

GLOBALINDIA

Institutional dilemmas to address non-performance of contracts in the Electricity Sector¹

Author: Shashwat Kumar, IBEI & UPF

EXECUTIVE SUMMARY

Here we discuss a recent proposal by the Indian Ministry of Power to establish a new authority i.e. Electricity Contract Enforcement Authority, aiming to cope with the problem of non-performance contracts in the electricity sector. After introducing the case and its antecedents, different options to these challenges are considered, putting in place and pondering the recently launched proposal vis-à-vis alternative actions.

The Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs) were set up after Government of India had initiated structural changes in the electricity sector in 1998. Under section 79(1) and 86(1) of Electricity Act, 2003 (EA 2003), the CERC and SERCs perform a wide array of functions such as determining tariff, regulating electricity purchase and procurement process of distribution licensees, issue licenses, adjudicate on disputes etc. This Act envisaged participation of private sector to drive growth in the sector. As of April 2020, 47% of total installed generation capacity in India is by private players. However, non-performance of contracts and subsequent arduous litigation is an issue which is adversely affecting the sector. The Ministry of Power's proposal of setting up of Electricity Contract Enforcement Authority attempts to centralize the function which at present is responsibility of respective SERCs.

This policy paper outlines the existing institutional arrangement, analyzes issues that can emerge from the proposed amendment and then suggest that the ministry should consider promoting the option of ARBITRATION as a mechanism to address the issue of non-performance of the contract, not necessarily creating a new agency. An alternate option could be to increase the strength of SERCs beyond what is

¹ This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 722446

GLOBALINDIA

proposed in the amendment bill and create dedicated bench for resolution of non-performance of contract at the level of SERCs itself.

A. Introduction

The Electricity (Amendment) Bill, 2020 circulated by the Ministry of Power, Govt. of India, proposes to set up a new authority i.e. Electricity Contract Enforcement Authority (ECEA) to address the growing concern about non-performance of contracts. Under Section 79(1)(f) and 86(1)(f) adjudicating on disputes related to contracts are under the jurisdiction of the Central Electricity Regulatory Commission (CERC) and State Electricity Regulatory Commissions (SERCs) respectively. The proposed amendment carves out the dispute adjudication function from the existing regulatory authorities and vests it with a new centralized authority.

Electricity is a concurrent subject where both, central and state government, can make laws. The proposal to establish new authority (along with other amendments proposed) appears to dilute the power of states. Hence, state governments and regulatory authorities have opposed the amendment. In this policy paper, I outline the amendment pertaining to creation of ECEA and make an attempt to understand why the concerned ministry decided to create a new authority. After analysing feasibility of the proposed amendment, I put forth two recommendation which could achieve the objective and yet not dilute states powers.

B. Proposed Amendment

Statement of Object and reason put out by Ministry of Power:

“The 2003 Act recognizes the contracts for supply and purchase of electricity but it is not specifically dealing with the issues related to performance of the contract. Strength of contracts enables investment in the electricity sector. Non-performance of the contract may create uncertainty, upset investment decisions and adversely affect investment environment and ease of doing business. Electricity Regulatory Commissions established have been entrusted with multiple responsibilities under the Electricity Act such as regulatory functions, tariff fixation issues, grant of licenses etc with limited powers for adjudication of dispute
Consequently, enforceability of performance of the contracts remains an issue to be addressed.

*In view of above, it is proposed to establish a Electricity Contract Enforcement Authority having which shall be **sole authority and having original jurisdiction to adjudicate upon matter regarding specific***

GLOBALINDIA

performance of contracts related to purchase or sale of power between generating company and a licensee or between licensees; and contracts related to transmission of electricity between a generating company and a licensee or between licensees. Orders of the Electricity Authority shall be executable as a decree of civil court. The Appeal against orders of the Electricity Tribunal shall be heard by Appellate Tribunal for Electricity. It is proposed to strengthen the Appellate Tribunal in terms of strength of Members and powers of Tribunal.”

Figures showing Visual representation of how existing and proposed (may) institutional arrangement look like

Fig 1. Existing dispute adjudication structure

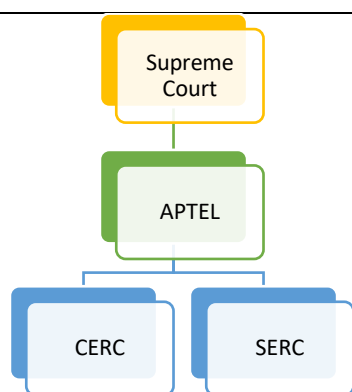
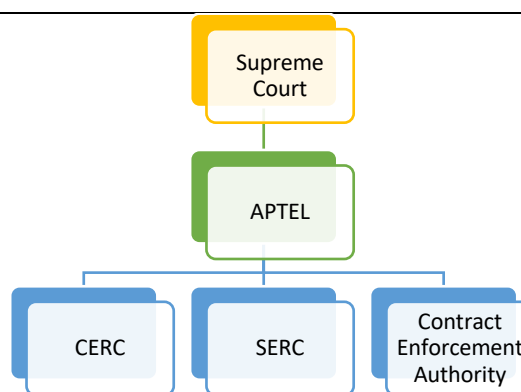


Fig 2. Dispute adjudication structure as per draft amendment bill, 2020



C. The Ministry of Power's diagnosis

The objective behind setting up ECEA has been clearly spelt out in the amendment bill. Non-performance of contract has been an issue plaguing ease of doing business in India. The World Bank's ease of doing business data from 2014 to 2020 (<https://www.doingbusiness.org/en/custom-query>) suggests it takes 1445 days to enforce contracts (45 days for filing and service, 1095 days for trial and judgment and 305 days for enforcement of judgment). The graph below shows these data

Graph 1: Contract Enforcement data from Ease of Doing Business Reports

GLOBAL INDIA

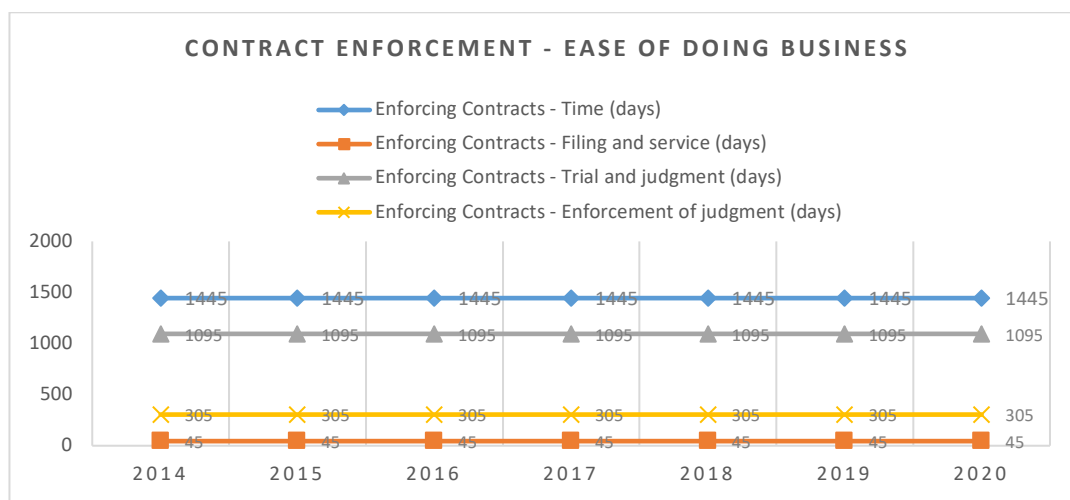
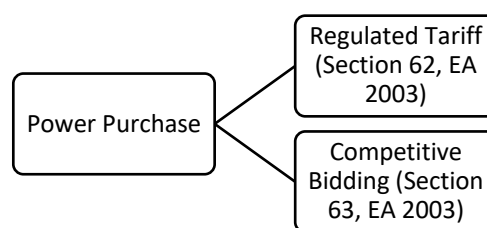


Figure 3: Two ways through which Power Purchase can be done as per EA 2003



47% of total installed generation capacity as of April 2020 is by private developers. The Electricity Act, 2003 prescribes two ways through which power can be purchased (Figure 2). The non-performance of contract issue dealt here is with respect to the competitive bidding route (Section 63).

Not all capacity added by the private players is through competitive bidding route. The [Forum of Regulator's report](#)² (dated November 2017) suggest that between 2006-2016 approximately 55,410 MW of generation capacity (using conventional fuel) have been contracted through competitive bidding route. [India RE Map 2019](#)³ (September) suggests between FY 2014-15 and FY 2018-19, 36,100 MW of renewable (solar + wind) generation has been commissioned by the private developers after being awarded through competitive bidding route.

The 2018 [study report](#)⁴ indicates that 1/6th of total judgments issued by the Appellate Tribunal for Electricity (APTEL) between FY 2013-14 to 2016-17 pertain to Power Purchase Agreements. As of June

² Competitive Tariff vis-a-vis Cost plus Tariff- Critical Analysis, Forum of Regulators (FOR), November 2017

³ India RE Map, September 2019, Bridge to India

⁴ Amicus Populi? A public interest review of the Appellate Tribunal for Electricity, Prayas Energy Group, Pune, October 2018

GLOBALINDIA

2017, approximately 40,000 MW of thermal power projects amounting to INR 37,941 crore have turned Non-Performing Assets ([The Standing Committee on Energy's report 'Stressed/ Non-Performing Assets in Electricity'](#))⁵

There is no readily available information on total generation projects of private developers, awarded under competitive bidding route, which are under legal dispute or have become NPAs. In absence of such data, the above two pieces of information tells us that the diagnosis of problem i.e. non-performance of contract, by the ministry is spot on.

D. Is ministry's prescription a feasible option?

There is no doubt about the need for speedier resolution of contractual disputes. **However, is Electricity Contract Enforcement Authority a correct prescription by the ministry?**

To answer this question, let us anticipate potential issues that can emerge. Unless there is clarity at the outset on these issues being raised, the proposed new authority may not solve the core problem.

(a) Tariff Recovery – how will it happen?

- i. The core issue plaguing the sector is under recovery of tariff by distribution companies from the consumers which in turn affects cost recovery of generation companies. Approximately 75-80% of the retail tariff is power purchase cost.

Suppose the appropriate commissions refers non-performance of contract issue to the new authority which decides the matter in favour of the generating company. As a result, the distribution company has to make payment to generation company. There are two scenarios through which this decision of contract enforcement authority can be enforced:

Scenario 1: Distribution company does not charge retail consumers

⁵ Standing Committee Report Summary, Stressed/Non-performing Assets in Electricity Sector, PRS Legislative Research
Page 5 of 11

GLOBALINDIA

In this scenario, payment to the generation company is delinked from recovery from consumers through retail tariff. The distribution company takes a loan to pay to the generating company on which it would incur interest. This will affect the financial health of the distribution company.

Scenario 2: Distribution company charges retail consumers

In this scenario, even though the distribution company decides to charge it to the consumers, it is respective SERCs who have to allow this. Further, as per Section 62(4) of Electricity Act, 2003, no tariff once decided by SERCs can be amended more than once in a year. The act allows recovery of variation in fuel charges as an exception through a specified mechanism. In absence of any provision of recovery of expenses on account of judgment of contract enforcement authority, the SERCs may not allow distribution companies to charge consumers. This impending amount will either be disallowed (detrimental for financial health of distribution company) or kept as regulatory asset (charged to consumers later with interest).

Therefore, considering the intricate nature of this process, it is advisable that there is clarity from the outset.

(b) Operationalization issues

- i. When proposed sections 92(6), 109(A)(2) and 109(B)(1) are put together, it seems that it would be up to CERC and SERCs to decide which matters would be referred to the Electricity Contract Enforcement Authority. [In that case on what parameters or grounds CERC and SERCs would take the call?](#)

Table 2: Proposed clauses in amendment bill 2020

92(6) - Where before or during the course of a proceeding, the Appropriate Commission comes to a conclusion that the Electricity Contract Enforcement Authority has the sole authority and	109(A)(2) - Notwithstanding anything contained in this Act or any other law in force, the Electricity Contract Enforcement Authority shall have the sole authority and jurisdiction to adjudicate upon matters regarding performance of	109(B)(1) - Any person aggrieved in any matter referred to in section 109A may prefer an application to the Electricity Contract Enforcement Authority.
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------

GLOBALINDIA

<p>jurisdiction to adjudicate a matter, it shall refer the same to the Electricity Contract Enforcement Authority for its orders.</p>	<p>obligations under a contract related to sale, purchase or transmission of electricity, provided that it shall not have any jurisdiction over any matter related to regulation or determination of tariff or any dispute involving tariff.</p>	
---------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--

- i. Jurisdiction is one of the preliminary objections in any litigation matter. There may be a possibility that litigants may file appeals against the orders of the SERC against the decisions of the SERC regarding reference of disputes to the Electricity Contract Enforcement Authority.
- ii. Under clause 79(1) and 86(1) appropriate commissions perform regulatory functions, tariff fixation, dispute resolution etc. What if the petition filed before the appropriate commissions consist of commercial as well regulatory issues? If the appropriate commission decides to refer commercial issue i.e. non-performance of contract to the Electricity Contract Enforcement Authority and keeps with itself regulatory issue, then wouldn't there be two separate proceedings? The matter would get even more complicated if these issues are inter-linked (as mentioned above in (a)) and it may very well happen that the appropriate commission may not refer the matter to the new authority owing to this complexity. This in turn would lead to very limited cases being referred to the new authority.
- iii. Exception has been carved out vis a vis tariff related issues i.e. the Electricity Contract enforcement Authority will not have the authority to adjudicate upon tariff related issues. In certain instances, this may lead to unnecessary confusion. For instance, whether a petition concerning Change in Law is a petition related to tariff related issues or is a commercial dispute amenable to the jurisdiction of the Electricity Contract enforcement Authority.
- iv. Clause 92(6) allows the appropriate commission to decide whether matter can be referred to the new authority or not. Does that mean Electricity Contract Enforcement Authority is subservient to CERC and SERCs? Clause 109 N allows appeal against order of Electricity Contract Enforcement Authority at APTEL. Does that mean this new authority is on par with

GLOBALINDIA

the appropriate commissions? The hierarchy needs to be clearly defined otherwise any conflict or dispute between organizations would not serve the purpose of speedy resolution of non-performance of contract.

- v. Also, whether the Electricity Contract Enforcement Authority have the authority to refer any matter back to the appropriate commissions?

(c) Organizational set up issues

- ii. The provision related to the composition (judicial and technical members) and location (Delhi) suggests that Electricity Contract Enforcement Authority has been modelled on the lines of APTEL which was established in 2005. Even though APTEL has a provision of constituting benches at places other than Delhi, [in 15 years of its operation it primarily continues to operate from Delhi](#). Circuit benches in Mumbai and Chennai were operational but for very limited time. Under such circumstances, it would be difficult to believe that new authority with such an important mandate would be operating at optimum level to provide speedy resolutions.
- iii. Like APTEL, new authority would be dependent on central government for funding and personnel. There have been occasions when APTEL functioned with reduced capacity due to delay in appointment of members. Similar fate cannot be ruled for new authority whose provision mirrors that of APTEL.

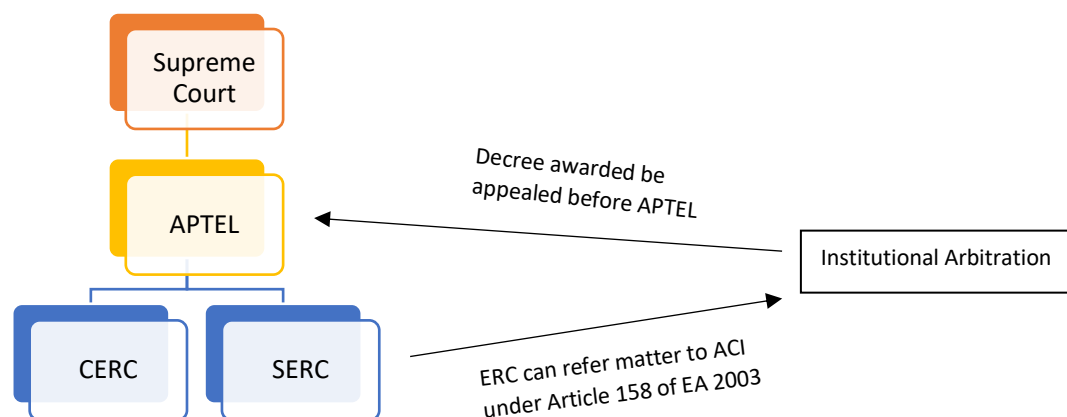
E. Policy Recommendation

The intent behind establishing ECEA is to facilitate ease of doing business and thereby investments by private sector. However, the complexity of tariff process and apparent lack of clarity on operationalization of new authority, will undermine the intent with which it is being created. Therefore, policy recommendations provided below are based on mechanisms available in EA 2003 and proposed amendment to strengthen regulatory commission. This way they do not dilute the existing functions of the regulatory commissions, [which is becoming a bone of contention](#).

(i) Use and promote Arbitration in electricity sector

Fig 4. Proposal on how the structure could be thought of for speedy adjudication

GLOBALINDIA



Instead of establishing a new authority from scratch and going through the process of building it up, the Ministry can think about utilising the existing provision of Arbitration under Section 158 of Electricity Act, 2003. In fact, both, clause 92(6) of the proposed amendment bill and clause 158 of Electricity Act, 2003, follow the same principle where it's up to the appropriate commissions to determine how to handle dispute adjudication.

Table 3: Comparing clause 158 of EA 2003 with clause 92(6) of amendment bill 2020

Section 158. (Arbitration) of EA 2003	Section 92(6) of amendment bill 2020
<p>Where any matter is, by or under this Act, directed to be determined by arbitration, the matter shall, unless it is otherwise expressly provided in the licence of a licensee, be determined by such person or persons as the Appropriate Commission may nominate in that behalf on the application of either party; but in all other respects the arbitration shall be subject to the provisions of the Arbitration and Conciliation Act, 1996.</p>	<p>Where before or during the course of a proceeding, the Appropriate Commission comes to a conclusion that the Electricity Contract Enforcement Authority has the sole authority and jurisdiction to adjudicate a matter, it shall refer the same to the Electricity Contract Enforcement Authority for its orders.</p>

GLOBALINDIA

The CERC and SERCs can refer matters regarding performance of obligations under a contract related to sale, purchase or transmission of electricity for arbitration under Arbitration and Conciliation (amendment) act, 1996. The decree awarded can be challenged before APTEL

Two major benefits of above recommendations:

- a) No new organization has to be set up. As a result, litigation that could potentially arise out of operationalization and organization related disputes can be avoided.
- b) Govt. of India's objective is to make India hub for domestic and international arbitration. By utilising and promoting this option, Ministry of Power can give impetus to this objective.

To operationalise the above model, the definition of 'Courts' in Arbitration and Conciliation Act, 1996 needs to be amended in order to include the appropriate commissions and APTEL. This will enable decree awarded through institutional arbitration to be challenged before it.

As arbitration is a close door event exclusively between the parties, the decree awarded through arbitration can be appealed before APTEL. The appeal before APTEL would give parties, who otherwise could not participate in arbitration proceedings, opportunity to participate and put forth their point of view.

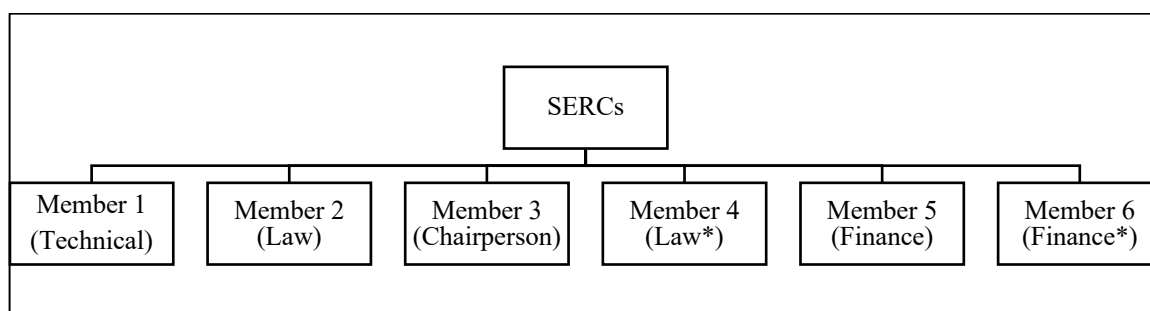
(ii) Increase strength of members of CERC and SERCs or allow them to create a dedicated bench for resolution of non-performance of contract

In case suggestion 1 is not a feasible option, the ministry may consider this as an alternative to it. Section 82 of the Electricity Act, 2003 states that SERCs shall consist of not more than three members. The Electricity (Amendment) Bill, 2020 proposes to increase it to four. Considering the number of functions that SERCs are mandated to perform and importance of adjudication of contract performance issues, the ministry may consider increasing the strength of members to six or more. This way among themselves, the members of commission may create a dedicated bench to deal with pressing issues such as non-performance of contract.

GLOBALINDIA

Additional members with qualification similar to National Company Law Tribunal or as proposed for ‘Electricity Contract Enforcement Authority’ or having experience with arbitration can be appointed at SERCs. This will increase the capacity of SERCs for providing speedier dispute adjudication. The ministry may consider figure 5 as a reference to increase the capacity at SERCs in line with how this sector will grow and what expertise would be required for better regulation of sector.

Figure 5: Representing constitution of members of SERCs with increased strength



*Expert in dealing with contractual dispute issues with increase in competitively discovered tariff and resultant dispute

ABOUT THE AUTHOR

Shashwat is a Predoctoral fellow at IBEI Barcelona and enrolled for PhD at Dept. of Political and Social Sciences at Universitat Pompeu Fabra (UPF). His Research is centred around India’s regulatory framework and Independent Regulatory Agencies in sectors such as electricity, telecommunications etc. He has worked with Electricity Regulatory Commissions in India before joining Global India project.

Email: skumar@ibei.org