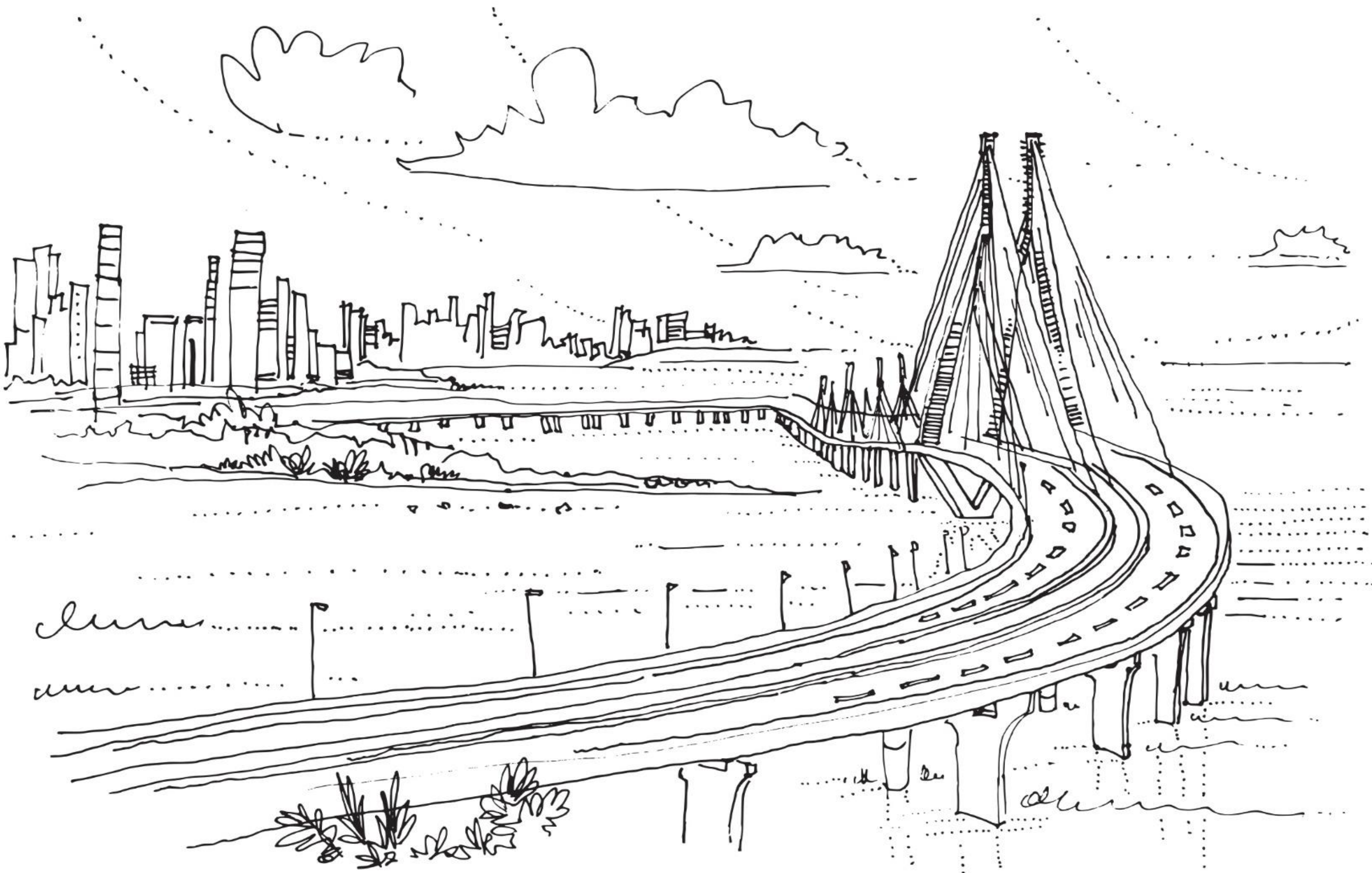
ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS



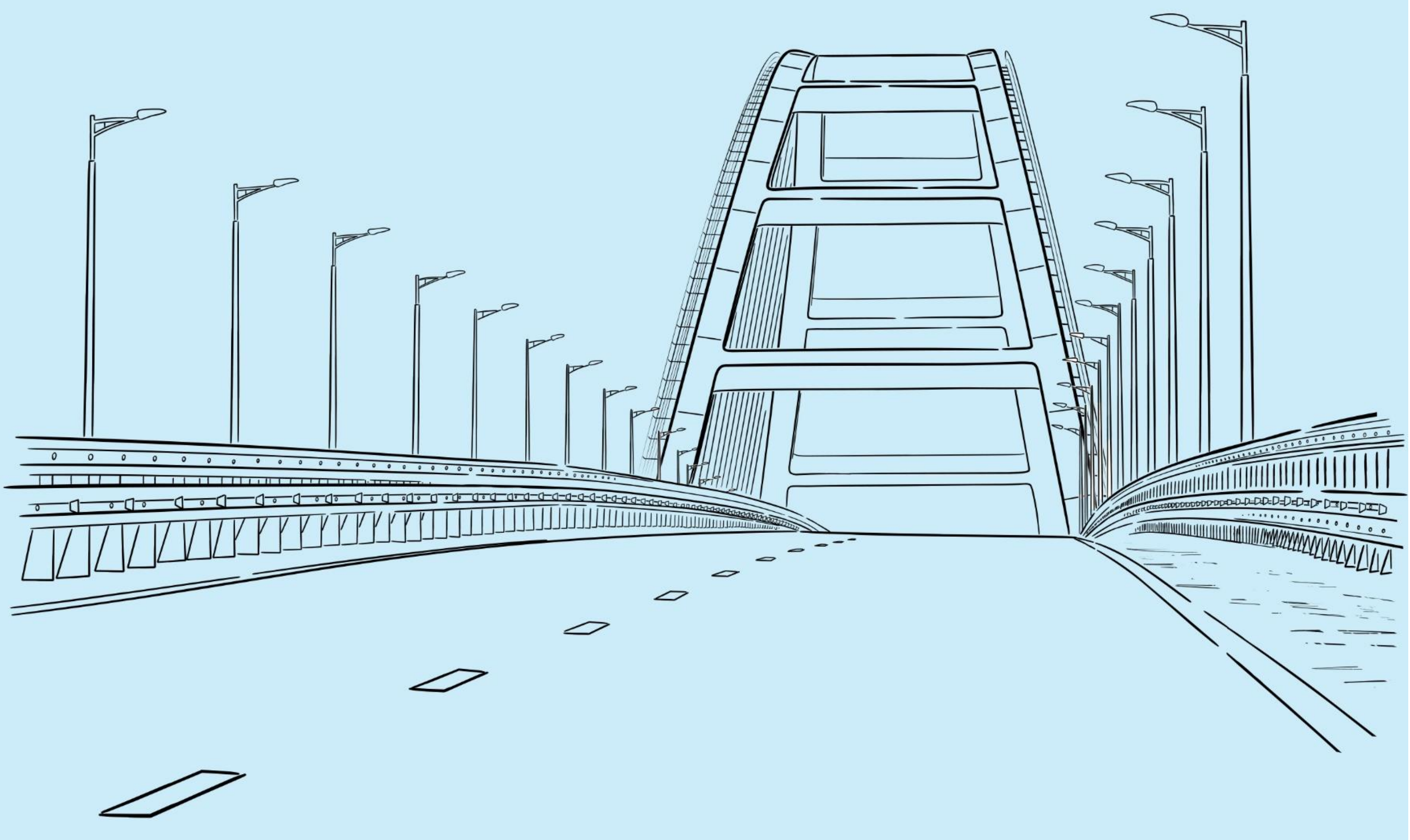
Infrastructure and Energy Digest

Overview of Legal and Regulatory Developments

March 2021

TABLE OF CONTENTS

INFRASTRUCTURE



Reduction in Contract Performance Guarantee for Tariff Based Competitive Bidding transmission projects

Brief Background

- The Department of Expenditure (**DOE**), Ministry of Finance issued an office memorandum dated November 12, 2020 (**OM**) inter alia stipulating reduction in performance security in all kinds of government procurements - from the existing 5%-10% to 3% of the value of the contract - for all existing tender/contracts as well as tenders/contracts to be issued/concluded till December 31, 2021. This was in order to address the acute financial crunch amongst many commercial entities and contractors due to the COVID-19 pandemic.
- The MoP received representation from the Transmission Developers Association to reduce the Contract Performance Guarantee (**CPG**) for Tariff Based Competitive Bidding (**TBCB**) transmission projects in line with the above OM issued by DOE.
- In view of the OM, the MOP issued a circular No. 3/7/2017 - Trans-Pt(6) dated March 25, 2021 (**Circular**).

What are the main provisions of the Circular?

- The MOP decided that CPG for the TBCB transmission projects may be revised for (a) projects under construction where CPG is valid; (b) projects where letter of award has been issued but CPG is yet to be submitted; (c) projects where request for proposal (**RFP**) has been issued but bids are yet to be submitted, and (d) for projects where RFP is not yet issued, but to be issued till December 31, 2021, as under:

	Existing	Proposed
CPG Value	@INR 13.5 lakh per km for the total Transmission Line length and @INR 1.125 lakh per MVA for sub-stations.	@ INR 5.25 lakh per km for the total Transmission Line length and @ INR 0.45 lakh per MVA for sub-stations.

- The Circular provides reduction in CPG subject to the following conditions:
  - it should not be given in contracts under dispute wherein arbitration/ court proceedings have already been started or are contemplated;
  - the reduced performance security shall continue for the entire duration of the contract and there would not be subsequent increase of performance security even beyond December 31, 2021; and
  - if there are compelling circumstances to ask for CPG in excess of reduced value, as stated above, the same should be done only with the approval of the next higher authority which is competent to finalize the particular tender, or the Secretary of the Ministry/ Department, whichever is lower. Also, specific reasons justifying the exception shall be recorded.
- The standard bidding documents for procurement of transmission services on TBCB stand amended to the above extent.

Our view: In light of the present state of affairs in the country and impending lockdowns by State Governments, the Circular should offer a significant relief for transmission projects and help alleviate the stress in the sector as well as reduce exposure of the lending sector. The Circular is in line with previous directions from the MOP to the State Governments and the Governments of Union Territories to relax performance security and earnest money deposit requirements for power project bids on account of the impact of COVID-19 on businesses.

Arbitration under Highways Act limited to independent determination of compensation

Brief Background

In a recent order, the Allahabad High Court (**High Court**) in the case of *Bhartiya Rashtriya Rajmarg Pradhikaran vs Rajesh Kaushik and Other*[3] stated that the arbitrator cannot set aside the order of compensation passed by the competent authority[4] under the National Highways Act, 1956 (**Highways Act**).

What are the facts of the case?

- The competent authority vide its order dated January 31, 2013 under the Highways Act had determined the compensation payable to the respondents for their land.
- The respondents were not satisfied with the order and invoked arbitration under Section 3-G (5) of the Highways Act for reconsideration of the compensation amount.
- The arbitrator vide its order dated October 25, 2016 directed the competent authority under the Highways Act to redetermine the amount of compensation under Section 3-G (5) of the Highways Act.
- A petition was filed by the National Highway Authority of India (**NHAI**) under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) before a district judge in Miscellaneous Arbitration Case No.35 of 2017, However, the district judge rejected the arguments of the NHAI.

What were the contentions?

- It was contended by the appellant that the arbitrator acted without the jurisdiction in remitting the matter to the competent authority for re-determining the compensation under Section 34 of the Arbitration Act.
- It was further contended that the arbitrator had no power to act as an appellate court or set aside the order of the competent authority.

What did the High Court observe?

- The High Court observed that there can be no two opinions about the scope of the proceedings before the arbitrator. Such proceedings arose purely in terms of the provision of Section 3-G (5) of the Highways Act. For ready reference, the said provision reads as:*"(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government*." Such arbitration may arise only at the instance of a party to whom the amount determined by the competent authority may not be acceptable.
- The High Court held that the concerned party may apply for determination of the amount by the arbitrator and for no other purpose. The scope or terms of reference have been chosen or determined or limited by the legislature to determine the amount payable to the claimant.
- While observing that the District Judge had erred in rejecting the objections raised by the appellant as not maintainable, the High Court held that the award was open to challenge in terms of Section 34(2)(a)(iv) of the Arbitration Act being beyond the scope of reference to arbitration and also under Section 34(2)(b)(ii) of the Arbitration Act, being contrary to be public policy of India.
- The award of the arbitrator dated January 31, 2013 was also set aside with leave to the claimant-respondent to seek a fresh arbitration. That arbitration may be held between the appellant and the claimant respondent only.

[3] Appeal under Section 34 of Arbitration and Conciliation Act, 1996 No. - 36 of 2020

[4] Competent Authority under the Highway Act means any person or authority authorised by the Central Government, by notification in the Official Gazette, to perform the functions of the competent authority for such area as may be specified in the notification.

Our view: The aforesaid decision emphasizes the principle that an arbitration for a dispute comes into existence upon an agreement between the parties to the dispute and the arbitrator's jurisdiction is confined to adjudicate the dispute brought by them. Arbitrators ought to exercise due care in acting only within the scope or terms of their reference. The decision should help settle the law for any similar pending matters and thereby reduce litigation. It may even serve as a precedent for other statutory arbitrations.

Major Port Authorities Act, 2021

Background

The Lok Sabha passed the Major Port Authorities Bill on September 23, 2020 and the Rajya Sabha on February 10, 2021. The said bill received the consent of the President on February 17, 2021 (**Port Act**). The Port Act replaces the Major Port Trusts Act, 1963 (**Port Act, 1963**). It aims at decentralizing decision making and seeks to infuse professionalism in governance of major ports and also aiming at reorienting the governance model in central ports to landlord port model in line with the successful global practice.

What are the salient features/key changes in the Port Act?

- The Port Act would apply to the major ports of Chennai, Cochin, Jawaharlal Nehru Port, Kandla, Kolkata, Mumbai, New Mangalore, Mormugao, Paradip, V.O. Chidambaranar and Vishakhapatnam.
- The Port Act has eliminated overlapping and obsolete sections.
- The Port Act has proposed a simplified composition of the Board of Port Authority (**Board**) which will comprise of 11 to 13 Members from the present 17 to 19 Members under the Port Act, 1963. A compact Board with professional independent members would strengthen decision making and strategic planning.
- Provisions have also been made under the Port Act for inclusion of representatives of the State Government in which the major port is situated, Ministry of Railways, Ministry of Defence and Customs, Department of Revenue as Members in the Board apart from a Government Nominee Member and two members representing the employees of the major port authority.
- The role of Tariff Authority for major ports (**TAMP**) would be redefined. The concerned port authority would be given powers to fix tariff which will act as a reference tariff for the purposes of bidding for public private partnership (**PPP**) projects. PPP operators would be free to fix tariff-based on the market conditions. The Board would be delegated the power to fix the scale of rates for other port services and assets including land.
- An adjudicatory board is proposed to carry out the residual function of the erstwhile TAMP for major ports, to look into disputes between ports and PPP concessionaires, to review stressed PPP projects and suggest measures to revive such projects and to look into complaints regarding services rendered by the ports/private operators operating within the ports.
- The Board would be delegated full powers to enter into contracts, planning and development, fixing of tariff except in national interest, security and emergency arising out of inaction and default. In the Port Act, 1963, prior approval of the Central Government was required in 22 instances.
- Under the Port Act 1963, the Board had to seek prior sanction of the Central Government to raise any loan. Under the Port Act, to meet its capital and working expenditure requirements, the Board may raise loans from any: (i) scheduled bank or financial institution within India, or (ii) any financial institution outside India that is compliant with all the applicable laws. However, for loans above 50% of its capital reserves, the Board will require prior sanction of the Central Government.

- The Board of each major port would be entitled to create a specific master plan in respect of any development or infrastructure.
- The Port Act provides that the Board may use its funds for providing social benefits including development of infrastructure in areas such as education, health, housing, and skill development. These benefits could be provided for the Board's employees, customers, business partners, local communities, environment and the society at large.
- The Port Act also provides for safeguarding the pay and allowances and service conditions including pensionary benefits of the employees of major ports.

Our view: There has been criticism that the Port Act aims at privatizing the ports and diluting the powers of the State on land use from the opposition. However, a prevalent counterview is that the amended Port Act will help in bringing transparency in operations of the major ports and empower the major ports to perform with greater efficiency on account of full autonomy in decision making and by modernizing the institutional framework of major ports. The new Port Act will certainly pave the way for driving the country's vision towards Aatmanirbhar Bharat, promote expansion of port infrastructure and facilitate trade and commerce.

ENERGY

Electricity (Late Payment Surcharge) Rules, 2021

Background:

The MOP vide notification dated February 22, 2021 has notified the Electricity (Late Payment Surcharge) Rules, 2021 (**LPS Rules**).

What is Late Payment Surcharge?

Late Payment Surcharge (**LPS**) means the charges payable by a distribution company to a generating company or electricity trader for power procured from it, or by a user of a transmission system to a transmission licensee on account of delay in payment of monthly charges beyond the due date.

When will the LPS Rules apply?

The LPS Rules will be applicable for payments to be made in pursuance of:

- Power Purchase Agreements, Power Supply Agreements and Transmission Service Agreements, in which tariff is determined under Section 62 of the Electricity Act, 2003 (**Electricity Act**); and
- Such Power Purchase Agreements, Power Supply Agreements and Transmission Service Agreements that become effective after the LPS Rules come into force, in which tariff is determined under Section 63 of the Electricity Act, 2003.

How much LPS is payable?

- For the first month of default, LPS would be payable on the outstanding payment at the base rate of LPS applicable for the period.
- The rate of LPS for the successive months of default would be increased by 0.5% (zero point five percent) for every month of delay provided that the LPS should not be more than 3% (three percent) higher than the base rate at any time.
- The rate at which LPS is payable should not be higher than the rate specified in the agreement for purchase or transmission of power, if any.

How will the LPS be adjusted?

All payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system to a transmission licensee would be first adjusted towards LPS and thereafter, towards monthly charges, starting from the longest overdue bill.

What are other consequences of non-payment of outstanding amounts?

In the event a distribution licensee has any payment including LPS outstanding against a bill after the expiry of 7 (seven) months from the due date of the bill, it would be debarred from procuring power from a power exchange or grant of short term open access till such bill is paid.

Our view: The LPS Rules should help deter late payments by distribution companies. However, from the perspective of the generation companies who are already reeling under financial stress, it remains to be seen whether the quantum would be sufficient to counter any delays in payments. Further, although a distribution licensee is debarred from procuring power from a power exchange or short-term open access, it would be at liberty to enter into longer term contracts with better terms and for that purpose obtain mid- or long-term open access.

Adoption of Tariff Based Competitive Bidding for Intra-State Transmission Projects

Background:

- The MoP issued a notification dated March 15, 2021 regarding the adoption of Tariff Based Competitive Bidding (**TBCB**) for intra-state transmission projects.
- The Electricity Act permits investment in all segments of the electricity, both for public and private sectors by removing barrier to entry in different segments.
- The National Electricity Policy, 2005 encourages the role of private participation in generation, transmission and distribution due to the rapidly growing investment needs of the sector.
- Thereafter, the Tariff Policy was notified by the Central Government in 2006 to ensure optimal development of the transmission network to promote efficient utilization of generation and transmission assets in the country, as well as for attracting the required investments in the transmission sector and providing adequate returns.
- Subsequently, the MoP notified 'TBCB Guidelines for Transmission Service' and 'Guidelines for Encouraging Competition in Development of Transmission Projects' as under the Electricity Act. Since 2010, TBCB started for development of inter-state transmission sector.

Proposal:

- The MoP noted that intra-state transmission system has a major share in the transmission sector in the country and hence, adoption of TBCB in development of Intra-State Transmission System can effectively reduce burden on State Governments' finances as well as reduce tariff of Intra-State Transmission System, leading to consumers' benefit.
- The MoP also indicated that on February 3, 2021 a meeting was held by the Union Minister of State (independent charge) for Power and New and Renewable Energy, where it was decided to request State/ Union Territory Governments to adopt TBCB in development of Intra-State Transmission System.
- Accordingly, in the large interest of the consumers, the MoP recommended that TBCB may be adopted for development of Intra-State Transmission System also.

Our view: Adoption of TPCB for development of Intra-State Transmission System will effectively reduce burden on State Governments' finances. The move should also help reduce tariff for Intra-State Transmission Systems which should attract private investments and in turn benefit consumers.

RENEWABLE ENERGY

CERC directs SECI not to encash Bank Guarantees against Adani Wind Energy Kutchh One Ltd

Background:

In an order pronounced on March 5, 2021, the Central Electricity Regulatory Commission (**CERC**) in the case of *Adani Wind Energy Kutchh One Limited vs. Solar Energy Corporation of India Limited (SECI) and Another*[3], directed SECI not to encash the performance bank guarantee (**PBG**) furnished by Adani Wind Energy Kutchh One Limited (**Adani**) for the delay in commissioning of 250 MW wind projects in Gujarat (**Project**) until the next hearing.

What are the facts of the case?

- Adani filed a petition with the CERC seeking directions that it should be relieved from its obligations under the power purchase agreement (**PPA**) on the grounds of force majeure - without any financial implication - and further restraining the SECI from encashing the PBG.
- The petition was filed under Section 79 of the Electricity Act read with Articles 11 and 13 of the PPA's dated June 28, 2018 executed between Adani and SECI.
- Adani stated in the petition that due to the occurrence of various force majeure events, the construction and commissioning of the Project became impossible within the timelines mentioned in the PPA.
- SECI, however, refused to recognize the force majeure claims of Adani and vide its email dated January 1, 2021 informed that PBG submitted by Adani would be invoked upon expiry of 21 days i.e., by 13.1.2021.
- In terms of the Supreme Court order[4] dated August 28, 2020, CERC had stopped holding hearings.
- Adani filed a writ petition before the High Court[5] of Delhi (**High Court**), inter alia seeking directions for SECI to maintain the status quo as regards PPAs and restraining from encashing/invoking the PBG till the time the petition was heard by CERC. The High Court vide its orders dated January 13, 2021 and January 22, 2021 directed SECI to maintain the status quo and finally vide order dated February 3, 2021 disposed of the writ petition with direction to SECI not to take any coercive steps till the first date of hearing before CERC. The High Court directed CERC to take up the petition filed by Adani within a period of 30 days.
- SECI was of the view that the law on the invocation of bank guarantee is settled. Bank guarantees are independent and separate contracts and the existence any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain its enforcement. The exceptions to this rule being (a) when there is a clear case of fraud; (b) irretrievable injustice; and (c) special equities.

What were the contentions?

- It was contended by Adani that various force majeure events rendered the performance of its obligations under the PPA impossible, namely: -
  - delay in commissioning of transmission system;
  - outbreak of Covid-19 and imposition of lockdown;
  - delay in construction of the Adani's dedicated transmission line;
  - delay due to damages caused to the Adani's transmission tower by villagers;

[3] Petition No. 43/MP/2021 along with IA No.9/2021
[4] Contempt Petition (C) No. 429/2020
[5] Petition No. 340/2021

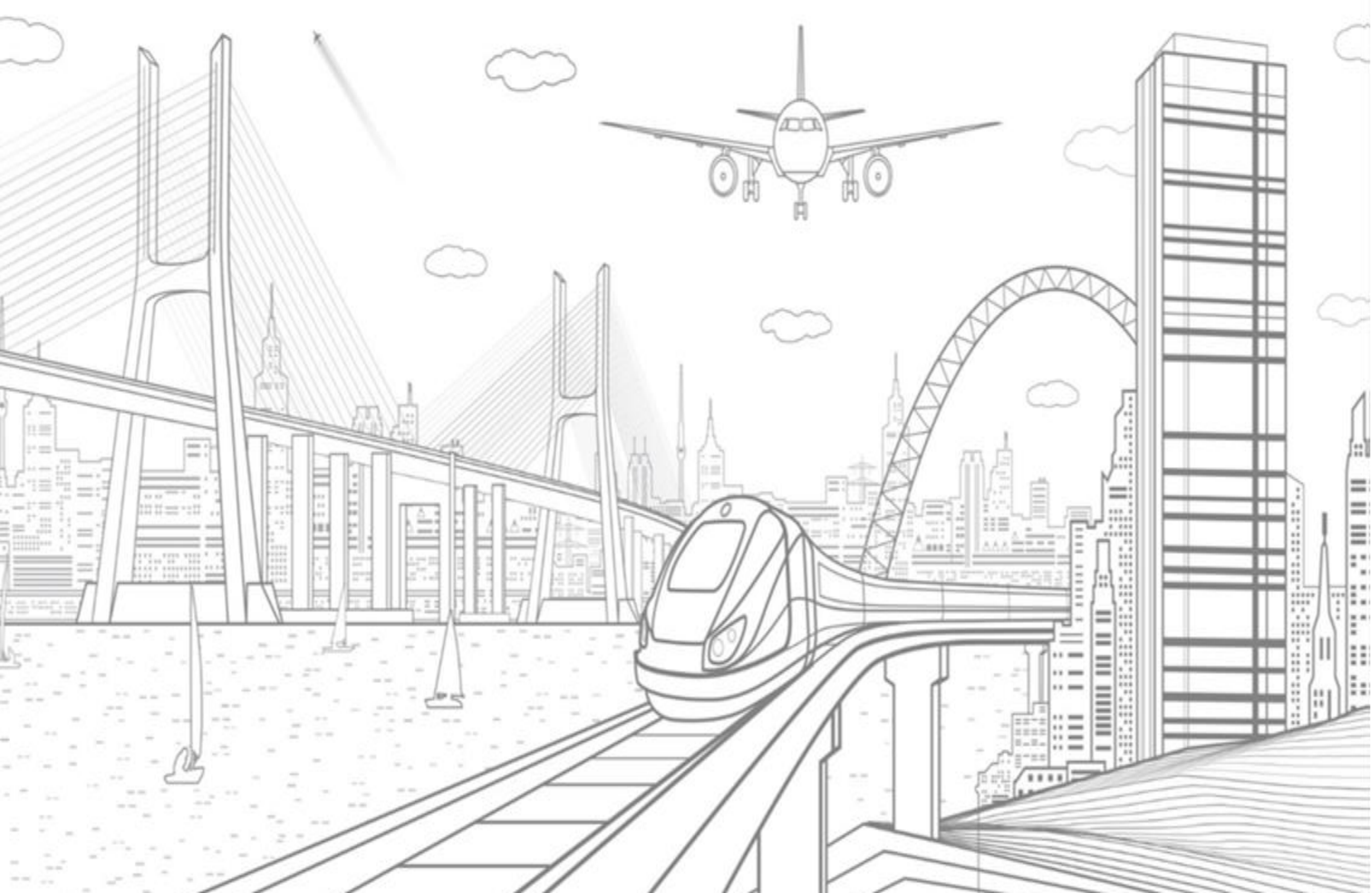
- delay caused due to occurrence of cyclone Vayu in Gujarat;
- delay and damages caused due to heavy rains in Gujarat; and
- delay in filing of adoption of tariff Petition under Section 63 of the Act by SECI, etc.

- It was contended by SECI that Article 13.5 of the PPA provided for the termination of the PPA by either party only in case of continuation of force majeure or its effects beyond 12 months. However, the documents showed that Adani's claim concerning the non-commissioning of the associated transmission system was incorrect.

What was CERC's judgement?

- CERC stated that the High Court has passed a restraining order for not invoking PBG. In view of the facts, CERC directed SECI not to invoke/encash the PGB furnished by Adani till the next date of hearing and Adani was directed to keep the PBG valid.
- CERC observed that it required time to examine the matter on merit.

Our view: It would be interesting to analyze the final order passed by CERC in this matter. As a result of the ongoing pandemic, force majeure clauses have gained tremendous importance. Courts and tribunals have paid heed to the plight of parties and accorded relief where the language of the agreements so permitted. However, as in all situations in which force majeure is claimed, the actual impact of the cited force majeure event on performance is a question of fact. Given the second wave of the pandemic and its associated repercussions, the final decision of the CERC would be critical in ascertaining the remedies in similar disputes.



Notifications on Approved Models and Manufacturers of Solar Photovoltaic Modules (Requirement of Compulsory Registration) Order, 2019

What is the Approved List of Models and Manufacturers?

The Approved List of Models and Manufacturers (**ALMM**) is a list of models and manufacturers of solar modules which are registered with the Ministry of New and Renewable Energy (**MNRE**). The objective of the ALMM is to ensure quality control and indigenous production of solar modules.

Why are the notifications issued by MNRE?

The MNRE has issued notification dated February 2, 2021 amending certain provisions of the ALMM Order (**Amendment Notification**) and notification dated March 10, 2021 regarding the implementation of the ALMM Order (**Implementation Notification**).

Why has the amendment been introduced?

Under the Approved Models and Manufacturers of Solar Photovoltaic Modules (Requirement of Compulsory Registration) Order, 2019 (**ALMM Order**) dated January 2, 2019, specified solar power projects were mandated to procure Solar PV modules and cells under the ALMM. In order to improve the reliability and minimize the variability of solar power plants, new kind of renewable energy plants like wind-solar hybrid plants, RTC renewable energy plants and peak renewable energy plants were introduced. Separate guidelines have been issued for development of such new projects. Therefore, to mandate the solar power projects under these instruments, certain amendments have been introduced in the ALMM Order.

What is the amendment?

The MNRE vide the Amendment Notification has amended paragraph 3 of the ALMM Order.

Previously, only models and manufacturers included in the ALMM were eligible for use in, inter alia, Government projects including projects set up for sale of electricity to the Government under 'Guidelines for Tariff Based Competitive Bidding process for procurement of power from Grid Connected Solar PV projects dated August 3, 2017'.

As per the amendment introduced in Paragraph 3, now, only models and manufacturers included in the ALMM projects are eligible for use in, inter alia, projects set up for sale of electricity to the Government under the guidelines issued by the Central Government under Section 63 of the Electricity Act.

What does the Implementation Notification provide?

- The MNRE has, vide the Implementation Notification approved and published the ALMM list for Solar PV Modules, i.e., List I – List of Models and Manufacturers for Solar PV Modules as on March 10, 2021.
- The enlistment is valid for a period of 2 years and can be renewed on submission of necessary documents.
- MNRE is empowered to conduct production and sale audit and random quality test, inspection of facility at any time to ensure compliance. In case of any non-compliance, the enlisted manufacturer would be removed from ALMM.
- The Approved List of Models and Manufacturers would be uploaded on the MNRE website and updated monthly.
- Apart from publishing List I, the notification also directs that the ALMM Order will be applicable only on the projects for which the bids are concluded after 30 days of publication of the respective List. Accordingly, ALMM order in respect of List I (Modules) would be applicable on all such bids whose last date of bid submission is on or after April 10, 2021.
- Further, the bidding agencies have been directed to take an explicit declaration from the bidders that they are aware of the binding provisions of the ALMM Order and list(s) thereunder while quoting tariff in the bid.

Our view: The amendments have been introduced in light of the introduction of new renewable energy technologies and plants. The implementation of the ALMM Order would be a positive step with the objective of building energy security for the country and ensuring reliability of solar PV cells and modules.

Amendments to the Guidelines for Tariff Based Competitive Bidding Process

Background:

- The Guidelines for Tariff Based Competitive Bidding Process for procurement of round-the clock power from grid connected renewable energy power projects, complemented with power from coal based thermal power projects (**Guidelines**) were notified under Section 63 of the Electricity Act on July 22, 2020.
- The Guidelines were amended vide a resolution dated November 3, 2020.
- Thereafter, the Ministry of Power (**MoP**) passed a resolution dated February 5, 2021 in order to further amend the Guidelines (**2021 Amendment**).

Amendments:

- **Renewable (RE) Power:**

  The 2021 Amendment has introduced certain clarifications in the definition of '**RE Power'**. The 2021 Amendment provides that the Energy Storage System (**ESS**) charged using a source other than RE power would not qualify as RE power. Further, ESS, which is offered with a solar power generating system or a wind power generating system, can only be charged from RE power capacity. The same RE power would either be considered for getting compensation in case of curtailment or for charging of ESS.

- **Force Majeure:**

  The Guidelines contained detailed provisions on Force Majeure such as the categorization of Force Majeure Events, exclusions, liability of parties during a Force Majeure Event and the suspension of performance and termination of the Power Purchase Agreement (**PPA**) due to a Force Majeure Event. The 2021 Amendment has replaced all such provisions and now requires the PPA to contain provisions with regard to Force Majeure definitions, exclusions, applicability and available relief on account of Force Majeure as per the Industry Standards. However, the 2021 Amendment does set out the notification requirement and provides that the Generator should intimate the procurer about the occurrence of a Force Majeure within 15 days of the start of the Force Majeure. The procurer is to take a decision on such claim within 15 days of the receipt of the intimation.

Generation Compensation in case of reduced off take:

The 2021 Amendment has made revisions in the manner of sharing the amounts realized by the generator, by third party sale or sale in the power exchange of such power which was offered but not scheduled, with the procurer.

As per the 2021 Amendment the realized amounts would be shared in the following manner:

- **For RE Power**:

  95% of realization after deducting actual expenses, if any, in such sale.

  Prior to the 2021 Amendment, this was 90% of net realization above RE tariff.

- **For Non RE Power**:

  95% of realization above variable Charges of Non RE Tariff after deducting actual expenses, if any, in such sale.

  Prior to the 2021 Amendment this was 50% of net realization above variable charges of non RE tariff.

Our view: The 2021 Amendment offers much needed clarity regarding the ESS. Further, we are of the view that the learnings from the pandemic would have prompted the amendments regarding force majeure. It is prudent to let the PPA stipulate the substantive provisions regarding the applicability of force majeure given the different procuring entities and surrounding circumstances in which PPAs are executed, whilst laying down the notice requirements in black and white.

Public Procurement to provide for Purchase Preference in respect of Renewable Energy Sector

Background:

- The Government of India, Department for Promotion of Industry and Internal Trade (**DPIIT**) issued the Public Procurement (Preference to Make in India), Order 2017 (**2017 Order**) for encouraging 'Make in India' and promoting manufacturing and production of goods and services in India with a view to enhancing income and employment.
- Thereafter, DPIIT issued the revised Public Procurement (Preference to Make in India) Order 2017 dated June 4, 2020 (**Order-I**) and September 16, 2020 (**Order-II**).
- Further, in light of the 2017 Order the MNRE issued an office memorandum dated December 11, 2018 covering certain products related to Renewable Energy (**RE**) sector under the 2017 Order, specifying the minimum percentage of local content required for such RE products.
- In pursuance of Order-I, the MNRE issued an Order dated September 23, 2020.
- The MNRE recently issued an Order dated February 9, 2021 in pursuance of the revised Order-II.

MNRE's revisions:

- The provisions relating to the following would be the same as in Order-II:
  - Eligibility of 'Class-I local supplier' / 'Class-II local supplier' / 'Non-local suppliers' for different types of procurement,
  - purchase preference,
  - exemption to small purchases, and
  - margin of purchase preference
- In procurement of all goods and services or works in respect of which there is sufficient local capacity and local competition, only 'Class—I local supplier', will be eligible to bid irrespective of purchase value.
- Only 'Class I local supplier' and 'Class-II local supplier', will be eligible to bid in procurements undertaken by procuring entities, except when global tender enquiry has been issued. In global tender enquiries, 'Non-local suppliers' will also be eligible to bid along with 'Class-I local suppliers' and 'Class-II local suppliers'.

  In procurement of all goods, services or works, not covered above, and with estimated value of purchases less than INR 200 Crore, global tender enquiries cannot be issued except with the approval of competent authority as designated by Department of Expenditure.
- The MNRE order would also include 'turnkey works', Engineering, Procurement and Construction contracts and service contracts including System Integrator contracts.
- The list of items regarding local capacity with sufficient competition, will be reviewed at regular intervals with a view to increase number of items in this list.
- Purchase preference will be given to local suppliers in accordance with Order-II.
- The MNRE has provided for constitution of committees:
  - for independent verification of self-declarations and auditor's / accountant's certificates on random basis and in the case of complaints.
  - to examine the grievances in consultation with stakeholders and recommend appropriate actions to the Competent Authority in MNRE.
- A complaint fee of INR 2,00,000 or 1% of the value of the local item being procured (subject to maximum of INR 5,00,000) whichever is higher, must be paid in the form of online transaction or Demand Draft, drawn in favour of IREDA. If the complaint is found to be incorrect, the complaint fee will be forfeited. If the complaint is upheld and found to be substantially correct, deposited fee of the complainant would be refunded without any interest.
- This order would be applicable in respect of the procurements made by specified offices or

autonomous bodies under the MNRE, Government of India including Government Companies, and the States and Local Bodies making procurement under all Central Schemes/Central Sector Schemes where the Scheme is fully or partially funded by Government of India. The order would also be applicable in respect of funding of capital equipment by IREDA, PFC and REC, for all RE projects, for which the bids are issued on or after April 1, 2021.

- Procuring entities have been advised to revise their tender documents fully complying with the orders that would be issued in this regard by DPIIT/MNRE from time to time.
- The MNRE order enlists equipment used in the RE sector which are manufactured under license from foreign manufacturers holding intellectual property rights and where there is a transfer of technology agreement, if any. However, it has been indicated that such list will undergo regular review to check for those items in the list for which sufficient local manufacturing capacity and competition get developed and which meet minimum local content of 50%.
- The procuring entities, while procuring Solar PV Cells beyond 250 MW per annum, are required to prescribe in their respective tenders that foreign companies must enter into a joint venture with an Indian company to participate in the tender.
- In order to further encourage Make in India initiative and promote manufacturing and production of goods and services in India, general guidelines have been prescribed which may be adopted in an appropriate manner according to the circumstances by the procuring entities in their tendering process.

Our view: The MNRE order shall bring much needed clarity regarding the purchase preferences given to Indian entities. If implemented effectively, this should help further the Government's mission of an 'Aatmanirbhar Bharat'.

MNRE imposes Basic Customs Duty on Solar PV Cells & Modules/ Panels

Background:

- As part of Paris Climate Agreement, India has committed to achieve 40% (forty percent) of its installed electricity capacity from non-fossil fuels by 2030.
- India set an ambitious target of 175 GW of installed Renewable Energy (RE) capacity, including 100 GW of solar power, by 2022 and 450 GW installed RE capacity by 2030.
- As per the Central Electricity Authority's Optimum Energy Mix report, the electricity requirement of the country by 2029-30 will be 817 GW including the 450 GW from renewable energy sources, out of which 280 GW would come from solar energy. In order to achieve the target of 280 GW, around 25 GW of solar energy capacity is needed to be installed every year, till 2030.

Current Scenario:

- India's solar sector is heavily reliant on imports of solar equipment.
- The Government has noted instances of certain countries dumping solar cells and modules to kill the nascent domestic industry, because of which it to imposed safeguard duties.
- The COVID-19 pandemic has brought disruptions in international trade including imports of solar modules and solar cells affecting solar capacity additions in the country.
- Considering India's huge solar targets and that electricity is a strategic sector of the economy, India would need to develop domestic solar manufacturing capacities and reduce its dependence on imports to avoid disruption in future.

Atmanirbhar Bharat:

- The Atmanirbhar Bharat initiative has geared up the country toward scaling up domestic manufacturing, which would enable India to export solar cells/modules.
- As such, it would also provide other countries an alternative avenue for procuring solar cells/modules.

MNRE's Proposal:

- The following MNRE proposal to impose Basic Customs Duty (**BCD**) on solar cells and modules (without grandfathering of bid out projects) has been agreed to by the Ministry of Finance (**MoF**)

Items	CTH	Upto March 31, 2022	w.e.f. April 1, 2022
Solar Module	85414012	0%	40%
Solar Cell	85414011	0%	25%

Imposition of BCD:

The MNRE has advised all RE implementing agencies and other stakeholders to take note of the above trajectory and include provisions in their bid documents, so that bidders take the trajectory into account while quoting tariffs. In all such bids, the imposition of BCD as per above trajectory will not be considered to be change in law.

Our view: The imposition of BCD will definitely foster the Atmanirbhar Bharat initiative and scale up domestic manufacturing. The intent seems to be to curtail imports of solar modules and cells from China, on which the Indian market is heavily dependent. While the quantum of the BCD is steep, developers should have sufficient time to chalk out their strategies for procurement of such raw materials.

Potential concerns: India became a signatory to the World Trade Organization's Information Technology Agreement (ITA) in 1997. The ITA requires each participant to eliminate and bind customs duties at zero for all products specified therein. This includes solar cells and modules falling under chapter 854140 of the HS.

Pursuant to the same, India modified its Schedule of Concessions in July 1997 , undertaking to eliminate customs duty on products covered under the ITA, including solar cells and modules by 2005. Accordingly, in 2005 India's MFN rate of duty on solar cells and modules was reduced to zero.

Article II of the General Agreement on Tariffs and Trade, 1994 requires that WTO Members not impose duties in excess of their negotiated tariff commitments as set out in their respective Schedules of Concessions.

Therefore, by imposing a BCD of 40 and 25 percent on solar modules and cells respectively, India would be exceeding its bound tariff rate of zero on these products and may attract questions from its trading partners with respect to its obligations under Article II of the GATT and the ITA Agreement.

Thank you for reading our infrastructure & energy digest. Contributing authors are:

Aakanksha Joshi, Partner

Megha Agarwal, Senior Associate

Vinit Shah, Associate Manager

Farhan Ali, Associate

Shanaya Ardeshir, Associate

Trade practice inputs: Ambarish Sathianathan; Naghm Ghei

We welcome your queries and suggestions at: insights@elp-in.com

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

MUMBAI

9th Floor, Mafatlal Centre
Vidhan Bhavan Marg
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