



December 2022

## **CERC allows Force Majeure relief to the affected party after holding that the other party had 'constructive notice' of the Force Majeure event**

On November 25, 2022, the Central Electricity Regulatory Commission (“CERC”) in the case of ***M.P. Power Management Company Limited v. Nuclear Power Corporation of India Limited***<sup>1</sup> granted, *inter alia*, Force Majeure reliefs to the affected party by holding that the other party had sufficient knowledge of the Force Majeure event and same amounts to ‘constructive notice’ of the Force Majeure event.

### **Brief Facts**

1. The petitioner, M.P. Power Management Company Limited (“MPPMCL”) is a wholly owned undertaking of the State of Madhya Pradesh. It performs activities relating to bulk purchase and bulk supply of electricity. Respondent No. 1, Nuclear Power Corporation of India (“NPCIL”) is a public sector undertaking wholly owned by the Government of India that is responsible for the generation of nuclear power. NPCIL had set up nuclear power stations namely Kakrapar Atomic Power Station (“KAPS”) and Tarapur Atomic Power Station (“TAPS”) for the generation of nuclear power.
2. MPPMCL entered into a Power Purchase Agreement (“PPA”) with NPCIL on August 8, 2005 for the purchase of nuclear power. It is MPPMCL’s case that NPCIL stopped the supply of power from KAPS from April 2016 till September 2018. On the other hand, NPCIL contended that the non-supply of power for the aforesaid period is on account of a Force Majeure event i.e., leakage in the Primary Heat Transport (“PHT”) system of the nuclear reactor.
3. Aggrieved by non-supply of power, NPCIL filed a petition before CERC seeking relief for, *inter alia*, the alleged breach of PPA by NPCIL. MPPMCL argued that the act of non-supply of power during the period from April 2016 till September 2018 is a clear act of breach of the PPA by NPCIL and hence MPPMCL is entitled to damages from NPCIL. MPPMCL also submitted that even if it is assumed that non-supply of power is on account of a Force Majeure event, NPCIL cannot be granted Force Majeure reliefs as NPCIL has not issued a Force Majeure notice in terms of the PPA.
4. On the other hand, NPCIL’s contentions before CERC were premised on the ground that the non-supply of power was on account of the Force Majeure event and MPPMCL had sufficient knowledge of the Force Majeure event. In this regard, NPCIL submitted, *inter alia*, that leakage in the PHT system of the nuclear reactor resulted in the stoppage of supply of power to all beneficiaries under the PPA (including MPPMCL). Since the stoppage of the supply of power under the PPA was beyond the control of NPCIL, the same amounts to a Force Majeure event, and NPCIL cannot be held liable for any alleged breach of the PPA.

<sup>1</sup> Petition No. 12/MP/2019 decided on 25.11.2022.

## Issues

5. CERC framed, *inter alia*, the following primary issues for consideration:-
- Whether the shutdown of NPCIL's KAPS can be treated as a Force Majeure event?
  - Whether NPCIL has complied with the requirement of issuing a Force Majeure notice under the PPA?

## Decision and Analysis

- At the outset, CERC analysed the Force Majeure clause under the PPA and the impact of leakage in the PHT system to decide if the same constitute a Force Majeure event. CERC observed that as a result of the leakage in the PHT system, the unit was automatically shut down as the PHT is an essential feature of the cooling system of a nuclear reactor. After examining the impact of the leakage in the PHT system in detail, CERC was convinced that the shutdown of KAPS was on account of an unforeseen event beyond the control of NPCIL.
- As regards whether the leakage in the PHT system falls within the Force Majeure clause of the PPA, CERC observed that:-
  - The definition of Force Majeure events **includes** events which are beyond the reasonable control of any party.
  - NPCIL was constrained to shut down KAPS as the Atomic Energy Regulatory Board through its press release dated March 11, 2016 declared an emergency.
  - The occurrence of such technical eventualities is required to be dealt with in accordance with the applicable regulatory and legal framework under the Atomic Energy Act, 1962. Only after a detailed review, the unforeseen problem could be resolved, and Units 1 and 2 of KAPS were put into operation on May 24, 2019, and September 22, 2018, respectively.

Therefore, the non-supply of power during the period from April 2016 till September 2018, is due to unforeseen and uncontrollable events, covered under the Force Majeure clause of the PPA, and NPCIL cannot be held liable for breach of the PPA.

The Force Majeure clause under consideration before CERC is as follows:-

### **"11.0 FORCE MAJEURE**

*The parties shall ensure compliance of the terms of this Agreement. However, no party shall be liable for any claims for any loss, damage or compensation whatsoever arising out of failure to carry out the terms of this agreement, to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, fire, explosion, tempest, flood, lightning, earthquake or other forces, accident **or any cause beyond the reasonable control of any party**, or act of God or due to any restraint or regulation of the State or Central Government. **But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice within 30 days to the other party to this effect.** Generation / drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."*

- Dealing with MPPMCL's contention regarding the requirement of Force Majeure notice, CERC took into consideration the following peculiar facts to hold that MPPMCL had 'constructive notice' of the Force Majeure event:-
  - Due to the leakage in the PHT system, the Atomic Energy Regulatory Board, Government of India and NPCIL, had issued press releases on March 11, 2016, informing the public about the declaration of a plant emergency due to the incident of leakage from the coolant system resulting in a shutdown.
  - On March 12, 2016, another press release was issued by NPCIL regarding the shutdown of Unit 1 of KAPS.
  - NPCIL through its letter dated March 16, 2016 has informed Western Regional Power Committee ("**WRPC**") (where the MPPMCL is also a constituent) regarding the shutdown of the units and the procedure undertaken for their revival.
  - The issue of the non-availability of the units of KAPS was discussed in several meetings conducted by WRPC. Some of these meetings were admittedly attended by the MPPMCL.

4. Based on the aforesaid facts, CERC held that MPPMCL had sufficient knowledge of the Force Majeure event. Highlighting the legal concept of notice, CERC observed that notice describes a requirement that a party is aware of the legal process affecting their rights, obligations or duties. The relevant extract from the order is as follows:-

*“27. ...The notice is a legal concept describing a requirement that a party be aware of legal process affecting their rights, obligations or duties. Constructive notice is a notice, where knowledge of the fact is presumed from the circumstances of the case.”*

In view of the aforesaid legal principle, CERC concluded that a conspectus of the facts and circumstances shows that MPPMCL cannot claim to have no knowledge of the incident resulting in the shutdown of KAPS.

## JSA Comment

The decision confirms that if the other party has the knowledge of Force Majeure event, then the affected party ought not to be deprived of the Force Majeure reliefs. However, the decision cannot be seen as a precedent for claiming Force Majeure reliefs without the issuance of a Force Majeure notice in strict compliance with the PPA provisions. The peculiar facts and circumstances of this case are significant as the decision is based on a comprehensive study of the letters issued by the affected party, press releases issued by the government authorities and the affected party, the legal framework governing the nuclear power plants, and the meetings attended by the parties, etc. Therefore, a decision as to whether a party had a ‘constructive notice’ is a question of fact, which has to be determined based on the facts and circumstances of each case.

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