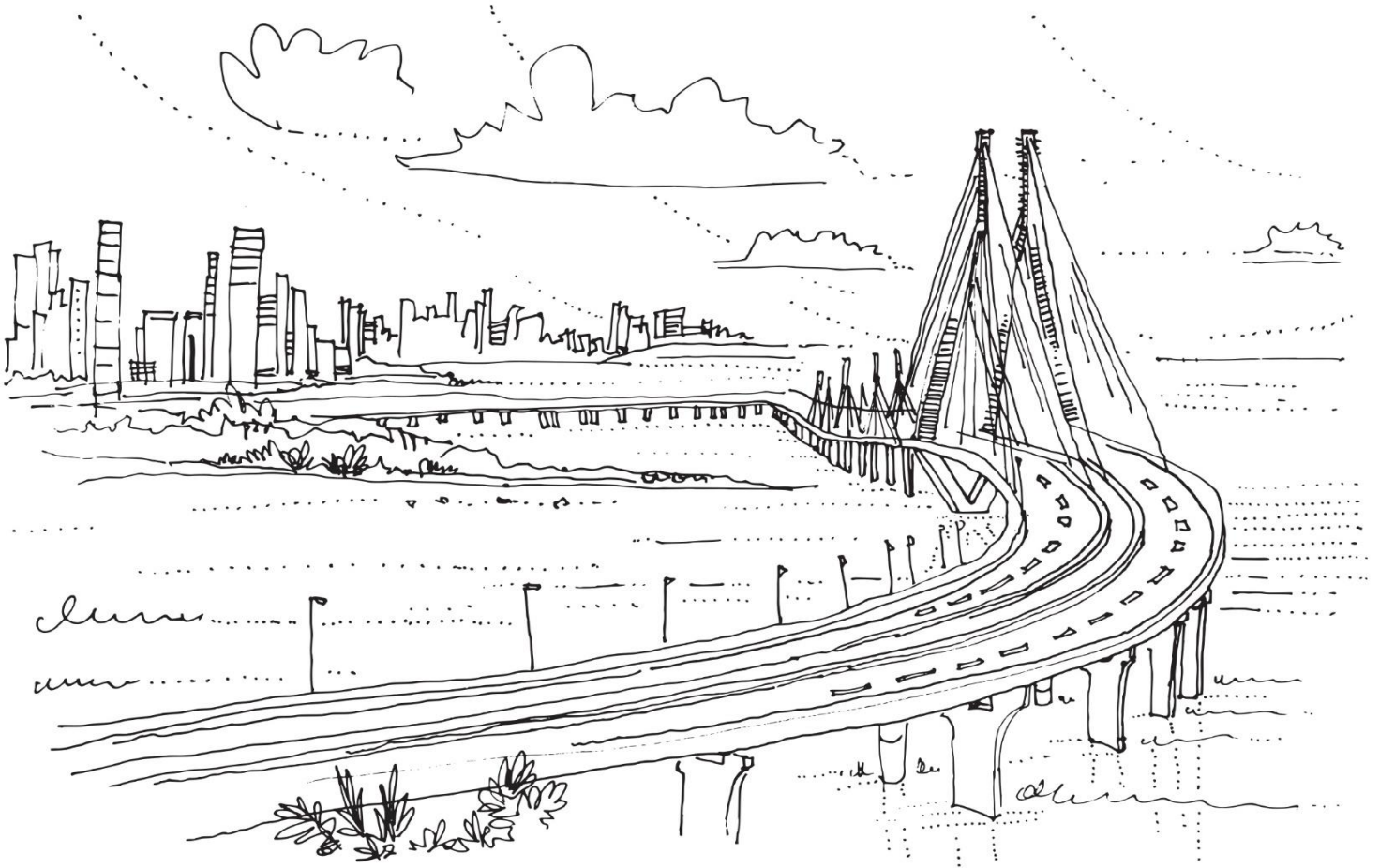




ECONOMIC  
LAWS  
PRACTICE  
ADVOCATES & SOLICITORS

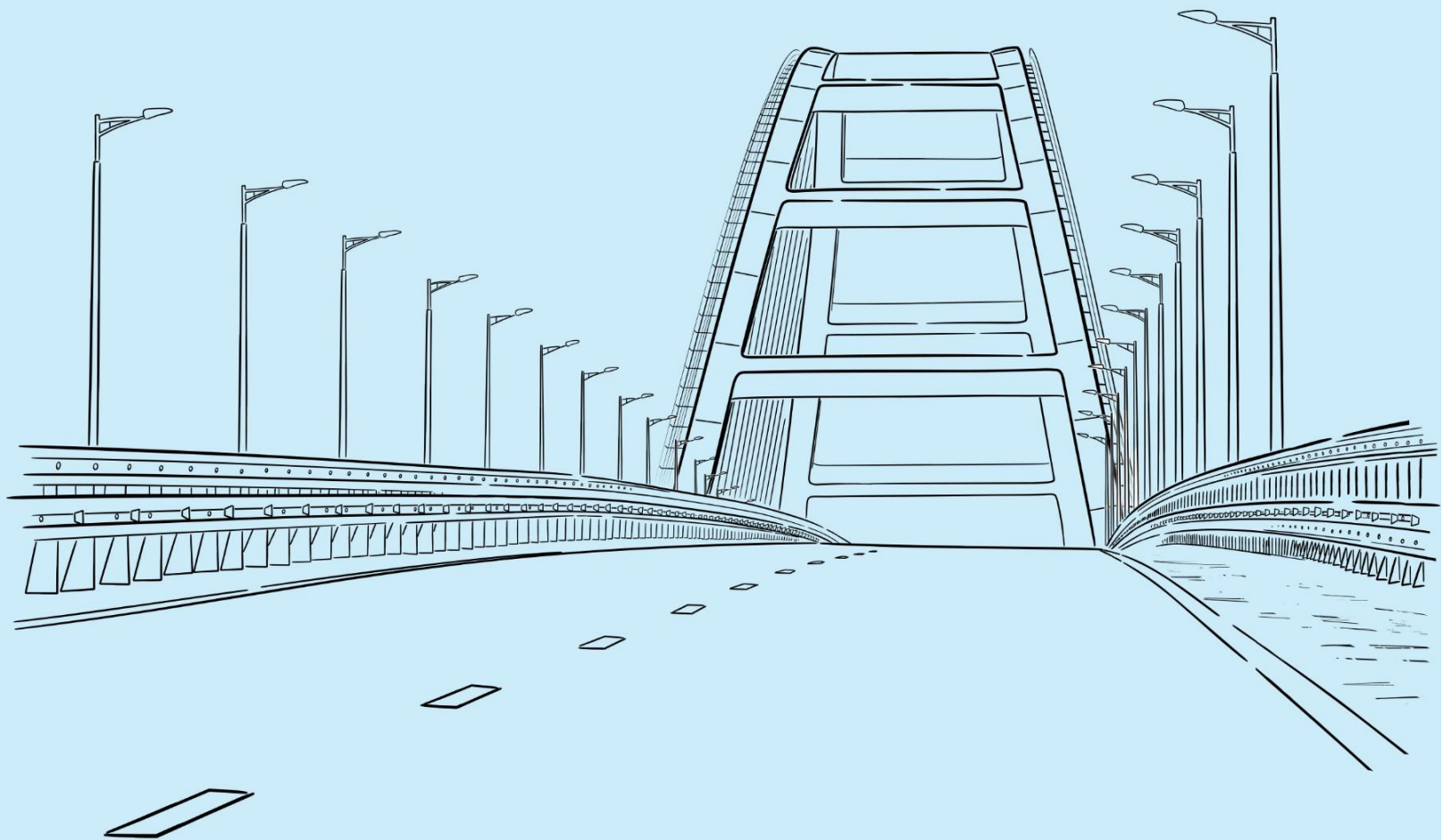


# **Infrastructure and Energy Digest**

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

June 2020

# INFRASTRUCTURE



# INFRASTRUCTURE

## Delhi High Court Judgement on COVID-19 as Force Majeure

### Brief Background

The High Court of Delhi (**High Court**) vide order dated June 12, 2020 in the case of *MEP Infrastructure Developers Limited vs. South Delhi Municipal Corporation and Others*<sup>1</sup> has adjudicated on a dispute where one party sought relief on account of COVID-19.

### What were the facts of the case?

- South Delhi Municipal Corporation (**SDMC**) had floated a tender for collection of toll tax and ECC from specified commercial vehicles on certain toll plazas/post/barriers bordering Delhi. MEP Infrastructure Developers Private Limited (**Petitioner**) was the successful bidder and a toll tax collection agreement was signed between the Petitioner and SDMC on September 28, 2017 (**Agreement**).
- As per the Agreement the Petitioner was required to make certain weekly payments to SDMC. However, the Petitioner defaulted in making some payments. Subsequently the High Court *vide* its judgement dated November 26, 2019 directed the Petitioner to make payments to SDMC and issue fresh post-dated cheques (**PDCs**).
- Thereafter, *vide* order dated March 2, 2020 (**March Order**), the High Court directed the Petitioner to deposit all arrears as directed in its earlier order dated November 26, 2019 in three equal instalments and issue fresh post-dated cheques. It was indicated that subject to compliance with such directions, no coercive actions would be taken against the Petitioner until the next date of hearing. On March 16, 2020, SDMC served a notice terminating the Agreement to the Petitioner with the effective date of termination of the Agreement as April 14, 2020.
- The High Court passed a generic order on March 25, 2020, extending all interim orders obtained as on March 16, 2020 till May 15, 2020.
- Vide its letter dated April 4, 2020, SDMC extended the effective date of termination of the Agreement to May 5, 2020. On April 4, 2020, the High Court passed an order further extending the effective date on account of an extension in the period of the lockdown. The High Court passed subsequent orders on April 27, 2020 and May 21, 2020.
- Subsequently, contending that the Agreement had become temporarily non-operational/unfeasible in view of COVID-19, the Petitioner sought the following reliefs (i) it be granted protection against the notice of termination of the Agreement dated March 16, 2020 issued by the Respondent, (ii) coercive steps not be taken against it; and (iii) the time accorded for payment of the second and third instalment of the arrears be extended.

### What did the High Court observe?

- The High Court observed that the force majeure period had not abated as per any government notification; free movement of traffic was being regulated even then at borders between the States. The High Court further noted that evidently, the full operability of the Agreement was hindered by orders of the National and the State governments i.e. by circumstances beyond the control of the Petitioner.

<sup>1</sup> W.P.(C) 2241/2020

- The High Court observed that since the Petitioner had secured monies to SDMC in the form of a bank guarantee, which could be encashed by SDMC, there could not be a deemed default.
- The High Court also placed reliance on the FM OM and a circular issued by the Ministry of Road Transport and Highways and observed that in effect the force majeure clause under the Agreement immediately becomes applicable and the notice for the same would not be necessary. The High Court further held that a strict timeline under the Agreement would be put in abeyance as the ground realities had substantially altered and performance of the contract would not be feasible till restoration of the pre force majeure conditions.
- As per the High Court, once the force majeure was acknowledged by SDMC on March 23, 2020, the force majeure would come into effect with effect from February 19, 2020 itself.
- The High Court directed that the arrears would be payable as directed by the March Order. However, the weekly payments would stand suspended in view of the force majeure clause. Nevertheless, the amounts collected by the Petitioner were to be deposited into the account of SDMC after deduction of 15% towards operation and maintenance charges, subject to final adjustments. The requisite post-dated cheques were to be issued within 2 weeks. The March Order was modified accordingly.

**Our view:** The order is of great importance during the current uncertain times, particularly for the road sector. A typical Force Majeure clause requires the affected party to provide a notice to the other party, however, it has been clarified by the High Court, that once a party has acknowledged Force Majeure, no notice would be required. However, this position could vary depending upon the facts and circumstances of each case, the Agreements entered into by the parties and other incidental matters.

## Formation of Project Development Cell

### Background:

- The Central Government has approved the setting up of an Empowered Group of Secretaries (**EGoS**) and Project Development Cells (**PDCs**) in Ministries/Departments of the Government of India for attracting investments in India by development of investible projects in coordination between the Central Government and State Governments.
- In light of the above, the MNRE passed an order dated June 17, 2020 for constituting a PDC for “Attracting Investments in India”.

### What are the objectives of PDCs?

- To create projects with all approvals, land available for allocation and with complete detailed projects reports for adoption/investment by investors.
- To identify issues that need to be resolved in order to attract and finalize the investments and put forth these before the EGoS

### What is the constitution of the PDC?

- The PDC has been constituted in the MNRE under the Joint Secretary of MNRE, assisted by a Director in the MNRE, other officers of the Grid Solar Power Division and representatives of Invest India.

- The Department of Promotion of Industry and Internal Trade (**DPIIT**) is required to nominate representatives from Invest India to participate in the working of the PDC.
- A portal is being developed in order to receive proposals from the RE Sector, with provisions to check the status of action taken on such proposals.

**Our view:** The renewable energy sector in India has been growing at a rapid pace with many global players entering the market. The aforesaid order may attract further investments as it helps expedite many processes and compliances. This should help bolster India's commitment of increasing its renewable energy share and aid in its countering the challenges posed by climate change.

## ***Amendment in the Revised Guidelines and Standards for Charging Infrastructure for Electric Vehicles***

### **Background:**

- On December 14, 2018, the Ministry of Power (**MoP**) issued "Charging Infrastructure for Electric Vehicles- Guidelines and Standards", which was then revised as on October 01, 2019 (**Guidelines**).
- On June 8, 2020 the MoP further amended the Guidelines (**Amendment**).

### **What were the amendments?**

- The tariff for supply of electricity to Electric Vehicle (**EV**) Public Charging Station is to be determined by the appropriate Commission in accordance with the extant Tariff Policy issued under Section 3 of the Electricity Act 2003. Vide the Amendment, a ceiling has been stipulated in respect of the tariff. The tariff cannot be more than the average cost of supply plus 15% unless otherwise specified by the Tariff policy.
- The definition of 'Electric Vehicle Supply Equipment (**EVSE**)' has been revised to mean an element in EV charging infrastructure that supplies electric energy for recharging the battery of electric vehicles.
- The Amendment has stipulated that the Captive Charging Station would be an electric vehicle charging station exclusively for the electric vehicles owned or under the control of the owner of the charging station e.g. Government Departments, Corporate houses, Bus Depots, charging stations owned by the fleet owners etc. and cannot be used for commercial purpose.
- It has been clarified that Battery Charging Station (**BCS**) shall be treated at par with Public Charging Station (**PCS**), and the applicable tariff for electricity supply shall also be same as for PCS. A PCS is an EV charging station where any electric vehicle can get its battery recharged. Whereas, a BCS is a station where the discharged or partially discharged electric batteries for electric vehicles are electrically recharged.
- Any electric vehicle can get its discharged battery or partially charged battery replaced by a charged battery at a Battery Swapping Station.

**Our view:** The ceiling on the tariff along with clarity about the nature of different charging stations should provide clarity about the charging infrastructure for EVs in India and should enable the faster adoption of EVs.

## *Policy Announcements made by Union Minister R.K. Singh to promote 'Make in India'*

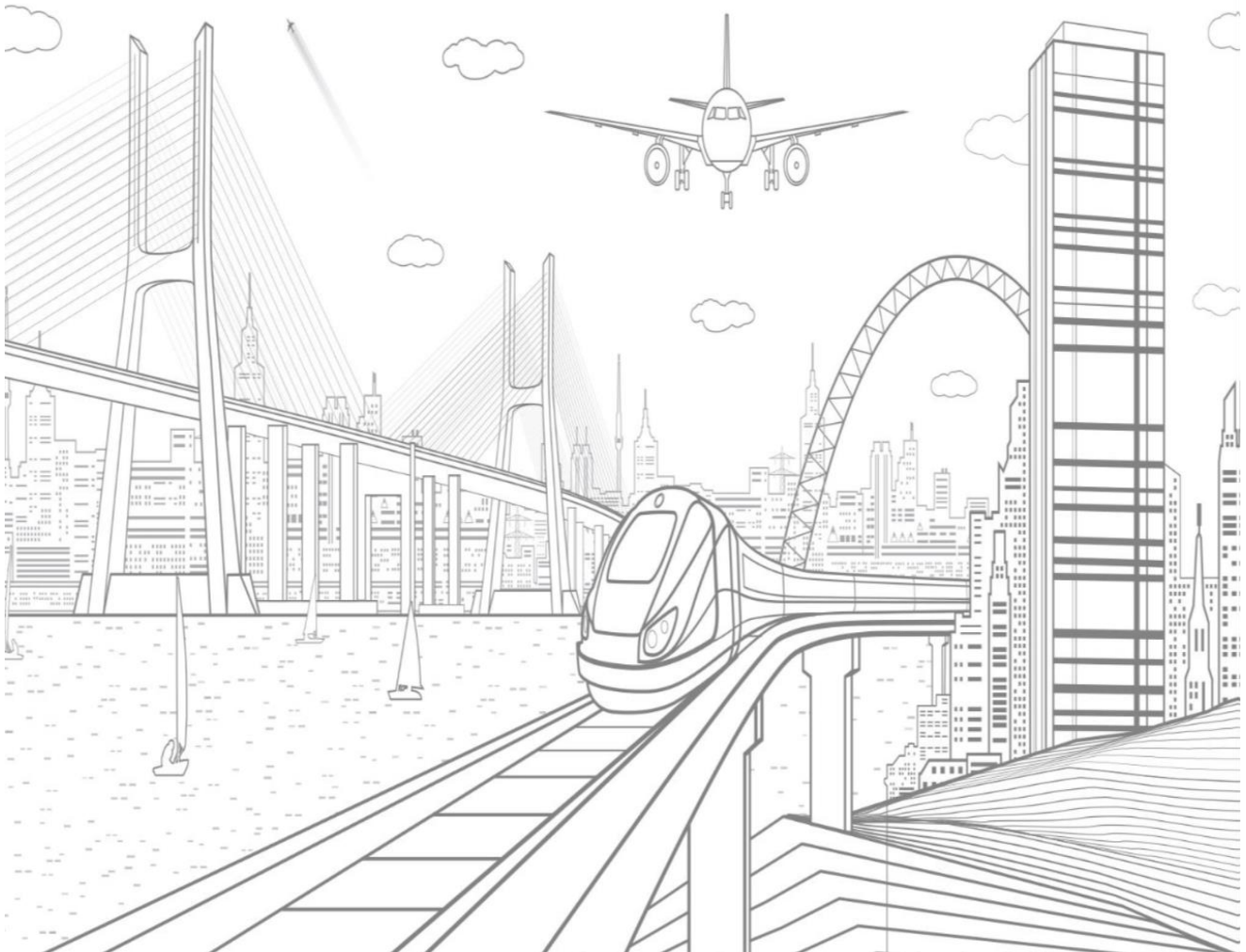
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- As per a Press Information Bureau release dated June 23, 2020, the Union Minister of Power, New and Renewable Energy and Skill Development and Entrepreneurship, Mr. R.K. Singh interacted with developers of generation and transmission projects. At this interaction, the Union Minister emphasized that:
  - 'Aatmanirbhar Bharat' is important in promoting the manufacture of goods and services as well as creating jobs in India.
  - Various equipment like transmission line towers, conductors, industrial electronics, capacitors, transformers, cables and insulators and fittings etc. are being imported although India has the capacity to manufacture such items.
  - In order to promote 'Make in India' and to reduce dependency on imports, it is essential that developers in the transmission, thermal, hydro, distribution and renewables join the national campaign of 'Aatmanirbhar Bharat' and adopt the 'Make in India' policy.
- As power is a sensitive and strategically important sector, 'Aatmanirbhar Bharat' has a much higher level of significance for the power sector. Hence, the developers were urged to pledge:
  - Not to import any equipment, materials or goods, for which there is sufficient domestic capacity.
  - Import of goods and services will occur when domestic capacity is unavailable. If an import is inevitable, it would be allowed for a period of 2 to 3 years. During such period, indigenous manufacturing of such items would be developed by enabling policy/tax incentives/start-ups/ vendor development/R&D support, so that these items get domestically manufactured. Further, the imported goods are required to be tested in Indian laboratories to ensure that they adhere to Indian standards and to check the presence of malware.
  - All equipment/items that are required to be imported shall be imported from prior reference countries only after obtaining prior approval from the Ministry of Power (**MoP**) or MNRE.
- The Union Minister also informed the stakeholders regarding the following:
  - It is proposed that Basic Customs Duty (**BCD**) would be imposed on solar modules, solar cells and solar inverters beginning August 2020.
  - A clear trajectory of BCD would be declared to obviate any uncertainty.
  - The Approved List of Models and Manufacturers (**ALMMs**) for renewable energy will take effect from October 1, 2020. This will help ensure that all solar power projects which are bid as per the standard bidding guidelines, will be required to procure solar cells and solar modules and other equipment from manufacturers in the ALMMs.
  - Financing from Power Finance Corporation (**PFC**), Rural Electrification Corporation (**REC**) and Indian Renewable Energy Development Agency (**IREDA**) will be structured in such a manner that lower rates of interest will be charged on the developers who will use domestically manufactured equipment.
  - The FDI cell is required to vet proposals for investment from countries that share borders with India. The Project Development Cells in the MoP and the MNRE are to ensure the process of investment is accelerated.



- The practice of issuing concessional custom certificates for certain import items in the renewable energy sector will be discontinued from a future date.

**Our view:** The announcements made by the Union Minister assume great significance in the present times and are in consonance with the Prime Minister's vision of an 'Aatmanirbhar Bharat'. Given that the dependency of the power sector on imports is high, it would be important to ensure that the measures are implemented carefully bearing in mind all factors. To strengthen domestic manufacturing of power equipment, developers would need to be ensured of policy certainty, suitable regime for facilitating import of capital goods that are required for manufacturing power equipment, availability of finance and power to the manufacturers at competitive rates, encouragement of R&D efforts and ensuring sanctity of contracts.



# ENERGY





## RENEWABLE ENERGY

### *MNRE Adds New Mode for Implementation of the Scheme for Development of Solar Parks and Ultra Mega Solar Power Projects*

#### Background:

The Ministry of New and Renewable Energy (**MNRE**) issued the 'Scheme for Development of Solar Parks and Ultra Mega Power Projects'<sup>2</sup> (**Scheme**) on December 12, 2014. The objective of the Scheme was to consolidate development of solar power generation projects and provide developers with an area that was equipped with proper infrastructure, access to amenities and where the risk associated with these projects could be minimized. Additionally, the Scheme lowered the number of approvals that were required to be obtained by the developers. The consolidation of projects into these 'Solar Parks' was aimed at reducing the high project costs and high transmission losses associated with projects scattered across the country.

Until now, the Scheme has 7 modes of implementation which briefly are:

- **Mode 1:** The designated nodal agency by the concerned State undertakes the development and management of the solar park. This agency could be a State Government Public Sector Undertaking (**PSU**) or a Special Purpose Vehicle (**SPV**) of the concerned State Government.
- **Mode 2:** A joint venture company is set up between State designated nodal agency and the Solar Energy Corporation of India (**SECI**) for the development and management of the solar park with 50% equity from SECI and 50% equity from the State Government Agency (State Government may also allow more than one agency provided total equity from State Government remains 50%).
- **Mode 3:** The State designates SECI as the nodal agency and SECI undertakes the development and management of the solar park on behalf of State Government on mutually agreed terms.
- **Mode 4:** Private entrepreneurs promote solar parks without any equity participation from SECI but may have equity participation from the State Government or its agencies.
- **Mode 5:** Central Public Sector Undertakings (**CPSUs**) like SECI, National Thermal Power Corporation (**NTPC**) etc., directly approach the MNRE for development of solar parks.
- **Mode 6:** Private developers develop solar parks without any financial assistance from the Central Government.
- **Mode 7:** Development of Renewable Energy Parks through SECI. SECI will make both Government and private land available for the successful bidder for setting up of renewable energy projects within the RE park (or solar or wind or other renewable energy park as the case may be). SECI will develop the RE park as the 'Solar Power Park Developer' (**SPDD**) i.e. the entity responsible for the development of the RE park itself.

On June 15, 2020, the MNRE issued an office memorandum modifying the Scheme and introducing a new Mode 8 that pertains to the development of Ultra Mega Renewable Energy Power Parks (**UMREPPs**).

#### What are the features of Mode 8?

- Any CPSU/State PSU/State Governmental Organization or their subsidiaries or a JV of any of these entities may be the SPDD of the UMREPP. The concerned State Government is to provide the necessary assistance to

<sup>2</sup> Ultra-Mega Power Projects are single projects that have a capacity of 500 MW or more.

the SPDD for the identification and the acquisition of the land required. This land is to be allotted on the condition that the development of the UMREPP is to be completed within a period of 2 years from the allotment.

- A committee is to be set up in order to facilitate the UMREPP, monitor the progress and fix upfront, O&M charges to be charged from the power developers. The committee is to consist of the Principal Secretary/Secretary of the concerned State Government, CEO of the SPDD, head of the designated State Nodal Agency and three experts in the field of renewable energy and power systems.
- The SPDD is entitled to Central Financial Assistance (CFA) of INR 20 lakhs/MW or 30% of the cost of development of the UMREPP, whichever is lower. Additionally, if the SPDD or any of the individual promoters of the SPDD possess a trading license, they may act as a power trader of the power that is being produced in the park, allowed to claim a margin of INR 0.07/unit.
- The power projects inside the UMREPP may be developed through the tariff based competitive bidding route or the EPC route (by the SPDD or any of its individual promoters) or a combination of both. The SPDD (or its individual promoters) is not allowed to take part in the tariff based competitive bidding process in an UMREPP developed by them. The bid documents are to specify that a facilitation charge of INR 0.05/unit and trading margin of INR 0.07/unit will be paid to the SPDD by the power developer if applicable.
- CPSUS are free to set up RE projects through the EPC mode, under Central Schemes like the CPSU scheme in any UMREPP.

**Our view:** The Scheme is the flagship demonstration of the MNRE with a commendable objective of consolidating renewable energy power generation in India. The new Mode 8 lays down incentives for participation for power developers and will also provide benefits in terms of employment in the State within which the UMREPPs are implemented. A concern, however, is the onus on the concerned State Government and the SECI to identify and acquire the land on which these UMREPPs are to be developed. While the other incentives provided to both the SPDD and the project developer appear attractive, it appears that the quick and fair acquisition of the substantial amount of land required will be key to the Scheme's success.

## ***MNRE Issues Guidelines for Installation of Innovative Standalone Solar Pumps***

### **Background:**

- On June 22, 2020, the MNRE issued guidelines for installation of innovative standalone solar pumps (**Guidelines**).
- The Guidelines which are designed to promote innovative standalone solar pumps are applicable to all Indian innovators/manufacturers/service providers who wish to install innovative standalone solar pumps in India under schemes operated by the MNRE.

### **What is the framework notified by MNRE for adoption of innovative technology?**

- Calling of Expression of Interest (**Eoi**)

The MNRE will call Eoi from time to time for inviting applications from solar pump innovators claiming better performance on account of improved efficiency, cost effectiveness, monitoring, other value addition etc.

- What is the eligibility criteria for participation in the EoI?
  - Innovative products which are available for testing and field trial.
  - New technologies for which patent/IP related filings have been done.
  - Organization which has filed the patent should be the sole applicant or lead partner in case of a consortium/joint venture.
- What should the application submitted in response to the EoI necessarily entail?
  - Clear mention of elements of innovation for improved performance of solar pump.
  - Cost benefit analysis should be enclosed with the proposal.
  - Test report for the proposed solar pump should be submitted along with the EoI.
- Evaluation of applications and Testing of Pumps
  - Applications will be evaluated by an Evaluation Committee constituted by MNRE (**EC**) having technical and financial experts of the sector including academic experts.
  - Prior to allowing installation of pumps, the EC may recommend re-testing of performance of the pump at National Institute of Solar Energy (**NISE**) or any other NABL accredited lab of the National Accreditation Board for Testing and Calibration Laboratories. Where the technology is at nascent stage, a special method may be adopted to test, at the expense of the applicant, the pumps in consultation with the innovator and NISE.
- Demonstration of the innovative technology
  - Demonstration of the innovative technology is permissible on recommendations of the EC after the innovator gets consent from respective State implementing agency (**SIA**) and the beneficiary farmers.
  - Innovator can install up to 50 solar pumps in different parts of the State/Union Territory for demonstration purpose.
  - Innovators will be treated at par with other vendors selected through competitive bidding for payment, AMC, performance guarantee etc.
  - Innovators have to deposit a bank guarantee equivalent to payment made against installation of a solar pump. The same will be encashed if the pump fails to meet MNRE performance standards during demonstration period of 1 year.
  - Innovators have to fill up an indemnity bond against damages caused to farmers due to performance of pump during the period of demonstration. The indemnity bond and bank guarantee would be released on successful trial of the pump.
  - Performance of pump would be monitored on real time basis during the subsistence of field demonstration i.e. for at least 1 year from date of installation of pumps.
  - A detailed performance report (including a detailed performance report of the pump comprising a comparative analysis with similar capacity pump specified by the MNRE, along with feedback from SIA & beneficiary farmers) would need to be submitted on monthly basis by the innovator to the EC.
  - Installed innovative pumps should meet at least the existing MNRE performance standards.

- Only innovations showing substantial improvement from the MNRE specifications would be considered for adoption.
- EC may recommend adoption of specifications of innovative pump with certain modifications.
- Adoption of technology by MNRE
  - MNRE may adopt the innovative technology and update the existing specification after having a detailed stakeholders' consultation on the same.
  - Innovators will get certificate of appreciation from MNRE for innovations with outstanding performance.

**Our view:** The guidelines issued by the MNRE for installation of innovative standalone solar pumps in test mode are an important step in promoting innovation in solar technology. By encouraging different designs/software for solar pumps, the MNRE is striving to attain better performance of pumps in a cost effective manner. In the backdrop of the restrictions on import of power equipment from China as announced by the Union Ministry of Power and the Made in India initiative, it is imperative for Indian manufacturers to innovate in a scalable manner.

## ***CERC Removes Floor Prices for Solar and Non-Solar RECs***

### **Background:**

The Central Electricity Regulatory Commission (**CERC**) through its order dated June 17, 2020 redetermined the floor price and forbearance price for the Renewable Energy Certificate (**REC**) framework (**Order**). The floor prices and forbearance prices so determined will be effective from July 1, 2020 until June 30, 2021.

### **What are renewable energy certificates?**

Also known as green energy certificates, a REC represents proof that renewable energy has been generated and fed into the national grid, with each REC purchased being equivalent to 1 MWh of energy. RECs may be purchased by an entity to comply with its renewable purchase obligation (**RPO**). As per the Electricity Act, 2003, power distribution companies, captive power plants and other large consumers of electricity are required to purchase a certain percentage of their power requirement from renewable energy sources. This obligation is known as RPO. RECs are aimed at meeting the shortfall between the supply of renewable energy and the RPO on the concerned entity.

### **What are floor and forbearance prices with respect to the REC framework in India?**

- The floor price of a REC as determined by the CERC is the minimum price at or above which, a REC may be dealt in by a power exchange in India. It is determined keeping in mind the basic minimum requirements of ensuring the viability of a renewable energy project set up to meet renewable energy targets.
- The forbearance price of a REC as determined by the CERC is the maximum price within which RECs may be dealt in by a power exchange in India. It is determined based on the highest difference between the cost of generation of renewable energy technologies/renewable energy tariff and the average cost of purchasing power in the preceding year by the respective States.

### **What is the basis for the Order?**

- The CERC's previous determination of the floor and forbearance prices on April 1, 2017 was the subject of extensive contention before the Appellate Tribunal for Electricity and the Hon'ble Supreme Court of India,

with the legal validity of the CERC's determination being challenged. Finally, the CERC directed on May 28, 2018 that Solar RECs (*RECs based on electricity generated through solar power*) be traded at a floor price of INR 1000/MWh and a forbearance price of INR 2400/MWh. Non-Solar RECs were traded at a floor price of INR 1000/MWh and a forbearance price of INR 3000/MWh. RECs have been traded accordingly since.

- The CERC has now reviewed the above prices and has determined that both Solar and Non-Solar RECs will not have a floor price and are to have a forbearance price of INR 1000/MWh. However, these prices will only be applicable to RECs issued after April 1, 2017.
- For Solar RECs issued before April 1, 2017, the eligible entities have an option to adopt the above revised floor and forbearance prices or continue with the older floor price of INR 1000/MWh and forbearance price of INR 2400/MWh.
- Trading of Non-Solar RECs issued prior to April 1, 2017 is to be carried out at the floor price of INR 1500/MWh. Obligated entities (with respect to RPOs)/Power Exchanges were directed to deposit INR 500 i.e. the difference between the floor price prevailing earlier, i.e. INR 1500/MWh and INR 1000/MWh which was the floor price determined on April 1, 2017.
- The Order recognizes that the renewable energy sector in India has changed substantially since April 2017. The CERC has revised the prices keeping in mind the sharp decline in solar and wind tariffs as a result of both solar and wind projects being awarded on the basis of competitive bidding at national and state levels. They state that the forbearance and floor prices necessitated a review in order to balance the interests of entities eligible to issue RECs and the obligations of entities required to purchase RECs.

**Our view:** The removal of the floor price for trading in an REC ought to make their purchase a lucrative proposition for obligated entities, with minimum prices being determined by market forces instead. For obligated entities with shortfalls in meeting RPO targets, the removal of the floor price is undeniably good news. Conversely however, the concept of the floor price was designed to protect the renewable energy generator and ensure that the price meets the minimum requirements to keep the project viable. With tariff rates declining sharply since 2017, the removal of the floor price also leaves the renewable energy generators vulnerable to volatility in pricing. Given the lack of assurance in relation to sale of RECs, investors may have further apprehensions in relation to investments in the renewable sector.

## ***CERC Orders Immediate Release of Safeguard Duty Payments***

### **Background:**

- On June 3, 2020, the CERC passed an order in a petition (**Petition**) filed by ACME Jaipur Solar Power Private Limited (**Petitioner**), a special purpose vehicle engaged in the business of generation of solar power.
- In terms of the Petition, the Petitioner who had been selected to develop one unit comprising 250 MW capacity of Rewa Solar Power Project in Rewa District of Madhya Pradesh sought complete payment of compensation of INR 47,10,35,111 towards safeguard duty (**SGD**) as per deferred annuity payment model agreed with M.P. Power Management Company Limited (**MPPCL**), Delhi Metro Rail Corporation (**DMRC**) and Rewa Ultra Mega Solar Limited (collectively, **Respondents**).
- In an earlier petition filed before the CERC, the Petitioner had sought declaration of “change in law” event and grant of consequential relief for the increase in capital cost due to introduction and imposition of SGD. Whilst upholding imposition of SGD as “change in law”, the CERC, vide order dated October 15, 2019, had



directed (as an alternative to payment in lumpsum) that the contracting parties mutually agree to a mechanism for payment of compensation on an annuity basis.

- Vide the Petition, the Petitioner contended that contrary to the aforesaid direction, the Respondents were coercing the Petitioner to agree to an annuity method having an adverse financial impact on the Petitioner. Further, the Respondents had informed the Petitioner that no payments would be made until unconditional acceptance by the Petitioner of annuity payment method proposed by the Respondents. In the absence of a mutual agreement on critical financial parameters relevant for determining annuity payments, the Petitioner approached the CERC for determining the same relying on the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2017 (**RE Tariff Regulations**).

### What was the decision of the CERC?

- The CERC denied MPPCL's request to make payments from July 2020 on easing/normalizing of the Covid-19 situation and directed immediate release of the payment by the Respondents as per "interim payment methodology" decided on March 20, 2020 (subject to final decision in the main Petition No. 373/MP/2020), after taking into consideration in particular:
  - the Petitioner's submission that the MNRE had vide its letter dated March 12, 2020 directed SECI to reimburse/compensate the change in law payments to renewable energy (**RE**) developers towards SGD and goods and services tax claims by annuity basis in accordance with the RE Tariff Regulations;
  - the directive dated April 1, 2020 of the MNRE that payments of RE generators be done on regular basis as was being done prior to lockdown; and
  - the fact that DMRC had already commenced making payments to the Petitioner in the interim.
- Additionally, the CERC allowed the prayer of the Petitioner to file a duly affirmed affidavit on resumption of regular functioning of the courts.

**Our view:** The CERC order clarifies that the lockdown imposed due to the pandemic does not warrant withholding of payments to renewable energy generators. Accordingly, regular payments need to be made to renewable energy generators. This is in line with other pronouncements and orders made by various regulators and authorities as well as the established legal principle that economic hardship cannot be considered a force majeure in normal circumstances.

## MERC Order on COVID-19 as Force Majeure Event under a Power Purchase Agreement

### Background:

The Maharashtra Electricity Regulatory Commission (**MERC**) vide order dated June 20, 2020 in the case of *ACME Heergarh Powertech Private Limited vs. Maharashtra State Electricity Distribution Company Limited*<sup>3</sup>, adjudicated on a case seeking frustration of a power purchase agreement on account of the occurrence of a force majeure event (COVID-19).

<sup>3</sup> Case No. 78 of 2020

## What were the facts of the case?

- On December 5, 2018, the Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) had issued a request for a solution document for procurement of power on a long term basis through a competitive bidding process for 1000 MW grid connected solar photovoltaic power projects.
- ACME Solar Holding Limited (**ASHL**) was declared as one of the successful bidders and a letter of authorization was issued for development of 300 MW of the solar project. ASHL set up a special purpose vehicle ACME Heergarh Powertech Private Limited (**AHPPL**) for the project.
- On August 21, 2019 a power purchase agreement was signed between AHPPL and MSEDCL (**PPA**). As per the PPA, AHPPL had submitted a bank guarantee and was required to achieve financial closure by April 25, 2020.
- On August 22, 2019 the Rajasthan Renewable Energy Corporation Limited (**RRECL**) published a draft Solar Policy, 2019, mandating the solar projects which supplied power outside Rajasthan to pay a prescribed sum of money as contribution towards the Rajasthan Renewable Energy Development Fund. ASHL made a representation regarding the unworkability of the draft Policy. The final policy which got notified on December 14, 2019, restored the conditions before publication of draft policy for projects for which bids had already been submitted. AHPPL contended that such uncertainty caused a delay in land acquisition and financial closure.
- In December 2019, ASHL and AHPPL executed purchase orders with certain suppliers for purchase of solar inverters and PV modules respectively. However, in January 2020, the suppliers issued a force majeure notice to ASHL due to outbreak of COVID-19 in China.
- Subsequently on February 21, 2020, AHPPL issued a force majeure notice to MSEDCL (**FM Notice**). Vide the FM Notice, AHPPL informed MSEDCL that the circumstances and events are completely beyond AHPPL's reasonable control which qualifies as a force majeure affecting AHPPL's performance and obligations in terms of the PPA. Subsequently, AHPPL requested MSEDCL for an extension of timelines for land procurement, financial closure and scheduled commissioning date (**SCOD**) due to material change in the Policy and outbreak of COVID-19.
- On April 20, 2020, ASHL wrote to AHPPL informing that its Chinese vendors had expressed inability in supplying modules and inverters as per the agreed timelines on account of force majeure. Accordingly, ASHL stated that in light of the uncertainty, it had become impossible to complete the Project at this stage on account of continued force majeure.
- On April 21, 2020, MSEDCL rejected AHPPL's claim for force majeure citing the Ministry of Home Affairs order dated April 15, 2020, which allowed construction of renewable energy projects to operate. Subsequently, AHPPL informed MSEDCL that on account of disruptions in global supply chains and lockdowns, performance of obligations under the PPA had become impossible. Thereafter, a petition was filed by AHPPL in MERC on April 24, 2020.

## What were the issues framed by the MERC?

- Whether the Petition was premature as it was filed without resorting to procedure mentioned in the PPA?
- Whether AHPPL was affected by event of force majeure?
- Whether the PPA could be terminated on account of prolonged force majeure?

## What were the observations of MERC?

- As regards the first issue, the MERC observed that since the FM Notice was sent by AHPPL and was disputed by MSEDCL, the parties were in dispute regarding the applicability of the force majeure event. The MERC ruled that even though parties have not resorted to procedure of mutual resolution of dispute under the PPA, considering that period of 60 days available for mutual resolution of dispute under the PPA had already lapsed, the MERC could adjudicate the dispute.
- As regards the second issue, the MERC analyzed the force majeure clause under the PPA and observed that 'epidemic' and 'late Delivery' of the plant's machinery, equipment, materials etc. on account of force majeure event was included in the force majeure clause. The MERC also took note of the office memorandum dated February 19, 2020 issued by the Department of Expenditure, Ministry of Finance in relation to 'Manual for Procurement of Goods, 2017' which clarified that disruption in supply chain on account of spread of COVID-19 in China and other countries is to be treated as force majeure (**FM OM**).
- The MERC ruled that since COVID-19 was an epidemic and AHPPL's suppliers had been affected on account of spread of COVID-19 causing delay in supply of material to AHPPL, AHPPL was affected from force majeure event i.e. spread of COVID-19, and was eligible for relief on account of force majeure as specified in the PPA. As regards the draft Policy, MERC observed that AHPPL has not issued any notice of force majeure under the PPA and hence it would not be eligible for any relief on this account. The MERC further held that the Policy could not be a ground for invoking force majeure under the PPA.
- As regards the final issue, MERC observed that since there was no clause for termination of PPA on account of prolonged force majeure event, the only relief available is that the affected party is exempted from its obligation for that period of the force majeure without any compensation in tariff.
- The MERC directed MSEDCL to extend the due date of financial closure and SCOD of the project for a period starting from the date of FM Notice till restoration of supply chains and Government of India withdrawing lockdowns imposed on account of Covid-19, plus an additional period of 30 days. Further, AHPPL was directed to provide a bank guarantee as per the PPA valid for the period extended from time to time on account of Force Majeure.

**Our view:** The aforesaid order provides clarity on the enforcement of the force majeure provisions in light of the COVID-19 crisis. In line with the earlier jurisprudence, (i) the relief pursuant to a force majeure has been limited to the provisions of the PPA; and (ii) a request for frustration was not acceded to as it had not become impossible to perform the obligations under the PPA.

## MNRE Notifies Benchmark Costs for Off-Grid Solar PV Systems

### Background:

The MNRE *vide* order dated June 25, 2020 (**MNRE Order**) has notified the benchmark costs for off-grid solar PV systems for the year 2020-2021.

### What are the key directives?

- The order has notified the benchmark costs for standalone solar pumps, solar lighting systems and standalone solar power plants/packs.
- The benchmark costs will vary depending upon capacity of the pumps/plants and category of states.

- The benchmark costs come into effect from the date of issue of the MNRE Order. However, in cases where the tender has been finalized as on date of issuance of the MNRE Order, but the letter of award (**LOA**) is yet to be placed, the benchmark costs for FY 2019-2020 would be applicable, provided that the LOA is placed by July 15, 2020. From July 16, 2020, the new benchmark costs will be applicable in all cases under MNRE's programmes.
- All the benchmark costs are for systems installed as per MNRE specifications inclusive of the total system cost and its installation, commissioning, transportation, insurance, comprehensive maintenance charges for 5 years, online monitoring and applicable fees and taxes.

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