noted that subsequent to the MHA order referred above, vide an order dated May 1, 2020, the lockdown was extended for a further period of 2 weeks from May 4, 2020. Depending on whether the site is in the red, orange or green zone, it would have to be ascertained whether construction is permitted. Various states have also issued fresh lockdown orders pursuant to the MHA order dated May 1, 2020. Accordingly, such orders would also need to be adhered to. Given the present labor situation in the country and the extent of the supply chain disturbance, resuming construction will be difficult to say the least.

# Infrastructure and Energy: Other Regulatory Developments



## Infrastructure

### *Blacklisting without prior hearing*

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Vide its decision dated May 4, 2020, in *Cherian Varkey Construction Company Private Limited, Engineers and Contractors vs. State of Kerala*<sup>2</sup>, the High Court of Kerala passed an order holding that blacklisting without an opportunity of being heard was bad in law

#### What were the facts of the case?

- The Government of Kerala invited bids for construction and upgradation of a section of a state highway.
- The petitioner, who was a contractor, formed a joint venture with another contractor and submitted a bid for the project. The joint venture of the petitioner passed the technical qualification stage and submitted the lowest financial bid.
- Subsequently, it was reported in the newspapers that the joint venture was excluded from the bidding process, since the joint venture partner of the petitioner was facing an enquiry in respect of another project and a case had been registered for the same.
- Thereafter, petitions were filed by the petitioner and its joint venture partner challenging the decision of the respondent to disqualify the joint venture of the petitioner.

#### What did the High Court of Kerala observe?

- The High Court observed that the disqualification of the joint venture of the petitioner from participating in the tender process amounted to blacklisting.
- Placing reliance on decisions of the Supreme Court, the High Court held that the decision to exclude the joint venture of the petitioner from the bid was arbitrary and violative of the principles of natural justice and Article 14 of the Constitution. This was because neither the joint venture nor the joint venture partners were given an opportunity to represent their case before they were blacklisted.
- The High Court noted that even if the tender documents conferred a right on the respondent to reject any bids or disqualify any bidder, any decisions taken pursuant to such a right should not be contrary to the constitutional mandate under Article 14. Such a requirement is inbuilt even in such sweeping provisions in tender documents conferring power on the competent authority to take legitimate decisions in public interest.
- The High Court also observed that in case the guidelines provided in the tender notice cannot be followed, the only option was to re-tender the project. The High Court took note of the circular of the Central Vigilance Commission (CVC) bearing No. 4/3/07 dated March 3, 2007 which provides that, except in exceptional situations such as procurement of proprietary items, items with limited sources of supply and items where there is suspicion of a cartel formation, there should be no post tender negotiations even with the lowest tenderer and quashed the decision of the respondent to award the project to another bidder<sup>3</sup>.

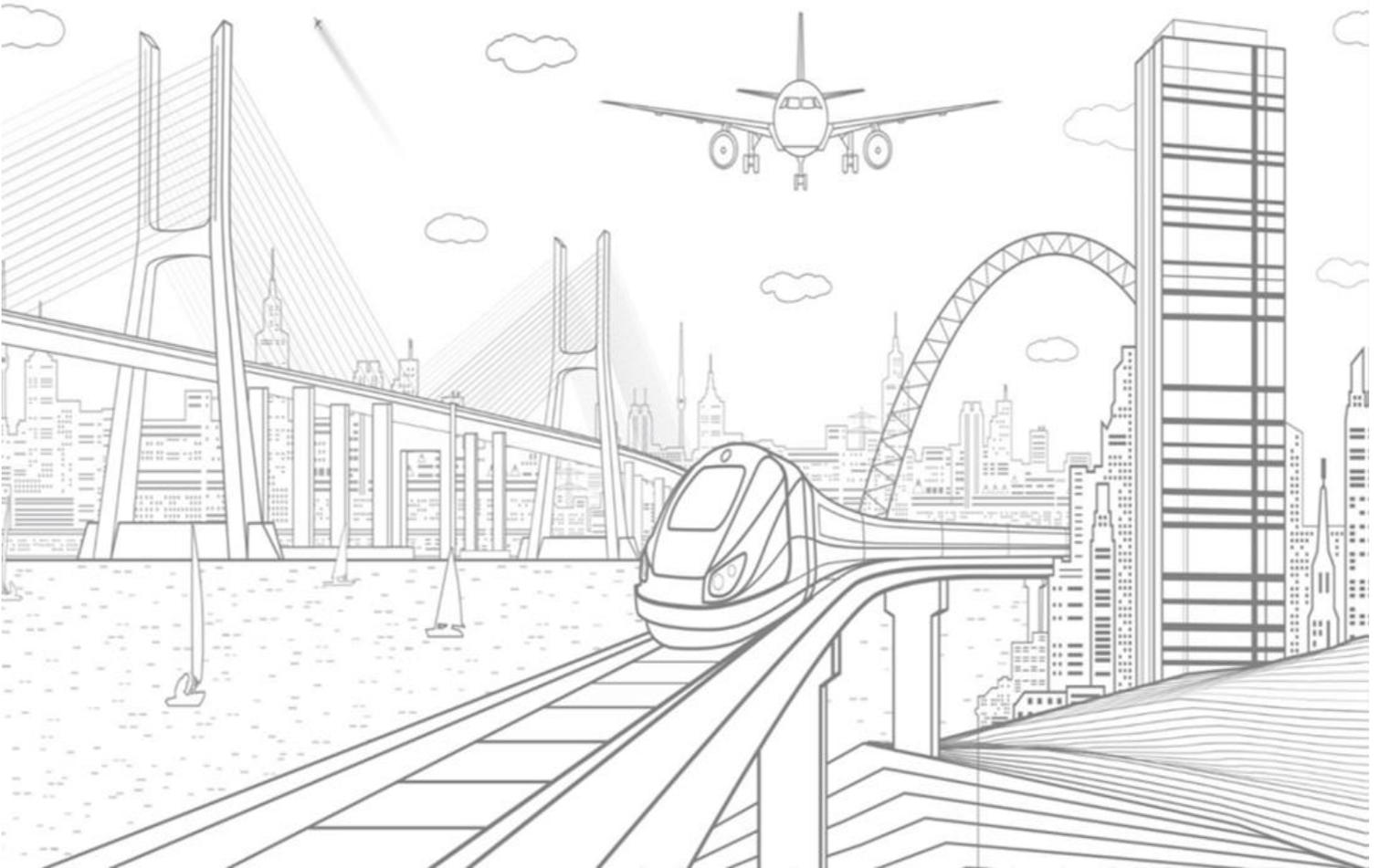
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<sup>2</sup> Writ Petition No. 26583 of 2019 and 31556 of 2019.

<sup>3</sup> Whilst the High Court did not refer to this, there was a subsequent circular by the CVC on the subject. Vide CVC Circular No. 01/01/10 dated January 20, 2010, the CVC clarified that there should normally be no post tender negotiations. If at all negotiations are warranted under exceptional circumstances, then it can be with the lowest tenderer, only if the tender pertains to the award of work/supply orders etc. where the Government or the Government company has to make payment. However, if the tender is for sale of material by the Government or the Government company, the post tender negotiations are not held except with highest tenderer, if required.

- The High Court directed the State Government to complete the blacklisting proceedings against the joint venture partners after giving them due notice. It was also directed that, in the event the joint venture partner was blacklisted pursuant to the aforesaid proceedings, the project would be re-tendered and if the joint venture partner was not blacklisted, the project would be awarded to the joint venture.

**Our view:** The decision of the High Court reiterates the fundamental principles of natural justice which mandate giving parties an opportunity of being heard. As for the observations regarding award of the project to the petitioner, it may be argued by the State that this impinges on its freedom to contract.



## ENERGY

### *Electricity Amendment Bill, 2020: Brief Overview*

#### Background

On April 17, 2020, the MoP issued the draft Electricity (Amendment) Bill, 2020 (**Draft Bill**). The Draft Bill seeks to amend provisions of the Electricity Act, 2003 (**Electricity Act**), as a response to controversies relating to contract enforcements, that have resulted in weakening investment activities in this sector.

#### What are the major amendments proposed in the Draft Bill?

- **Establishment of Electricity Contract Enforcement Authority (ECEA)**

ECEA would be set up with the sole jurisdiction to adjudicate disputes arising with respect to the performance of obligations under a PPA for sale, purchase or transmission of electricity. Currently, CERC and State Electricity Regulatory Commissions (**SERCs**) exercise jurisdiction over multiple interstate and intra-state electricity regulatory issues respectively and have power to hold inquiries and adjudicate disputes between licensees and generating companies. ECEA has been enshrined with the powers of a civil court to direct the contracting parties to immediately perform the contract and pay compensation, on account of any breach of contract. However, the powers of ECEA does not extend to adjudicate disputes involving determination of tariff, which is the domain of CERC and SCRCs.

- **National Selection Committee (NSC)**

To bring uniformity to the process of selecting the Members of the Appellate Tribunal for Electricity (**APTEL**) and the Chairperson and Members of the Central Commission, Electricity Contract Enforcement Authority, State Commissions and Joint Commissions, the Central Government will set up an NSC. The NSC shall consist of a Supreme Court Judge as the Chairperson and Secretary-in-charge of Ministry of the Central Government to be nominated by Central Government, Chief Secretaries of 2 State Governments and Secretary-in-charge of the Ministry of the Central Government dealing with power as the member. The Chief Secretary of the State Governments in alphabetical order of states starting with Andhra Pradesh, Arunachal Pradesh will be the members of the Selection Committee for a period of 1 year. The Secretary-in-charge of the MoP of the Central Government will be the Convener of the Selection Committee. This amendment would remove separate state selection committee in order to maintain the independent status of the SERC.

- **Other Measures**

In addition to the above, provisions have been included to mandate provision of payment security to secure generators. For this, load dispatch centers would be required to oversee the payment security mechanism before scheduling dispatch of electricity. This requirement may, however, be waived by parties to the PPA. Another proposed measure is the increase the strength of APTEL to 7 apart from the Chairperson so that multiple benches can be set-up to facilitate quick disposal of cases. It is also proposed that tariff be determined by commissions without taking into account the subsidy, which will be given directly by the Government to the consumers. Further, to ensure compliance of the provisions of the Electricity Act and orders of the Commission, the Electricity Act is proposed to be amended to provide for higher penalties.

**Our view:** The proposal attempts to strengthen the legislative framework to prevent power distribution companies from renegeing PPAs and consequently evading long-term off-take commitments made to generators. However, the proof of the pudding lies in the eating, and implementation of these measures may throw up new questions. Where the ECEA is concerned, clarity is required whether the ECEA will decide matters as per extant contract law or be guided by other principles, how it would work in tandem or supersession of the existing legal machinery and how pending matters are to be decided. Further, the NSC does provide streamlining of the selection process – but it remains to be seen how transparent the process actually is.

## DGH simplifies procedures under production sharing contracts of NELP/Pre – NELP Blocks

### Background

The Directorate General of Hydrocarbons (DGH) is the nodal agency appointed for the implementation of the New Exploration Licensing Policy (NELP) on behalf of the Ministry of Petroleum and Natural Gas (MoPNG). The NELP, issued by the Government of India (GOI) became effective in 1999 and was aimed at increasing capital inflow, development of state of the art technology and the incorporation of best management practices to explore oil and gas resources in the country. Since the introduction of the NELP, licenses for exploration in oil and gas blocks have been awarded through competitive bidding and through production sharing contracts (PSC). On April 25, 2020, the DGH simplified and categorized certain procedures and processes under PSCs of NELP and Pre-NELP oil and gas blocks.

### What are the key changes?

- The GOI undertook a review of the various approvals and documents required to be submitted in relation thereto under PSCs and divided the processes into the following three categories:
  - **Category A:** Processes where documents shall be accepted on self-certification basis and no approval is required.
  - **Category B:** Processes where approval will be deemed on expiry of 30 days of submission of documents under self-certification; and
  - **Category C:** Processes where approvals are required under the relevant Act/Rules or contracts.
- The processes under Category A are related to the submission of documents and reports pertaining to information and discovery, bank guarantees, calibration of flow meters, environmental impact assessment reports, contingency plans, appointment of auditor by the Operator under the PSC, procedures for measurement of petroleum etc.
- Category B pertains to process which require the approval of the Management Committee (constituted under the relevant PSC)/the DGH/MoPNG. These processes are the work program and the budget, appraisal program or its revisions, and the field development plan or its revisions. While the documents for these processes are required to be submitted after self-certification, the contractor is required to wait for a minimum of 30 days for the deemed approval of the relevant authority.
- Category C is comprised of those core processes which require the approval of the Management Committee/DGH/MoPNG. These pertain to, *inter alia*, extension of the exploration phase, grant of the petroleum license, grant of petroleum mining lease, liquidated damages on account of cost of unfinished work, assignment/transfer of participating interest in the oil and gas block, extension of the contract etc.

**Our view:** The focus area for the notification is ease of doing business in the field of exploration and production of oil. Allowing for self-certification by the contractor certainly ought to streamline the compliance process and make investment and private participation in the sector a more attractive proposition. While the more routine submissions and compliances have been left to self-certification by the party carrying out the PSC, the DGH has ensured that the GOI retains complete control over the core processes and governance of the oil and gas blocks mentioned in Category C above. It has also allowed a middle ground in the ability to exercise control if the GOI so chooses through the deemed approvals condition in Category B.



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