

Whittling down of strict liability for suppliers under the nuclear power sector.

written by Divyadeep Manu | January 18, 2019

Introduction

Generating nuclear power as an alternate source of energy has been a long felt need for a developing nation like India. In light of achieving this objective, in September 2010, the Government of India ("GOI") enacted the Indian Civil Liability for Nuclear Damage Act, 2010 ("Act"),^[1]

wherein the rights and liabilities of the operator and supplier^[2] are allocated to give a basic structure for Nuclear Power Corporation of India Limited ("NPCIL")^[3]

while advancing into a contractual relationship with the suppliers.

Thereafter,

in October

2010, the GOI signed The Convention on Supplementary Compensation for Nuclear Damage of 1997 ("CSC Convention"),^[4] wherein India attained international support and also strengthened its ties with other nuclear power nations on an international platform. Further, on November 11, 2011, GOI notified The Civil Liability for Nuclear Damage Rules, 2011 ("Rules"),^[5]

which were drafted in line with the provisions of the Act.

However, efforts of the

GOI in creating a robust legal regime for the nuclear power sector seemed to have run into vain due to the concerns over suppliers' strict liability vis-a-vis

operators' right to recourse stipulated under the Act, which has apparently discouraged both global and local suppliers from entering into contracts to supply reactors and components for forthcoming nuclear power projects.

Laws

governing the liability of the operator and the supplier relating to the nuclear power sector in India

As per the CSC Convention and section 4 of the Act, the liability of an operator (NPCIL) would be strict based on the principle of no fault liability.

However, as per section 6(2) of the Act, NPCIL's maximum strict liability is capped at INR 1500 crores under the Act. Whereas, as per section 6(1) of the Act the maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million SDRs. Since, the current value of 1 SDR is approx. INR 96, hence, three hundred million SDRs

would be equivalent to approx. INR. 2900 crores. Therefore, lest the total liability of such incident exceeds INR 1500 crores, then as per Section 7(1) (a) of the Act this gap of INR 1400 crores, would be bridged by the Central Government. In case any liability relating to such incident goes beyond INR 2900 crores, then the GOI will be able to access international funds in accordance

with the CSC Convention.

Further, section 46 of the Act provides that the liability of NPCIL under the Act shall be in addition to and not in derogation of any

other

law for the time being in force and NPCIL shall be liable for all proceeding instituted against it under any other law in India. Therefore, in addition to this Act, NPCIL can be held liable under, including but not limited to, criminal law, torts or environmental law.

With regards to liability of the supplier, the perturbing factor for all suppliers is section 17 of the Act which states that:

"The operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with section 6, shall have a right of recourse where: (a) such right is expressly provided for in a contract in writing; (b) the nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services; (c) the nuclear incident has resulted from the act of commission or omission of

an individual done with the intent to cause nuclear damage." [6]

Further, on analysing section 17 (a) of the Act read with rule 24 of the Rules, NPCIL while issuing any tender is required to include right of recourse as a mandatory clause in the tender documents, wherein for the purposes of NPCIL's

right of recourse under section 17(a), a minimum amount (value of the contract or INR 1500 crores, whichever is less) is

required to be specified in the contract. Also, the corresponding time period for which this minimum amount would be valid is required to be specified.

However, nothing in rule 24 of the Rules prohibits NPCIL and the supplier from

agreeing to a larger right of recourse amount in the contract. Therefore, as per our understanding, rule 24 of the Rules read with section 17(a) of the Act

restricts suppliers' liability under the contract to either the value of the contract or NPCIL's liability as stipulated under the Act, whichever is less. However,

the Rules are silent with regards to section 17(b) or section 17(c) of the Act. Therefore in our understanding, NPCIL could have a right of recourse under

section 17(b) or section 17(c) of the Act against the supplier for liabilities incurred by it under section 46 of the Act, which can go beyond the

contract value upto a maximum of NPCIL's liability as stipulated under the Act

i.e. INR 1500 crores. Also, the Central Government has been given the power to review the amount of NPCIL's liability from time to time and specify a higher amount by a notification.

The GOI and

NPCIL attempt to whittle down suppliers' liability

Perhaps,

the GOI noticed the concern of suppliers regarding liability stipulated under section 17 and section 46 of the Act and thereby, on 8th February, 2015, issued clarifications intending to resolve and clarify such concerns of the suppliers ("FAQs").[7] The GOI clarified in the FAQs that while section 17 of the Act provides a substantive right to NPCIL, it is not a mandatory but an enabling provision. In other words it permits but does not require NPCIL to include in the contract or exercise a right of recourse.

Further, with respect to Section 46 which permits claims for compensation for nuclear damage to be brought under statutes other than the Act, the GOI clarified this concern, perhaps with an intention to project that the provision is not worthy of any concern, the GOI stated that *"the language in section 46 of the Act is similar to such language in several other legislations such as Telecom Regulatory Authority Act, Electricity Act, Securities and Exchange Board of India (SEBI) Act, Insurance Commission Act. Such language is provided routinely to underline that other relevant laws continue to be operable in their respective domains."*

Recently, NPCIL issued an Expression of Interest ("EOI") for *"Design, Engineering, Manufacture, Testing, Supply, of 417 MVA, 420/24 kV single phase generator transformers with unit coolers for Kudankulam Nuclear Power Project – Units 5&6"*[8], wherein the general condition of contract ("GCC") which forms part of the EOI states that NPCIL shall have a right of recourse against the contractor/ supplier in accordance with the provisions under section 17(a) of the Act, with following limitations, as stipulated in rule 24 of the Rules. Further, the GCC limits the suppliers' liability to the extent of NPCIL's liability as stipulated under the Act or the value of the contract, whichever is less. The GCC is silent with respect to NPCIL's right of recourse against the supplier under section 17(b) and section 17(c) of the Act wherein NPCIL has incurred liability under section 46 of the Act. Also, the GCC limits the suppliers' liability except in cases of criminal negligence or wilful misconduct, by providing that the contractor/ supplier shall not be liable to NPCIL, whether in contract, tort, or otherwise, for any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits or interest costs and the aggregate liability of the contractor/supplier to NPCIL, whether under the contract, in tort or otherwise, shall not exceed the total value of the contract.

Conclusion

We observe that, the legislature has made every effort to address concerns of the suppliers'

by
limiting their liability to the value agreed in the contract by the parties. A
Nuclear

Liability Fund has also been created by the GOI on 12th June, 2015, with the help of M/s General Insurance Corporation of India, along with several other Indian Insurance Companies, with a capacity of INR 1500 crores, to provide insurance to cover the liability related concerns of the suppliers and NPCIL under the Act which should bring relief to Indian as well as foreign suppliers

to participate in the Indian nuclear power projects. The pool will cover the risks of the liability of the nuclear operator under Section 6(2) of the Act and the suppliers under Section 17 of the Act.[9]

However

the liabilities stated in the above provisions are only with respect to the Act

and the allied Rules. The legislature would have no say with respect to the liabilities of a supplier/ contactor that arises under, inter alia, environment

laws, torts, criminal laws, wherein only the Court in India would have the authority to ascertain the liability arising under the same. An action under the law

of tort to abate nuisances is the oldest remedy taken by the Courts in India by

adopting various principles such as

'polluter pays' and absolute liability which require that a polluter should bear

the remedial or clean-up costs as well as the amounts payable to compensate the

victims of pollution without any exceptions.[10]

Also, the constitutional validity of various provisions of the Act and the Rules are currently under examination by the Supreme Court of India in the public interest litigation pending before it,[11] and the matter is sub-judice. It is therefore, the Supreme Court's judgment that must be seen as the only authoritative interpretation of the abovementioned provisions of the Act and the allied Rules since interpretation of law is ultimately a judicial prerogative.

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[1] Notified by the Ministry of Law and Justice, Government of India, on 22nd September, 2010, available at: <http://www.barc.gov.in/about/10.pdf>

[2] Defined under 24 (2) (b) of the Rules.

[3] For the purposes of the Act and the Rules, NPCIL means operator in India as per section 2(m) of the Act.

[4] The Convention came into force for India 90

days from the date of deposit of the ratification instrument, i.e. May 4, 2016,

available at: <https://www.iaea.org/sites/default/files/infcirc567.pdf>

[5] Notified by the Department of Atomic Energy, Government of India on 11th November, 2011, available at:

<https://www.prindia.org/uploads/media/Nuclear%20Rules/Civil%20Liability%20fo r%20Nuclear%20Damage%20Rules%202011.pdf>

[6] Section 17 of the Act

[7] Issued by Ministry of External Affairs, Government of India,
available at

https://www.mea.gov.in/press-releases.htm?dtl/24766/Frequently_Asked_Questions_and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010_and_related_issues

[8] Dated 09/07/2018, available at

http://www.npcil.nic.in/content/269_1_ExpressionofInterest.aspx

[9] As provided in the FAQs issued by the MEA

[10]

Bichhri Case, AIR 1996 SC 2715, 2721

[11] Public Interest Litigation & Ors v. Union of India (Kudankulam Case), [11] connected with Common Cause and Ors. v. Union of India, [11]

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