

Appointment of Arbitrators for Electricity Disputes in India

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According to the 2015 report of the BP Statistical Review of World Energy, India accounts for 5.1% of the world electricity generation and is the third largest generator of electricity in the world. A McKinsey report estimates the need to increase the generation capacity to about 440 GW by 2017 with an expected investment of USD 600 billion in the Indian energy market. Massive investments in the development of the electricity sector have led to large scale regulatory reforms since the past decade. These include special statutory mechanisms for efficiently resolving commercial and regulatory disputes among generation, transmission and distribution companies by specialised regulators and reference to arbitration. This post analyses the effects of the Supreme Court's judgment in *Gujarat Urja Vikas Nigam v. Essar Power Ltd.* (2008), 4 SCC 755 ("**Gujarat Urja**") on party autonomy under the Electricity Act, 2003 ("**Electricity Act**") to refer disputes to arbitration and for the appointment of arbitrators.

Briefly, the Electricity Act permits private participation in generation, transmission and distribution of electricity. Historically, the government's monopoly over these functions had proven grossly counter-productive to meet the demands of a rapidly growing economy. The Electricity Act authorizes regulators at the state and federal level to promote private investment and competition. The regulators also deal with all matters relating to policy, implementation and adjudication of disputes within their statutory jurisdiction. The Electricity Act has an overriding effect over anything inconsistent in any other law in India.

The contracts among electricity generators, distributors and transmission companies cover a variety of technically complex and time sensitive issues, which are often cyclical. Under the Electricity Act, the central and state electricity regulators can either decide disputes between licensees and generating companies or refer any dispute for arbitration. The term 'licensees' refers to electricity transmission, distribution and trading companies that must obtain licenses to operate.

On the other hand, the Indian Parliament had previously enacted the Arbitration and Conciliation Act of 1996 ("**Arbitration Act**"). Section 11 of the Arbitration Act governs the appointment of arbitrators either by state High Courts (in the case of domestic arbitration) or by the Supreme Court of India (in the case of international commercial arbitration) if the parties are unable to mutually appointment arbitrator(s) on the basis of the arbitration agreement.

Conflicting statutes and the Supreme Court's judgment in *Gujarat Urja*

The Electricity Act came in to force after the Arbitration Act and has carved a special exclusion for the appointment of arbitrators in electricity sector disputes. This had created a conflict between the two acts as to which governs the appointment of arbitrators in the case of disputes arising under the Electricity Act. The Supreme Court's ruling in *Gujarat Urja* resolved the controversy of whether state regulators have exclusive jurisdiction to refer a dispute to arbitration and appoint arbitrators under the Electricity Act or whether the courts had such power under the Arbitration Act.

Gujarat Urja Vikas Nigam ("**GVVN**"), a generating company, was supplying electricity to Essar Power Ltd. ("**EPL**"), a licensee. A dispute arose between these parties under the electricity supply contract. In their attempt to resolve the dispute in terms of the arbitration agreement under the contract, the parties could not agree upon a sole arbitrator. While, GUVN approached the electricity regulator to refer the dispute to arbitration under the Electricity Act, EPL approached the High Court of Gujarat for the appointment of an arbitrator under the Arbitration Act. The High Court appointed EPL's choice of sole arbitrator. GUVN appealed to the Supreme Court.

The Supreme Court took the view that since the Electricity Act is a special law, it must override the general provision for appointment of arbitrators under section

11 of the Arbitration Act. Therefore, the Court held that in all matters of dispute between distribution licensees and power generators, the electricity regulatory commissions have exclusive jurisdiction to either decide the dispute or refer it to arbitration by nominating an arbitrator. The Court ordered that since the Electricity Act came into effect from 10 June 2003, any dispute between a licensee and a generator after this date, can only be resolved by the concerned regulator or by arbitrator(s) appointed by it.

In the Court's view, the regulators have complete discretion whether to decide a dispute under the Electricity Act or refer it to arbitration. While no guidelines have been prescribed to guide the regulators, the Court offered illustrative examples of when regulators can refer a matter to arbitration. These could be cases where either the dispute is highly technical requiring an expert or when the regulator's docket is too full to expeditiously decide a dispute. However, in a recent ruling in *T.N. Generation and Distribution Corporation Ltd. v. PPN Power Generation Company Private Ltd*, [(2014) 11 SCC 53] ("**TN Generation**"), the Supreme Court has held that the regulator has to exercise its discretion reasonably and not arbitrarily. The Supreme Court also held that the Appellate Tribunal for Electricity ("**APTEL**"), the tribunal for first appeals under the Electricity Act, can re-examine the regulator's discretion with regard to the question of whether the dispute ought to have been referred to arbitration. The standards to be applied by APTEL while deciding such appeal are whether the regulator's order suffered from arbitrariness, unreasonableness or perversity.

Interestingly, while deciding *Gujarat Urja* the Supreme Court did not consider the implication of its decision to ongoing disputes where arbitrators were appointed either by the parties themselves or by a court under section 11 of the Arbitration Act. The Supreme Court's silence on the fate of ongoing or concluded arbitrations opened another window of controversy with respect to the fate of such arbitrations.

Further controversy

Recently, APTEL applied the Supreme Court's opinion in *Gujarat Urja* to a case involving an ongoing arbitration where parties had mutually appointed a sole arbitrator. In *Global Energy Private Limited v. Karnataka Electricity Regulatory Commission & Anr.*, [2014 ELR (APTEL) 539] ("**Global Energy**"), APTEL decided an appeal by Global Energy Private Limited ("**GEPL**"), a generating company, that

was party to an ongoing *ad-hoc* arbitration with Karnataka Power Transmission Corporation Limited (“**KPTCL**”), a transmission licensee. A sole arbitrator was mutually appointed by GEPL and KPTCL, before the Supreme Court had issued its ruling in *Gujarat Urja*.

While the arbitration was underway, the Supreme Court’s ruling in *Gujarat Urja* was brought to the notice of the sole arbitrator. In response, the arbitrator resigned. Consequently, Global Energy applied to the Karnataka State Electricity Regulatory Commission (“**KERC**”) to appoint a substitute arbitrator. KERC rejected the application on the ground that the parties had illegally appointed an arbitrator by mutual consent. KERC ruled that the original appointment of and all proceedings before the sole arbitrator were null and void. Global Energy appealed to APTEL. APTEL agreed with KERC and took the view that parties cannot appoint an arbitrator by mutual consent for disputes governed by the Electricity Act. Applying the Supreme Court’s judgment in *Gujarat Urja*, APTEL took the view that parties must submit their disputes to the concerned regulator. The regulator then has the discretion to either decide the dispute itself or refer it to arbitration by appointing arbitrator(s).

Analysis

The Supreme Court’s ruling in *Gujarat Urja* untangled a statutory impasse between the application of the Electricity Act and the Arbitration Act. The Supreme Court’s ruling has interpreted the Electricity Act to bar party autonomy to mutually appoint arbitrators in disputes governed by the Electricity Act and has even excluded the jurisdiction of courts for the appointment of arbitrators under section 11 of the Arbitration Act. However, as explained above, the discretion of the regulator cannot be exercised arbitrarily, unreasonably or perversely. A regulator’s decision rejecting a party’s request for referring a dispute to arbitration can be challenged before APTEL. The Supreme Court has ruled that APTEL is competent to investigate the exercise of such discretion by a regulator. The Supreme Court has also held that the Arbitration Act is otherwise fully applicable to disputes governed by the Electricity Act, including motions for interim relief and challenge, etc. Therefore, disputes under the Electricity Act can be arbitrated only upon a reference to arbitration by the state regulators.

Conclusion

The interpretation of the Electricity Act and the Arbitration Act by the Supreme Court and APTEL have led to a loss of full party autonomy to submit matters to arbitration as well as ousting the jurisdiction of the courts for the appointment of arbitrators (in the case of disagreement between parties). However, our experience suggests that the regulators in India have been receptive so far to requests for referring disputes to arbitration in suitable cases.