THE DILEMMA BETWEEN THE ARBITRATION AND CONCILIATION ACT & THE ELECTRICITY ACT

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There is no quarrel that great strides have been made in promoting arbitration as the preferred dispute resolution choice for both India Inc. as well as many government organisations, in the last 2 decades. Capped time for disposal, minimal court intervention and certainty of interpretation (*in matters of procedure, at least*) are few reasons responsible for such growth. However, as in the case with all things that witness rapid evolution, there are often myriad issues which creep from flanks unthought-of and play a somewhat obstructionist role. One such issue which this article delves on, is the conflict between sections 79(1)(f) and 86(1)(f) of the Electricity Act, 2003 ("**EA**") on one hand, and section 11 of the Arbitration and Conciliation Act, 1996 ("**ACA**") on the other.

Section 79(1)(f) of the EA empowers the Central Electricity Regulatory Commission ("**CERC**") to adjudicate upon inter-state disputes between transmission licensees and generating companies, or to refer any dispute for arbitration. Section 86(1)(f) confers a slightly wider power, in that it empowers the State Electricity Regulatory Commission ("**SERC**") to adjudicate intra-state disputes between any licensee and generating companies, or to refer any dispute for arbitration. Section 11 of the ACA on the other hand deals with appointment of arbitrator(s) by the High Courts or the Supreme Court, as the case may be.

The issue which confronts parties to a Power Purchase Agreement ("**PPA**") is when such an agreement envisages a procedure for appointment of arbitrator(s), can parties simply resort to such procedure, or would they have to still move the CERC or SERC for such appointment? If it is the latter, the question which begs an answer is, would that not be in complete derogation of the principle of party autonomy? Further still, in case of a failure to adhere to the said procedure, can the parties file an application under section 11(6) of the ACA or even then, the arbitrator would only be appointed by an ERC (i.e., *CERC or SERCs*)?

This article aims to analyse the legal and practical implications of this conflict and to suggest a possible view to resolve it. It will also highlight the importance of arbitration in the electricity sector and the need for a harmonious and consistent interpretation of the relevant statutory provisions.

The *Unsettling* Settled Law

The clash between the EA and the ACA was first noticed in the Supreme Court's judgment in ***Gujarat Urja Vikash Nigam Ltd v Essar Power Ltd***. The Court by observing that *whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute,* practically barred parties to mutually appoint arbitrators in disputes regarding matters governed by the EA. The judgment even excluded the jurisdiction of the High Court for appointment of arbitrators under section 11 of the ACA by relying on the maxim *generalia specialibus non derogant* (i.e., the general does not derogate

from the specific). The Court reasoned that since the EA was a special law it would prevail over the general law, that is the ACA.

The Supreme Court also relied on section 174 of the EA which provides for an overriding effect of the said act over all other laws, to reiterate its observation on the SERC's power over that of a High Court in matters of appointment of arbitrators.

Similar observations were followed in the cases like ***Chief General Manager MP. Power Trading Company & Anr V. Narmada Equipments Pvt.Ltd***. and ***Hindustan Zinc Ltd. v. Ajmer Vidyut Vitran Nigam Ltd.***

Should Party Autonomy Prevail and should the High Court be the appointing forum? Yes, Here's Why.

After the *Gujarat Urja* judgment, the cornerstone of arbitration, i.e. party autonomy, seems to have been diluted. After the judgement, many cases were observed wherein such a practice of appointing arbitrators was deemed illegal. The appointed arbitrators did not cooperate with the parties, and it only made the dispute resolution process lengthy and ineffective.

It may be argued that the interpretation in *Gujarat Urja* may be owing to the impact certain generator-licensee disputes may have on electricity tariffs, which have far-reaching implications for the public, however, in non-tariff matters, party autonomy ought to prevail. After the *Gujarat Urja* decision, the ERCs have been given complete authority in relation to matters of appointment of arbitrators in all electricity-related disputes thereby denying parties, the benefits such as timely mutual appointment. Furthermore, unlike the High Courts, whose remit is ordinarily confined to verifying the existence and validity of an arbitration clause, in reality, the appointment through ERCs take a longer time.

Furthermore, it has been observed that the arbitrators appointed by the ERCs are usually people who carry expertise in the subject matter i.e. electricity-related issues, and who may not necessarily possess a proper understanding of the legal processes, which can be fatal to the entire adjudication.

The issue of Trading Licensees Disputes

As early as in 2011, the Appellate Tribunal for Electricity, in ***M/s Pune Power Development Private Ltd. v. Karnataka Electricity Regulatory Commission*** held that all purchasers of electricity from persons, including trading licensees, fall under the regulatory jurisdiction of the State Commission. The entire process of power procurement, including the price at which power is to be obtained by a Distribution licensee, is therefore subject to the regulatory jurisdiction of the State Commission in terms of Section 86(1)(b) of the EA.

Be that as it may, in ***M/s. Welspun Energy Private Limited v. Solar Energy Corporation of India***, where Solar Energy Corporation of India had taken an objection to the jurisdiction of CERC owing to an arbitration clause in the PPA, the CERC observed that since the *dispute raised in the petition will have implication for tariff, the dispute can be either adjudicated by the Commission or the Commission may refer the dispute to arbitration in terms of Section 79 (1) (f) of the Act.*

From a reading of the order in *Welspun Energy* it is certainly clear that the CERC invoked its powers on the ground that the dispute had an impact on tariff. Could it therefore be inferred as a natural corollary that as far as non-tariff matters against trading licensees are concerned, the CERC (or, any ERC) does not possess jurisdiction to even appoint an arbitrator?

The Bottom Line

The clash between the EA and the ACA in relation to appointment of an arbitrator, in our humble view, requires re-consideration. The position of law as espoused in the *Gujarat Urja* judgment has added complexity by limiting the parties' freedom to choose their arbitrators without even considering the nature of the dispute. Moreover, the issue of trading licensees has further raised questions related to the appropriation of jurisdiction by the ERCs.

At this crossroads, a balance must be struck between party autonomy (along with the right to approach the high court) and the powers of the ERCs with respect to appointment of arbitrators, especially in relation to non-tariff matters. This would go a long in enhancing the effectiveness and fairness of the law given the growing deference to arbitration in the electricity sector.