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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
16/07/2007

B e f o r e :

THE HONOURABLE MR JUSTICE COOKE

Between:

TAMIL NADU ELECTRICITY BOARD
Claimant
- and -

ST-CMS ELECTRIC COMPANY PRIVATE LIMITED
Defendant

Mr Steven Gee QC, Prof Mark Watson-Gandy and Roger Kennell (instructed by Zaiwalla & Co) for the Claimant
Mr Joe Smouha QC and Mr Ricky Diwan (instructed by Freshfields) for the Defendant
Hearing dates: July 3,4,5,6,16 2007

HTML VERSION OF JUDGMENT

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Mr Justice Cooke :

Introduction

1. The claimant (TNEB) is the State Electricity Board for the State of Tamil Nadu. Its principal objective is to generate, transmit and distribute electrical power. The defendant (ST-CMS) is an Indian incorporated company incorporated by foreign investors from the US, Switzerland and the

Netherlands in 1993, for the purpose of pursuing the development, construction and operation of a 250 MW Lignite-Fired Power Plant located at Neyveli in the State of Tamil Nadu (the Plant). At the time of ST-CMS's incorporation, the regulatory regime then in force did not permit foreign companies to construct or own power plants. This necessitated the incorporation of an Indian company by the foreign investors. TNEB and ST-CMS first concluded a long term supply agreement for the supply of energy and capacity from the Plant on 4 November 1993. This subsequently took the form of the Restated and Amended Power Purchase Agreement dated 20 November 1996 (which was also subsequently amended) (the PPA).

2. The PPA includes Article 15 which provides for informal dispute resolution of "any dispute arising under this Agreement". Failing resolution of any such dispute then, except as otherwise provided in the PPA, disputes arising out of or relating to the PPA are to be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ICC). The arbitration is to be held in London, England and the arbitration proceedings are to be conducted, and the award rendered, in the English language. Article 15.1(c) specifically provides that any arbitration proceedings or award rendered under the PPA and the validity, effect and interpretation of the Arbitration Agreement is to be governed by the laws of England and by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10 June 1958, to which the United Kingdom and India were and are both parties.

3. ST-CMS has commenced arbitration by a Request for Arbitration under Article 4 of the ICC Rules. TNEB applies to this court under section 72 of the Arbitration Act 1996, seeking declarations that the matters submitted to arbitration are not within the scope of any arbitration agreement made between ST-CMS and TNEB and that neither the ICC Court of Arbitration, nor any arbitral tribunal appointed or approved by it, nor any other arbitral tribunal, has jurisdiction to determine matters submitted by ST-CMS. Injunctions are sought restraining ST-CMS from pursuing or continuing any steps in the ICC arbitration or from pursuing any other arbitration proceedings in relation to the self-same matters. ST-CMS seeks declarations to the opposite effect from those sought by TNEB and, waiting in the wings, is an anti-suit injunction, currently unnecessary because of undertakings given by TNEB, to prevent TNEB from pursuing the dispute between the parties, other than in the ICC arbitration already commenced.

The PPA

4. The PPA provides that TNEB will pay charges to ST-CMS for capacity and energy delivered to it under the terms of the agreement, in accordance with "the Tariff", which means the rate set forth in schedule 3. The PPA provides for a 30 year term from the Commercial Operation Date, being the date upon which the project completed its Acceptance Test and was available to commence operations on a continuous, full time, commercial basis. This occurred on 15 December 2002. Paragraph 1 of schedule 3 then sets out the Tariff, which refers to CEA, which is defined in the PPA as "the Central Electricity Authority constituted under the Electricity Supply Act of 1948 and any successor agency". Paragraph 1 of schedule 3, so far as relevant reads as follows:-

"1. Tariff

(a) TNEB shall pay the Monthly Tariff Payment for all Capacity and Energy for each Month or part thereof during the Term. A sample calculation of the Monthly Tariff Payment is attached as Annex A to this Schedule 3. The actual calculation of the Monthly Tariff Payment will be governed entirely and exclusively by this Agreement with the sample calculation acting solely as a guide.

…..

(d) The Parties hereby expressly agree that, notwithstanding anything contained in this Agreement or any other agreement, if any element of the Tariff provided for in this Agreement shall be in deviation of, inconsistent with or repugnant to the provisions contained in the Indian Electricity (Supply) Act, 1948 and, in particular, Notification No. S.O. 251(E) dated 31/03/92, as amended by Notification No. S.O. 35(E) of 18/19 January 1994, S.O. 605(E) dated 22 August 1994, S.O.39(E) dated 13 January 1995, S.O. dated 6 November 1995, and Resolution A-27/94-IPC dated 6 November 1995, copies of which are annexed as schedule 12, such element shall be deemed to be amended to the extent required to bring it into compliance with the relevant provisions of the aforesaid Notifications and any amounts paid by TNEB in excess of the Tariff as so amended shall be repaid by the Company provided, however, that in no Month shall the amount required to be refunded pursuant to this Section 1(d) reduce the Tariff payable to the company hereunder below the amount of the Fixed Charge….."

5. Paragraph 1(b) of the Schedule refers to the Capital Cost, as further defined in paragraph 9, paragraph 2 sets out the Fixed Capacity Charge, paragraph 3 the Variable Fuel Charge, paragraph 4 the Incentive Performance Payment, paragraph 5 the Monthly Adjustment, and paragraph 7 the Year End Correction. These elements form part of the parameters for the calculation of the Tariff. Paragraph 9 contains definitions of words and phrases used in the Schedule. Amongst those definitions "Base Exchange Rate" is defined, in relation to foreign currency loans and interest, and all applicable fees thereon, or foreign currency paid up capital, to mean "the average exchange rate weighted over the contribution amounts of each foreign currency loan or foreign currency paid up capital source, as listed in the Approved Capital schedule" with a model computation thereafter set out by reference to the actual exchange rate on the particular day of the borrowings or equity contribution.

6. "Capital Cost" is defined in paragraph 9 in the following way:-

" "Capital Cost" means, subject to Section 2.1 and Section 6.1(o) of the Agreement, the cost (expressed in Rupees) actually incurred by the Company in completing the Project, provided that costs in excess of the capital cost ceiling agreed upon by the Company and TNEB (Rs. 1200 Crores), with approval of GOTN and CEA (the "Capital Cost Ceiling"), which amount is less than the capital cost approved in the techno-economic clearance of CEA dated August 19, 1994 but which is as per foreign exchange rates assumed in the techno-economic clearance of CEA, shall not be included as "Capital Cost" except to the extent that CEA approves such excess costs as not having been attributable to the Company or the Company's suppliers or contractors. In determining the amount of costs actually incurred in completing the Project, account shall be taken of (i) any increase or decrease in project cost resulting from changes in the rates of

exchange of the foreign currencies in which project expenditures are authorized to be incurred from the level set forth in Schedule 11 to the Agreement, (ii) (A) any reduction in interest during construction and principal amount of loans through the application delay liquidated damages received under the Construction Contract, as provided under Section 6.1(p), and (B) any excess liquidated damages or other compensation paid by the EPC Contractor to the Company and applied to reduce Capital Cost as provided in Section 2.1, (iii) any change to the debt equity ratio from the ratio assumed in the Approved Capital Schedule, and (iv) any excess insurance proceeds paid to the Company (after adjustment for the loss or damage to the Project and, to the extent not included in actual project cost, the cost of repair and replacement attributable to such loss or damage) in respect of any claims for loss or damage to the Project incurred prior to the Commercial Operation Date. Examples of the application of liquidated damages are provided in Schedule 10 to the Agreement. For purposes of determining the Capital Cost, all foreign currency loans and all foreign currency equity sources shall be converted into Rupees at the applicable Base Exchange Rate. It is understood and agreed that any increase or decrease in Capital Cost due to changes in foreign currency exchange rates shall be reflected in the amount of actual Capital Cost. In case the actually incurred cost is less than the ceiling cost of Rs. 1200 Crores, the lesser cost shall be taken as the Capital Cost. The Capital Cost includes interest during construction limited to a construction period of 38 months following the Effective Date, and shall not include any additional amounts for a longer construction period except with approval of CEA due to delays not attributable to the Company or the Company's suppliers or contractors.

The Company shall submit half-yearly reports certified by the Company's independent auditors (the "Actual Cost Reports") completing the Project, as determined in accordance with generally accepted accounting principles. The Company shall permit access to papers, documents and records as may be considered necessary by TNEB and CEA at the time of approval of final cost. During the period between the Commercial Operation Date and the delivery of the Actual Cost Reports on completion or the Project (the "Actual Completion Costs Report"), and its approval by CEA, the Company will use Rs. 1200 Crores (adjusted for foreign currency exchange rates) as its provisional Capital Cost for purposes of tariff calculation. When the Actual Capital Cost I finalized, the amount of overcharge or undercharge will be refunded or paid (as the case may be) in twelve equal payments at the time of the payment of the next twelve Monthly Tariff Payments after such finalization."

7. Schedule 10 sets out a model calculation for determination of capital cost which refers to the "capital cost ceiling as per PPA" and then provides for the case where the completed capital cost exceeds the ceiling, whereupon allowance is to be given for the "excess cost allowed by CEA" and the case where the completed capital cost is less than the ceiling cost, whereupon the amount of the cost under-run is similarly to be brought into account, although in this case deducted rather than added.

8. Schedule 11 sets out the capital cost debt and equity, amounting at the particular date when this schedule was added by later amendment, to 1200 crores with conversion rates of 44.15 to the $ and 280.80 to the Deutsche Mark.

9. Article 15 provided for resolution of disputes in the following way:-

"15.1 Informal Dispute Resolution

(a) Each Party shall designate in writing to the other Party a representative who shall be authorized to resolve any dispute arising under this Agreement in an equitable manner and, unless otherwise provided herein, to exercise the authority of the Parties to make decisions by mutual agreement. If the designated representatives are unable to resolve any such dispute within fifteen (15) days, such dispute shall be referred by such representatives to a senior officer designated by the Company and a senior officer designated by TNEB, respectively, who shall attempt to resolve the dispute within a further period of fifteen (15) days.

(b) The Parties agree to use their best efforts to attempt to resolve all disputes arising hereunder promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to any and all non-privileged records, information, and data pertaining to any such dispute.

15.2 Arbitration of Disputes - In the event the Parties are unable to resolve any dispute pursuant to Section 15.1, then:

(a) Except as otherwise provided in this Agreement, any dispute, controversy, or claim arising out of or relating to this Agreement or the breach, termination or validity thereof, shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "ICC") in effect on the date of this Agreement (the "Rules"). The arbitration shall be held in London, England. The arbitration proceedings shall be conducted, and the award shall be rendered, in the English language.

(b) There shall be three arbitrators of whom each Party shall select one. The two arbitrators thus appointed shall select the third arbitrator to act as chairman of the tribunal within thirty (30) days of the selection of the second arbitrator. If the two Party appointed arbitrators fail to agree on a third arbitrator, the ICC Court of Arbitration shall make such appointed.

(c) Any arbitration proceedings or award rendered hereunder and the validity, effect and interpretation of this arbitration agreement shall be governed by the laws of England and by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, to which each of the United Kingdom, India and the United States are parties.

(d) The Indian Arbitration Act (Act No. X[10] of 1940) shall not be applicable to this arbitration agreement to any arbitration proceeding or award rendered hereunder, or to any dispute or difference arising out of or in relation to this Agreement. Any award rendered hereunder shall be a "foreign award" within the meaning of the Indian Foreign Awards Act, 1961.

(e) The Parties hereby waive any rights of application or appeal to the courts of England and India to the fullest extent permitted by law in connection with any question of law arising in the course of the arbitration or with respect to any award made.

(f) This Agreement and the rights and obligations of the Parties shall remain in full force and effect pending the award in any arbitration proceeding hereunder.

15.3 Arbitration Award - The award of the arbitrators shall be final and binding upon the Parties, and shall be the sole and exclusive remedy between the Parties regarding any claims, counterclaims, issues or accountings presented or pled to the arbitrators. Judgment upon any award may be entered in any court having jurisdiction. Amounts due under any such arbitration award shall be paid within thirty (30) days of the award and interest shall accrue thereafter on unpaid amounts under the award at the rate specified in Article 9.7 of this Agreement. Any costs, fees or taxes incident to enforcing such award shall, to the maximum extent permitted by law, be charged against the Party resisting such enforcement."

10. The PPA is expressly governed by the law of India whilst the Arbitration Agreement is expressly governed by the law of England. Article 17.8 of the PPA runs as follows:-

"Except as provided in section 15.2 of this Agreement, this Agreement and the rights and obligations hereunder shall be interpreted, construed and governed by the substantive laws of India".

Section (Article) 15.2 is the Arbitration provision, as set out earlier.

11. In addition, Article 14.1 reads as follows:

Art. 14.1 Change in Law

(a) If as a result of Changes in Law, the Company suffers an increase in costs or reduction in net after tax return or other economic burden (including, without limitation, the result of any restriction on the ability to convert Rupees to Dollars in accordance with the Tariff, or to remit funds in Dollars outside of India), the aggregate economic effect of which exceeds the equivalent of US$125,000 in any Year, the Company may so notify TNEB and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupied in the absence of such cost increase, reduction in return or other economic burden; and the Parties hereto shall meet and either agree on such amendments to this Agreement or alternative arrangements to implement the foregoing.

(b) If, as a result of Changes in Law, the Company enjoys a reduction in costs or increase in net after tax return or other economic benefit, the aggregate economic effect of which exceeds the equivalent of US$125,000 in any Year, TNEB may so notify the Company and propose amendments to this Agreement so as to put the Company in the same economic position it would have occupied in the absence of such decreased cost, increase in return or other economic benefit; and the Parties hereto shall meet and either to (sic) agree on such amendments to this Agreement or alternative arrangements to implement the foregoing.

(c) If no such agreement has been reached within ninety (90) Days after any meeting pursuant to Section 14.1(a) or (b), the proposals of the Parties shall be submitted to arbitration pursuant to Article 15 hereof, such that the Company shall be put in the economic position it

would have occupied in the absence of such Change in Law.

12. Change in Law is defined in the PPA in the following way:

(i) the enactment or issuance of any new law or regulation, or (ii) the amendment, alteration, modification or repeal of any existing law or regulation of a Government Agency (including, without limitation, any law or regulation relating to any taxes, import fees or assessments or any expropriation or compulsory acquisition) or any new or modified directive or order thereunder, or (iii) any binding interpretation of any existing law issued by a competent court, tribunal, Government Agency or statutory authority contrary to the existing official interpretation thereof, coming into effect after the date hereof, provision for which has not been made elsewhere in this Agreement or in the Approved Capital Schedule.

13. By Article 15.2(a), any dispute was to be referred to arbitration "except as otherwise provided in this Agreement". No canons of construction, peculiar to the law of India, were brought to my attention and it was common ground between the parties therefore that questions of construction of the Indian law contract were a matter for the English court, as a matter of language, albeit set against the background of Indian law and the matters which would have been known to the parties at the time of contracting.

14. On the face of the PPA, there are two clear exceptions to the agreement to refer disputes to arbitration. Under Article 2.4(d), if there was a dispute about the Acceptance Test, following various procedures, the Independent Engineer was to determine the position and his determination was to be binding. The PPA also contains provisions for a "buy-out" and in schedule 5 a procedure is set out for determination of the buy-out price. An independent appraiser is to be appointed and, following a prescribed procedure, his decision is to be "final and binding on the parties and not open to dispute or arbitration".

15. In addition to this, TNEB submitted that by virtue of its choice of Indian law as the governing law, there is a further exception to the jurisdiction of the arbitrators under the Arbitration clause. It is said that there are compulsorily applicable principles of Indian law which require determination of the tariff to be charged by the statutory body, the Tamil Nadu Electricity Regulatory Commission (TNERC). TNEB also maintained that the PPA provided for the statutory regulation of the tariff to be charged, through control of the "actual capital costs" in relation to the project, which constituted one parameter used in the tariff calculation. TNEB pointed to the terms of paragraph 1(d) of schedule 3 and what it referred to as a "repugnancy provision", whereby it was agreed that "if any element of the Tariff provided for in this Agreement" should be inconsistent with, or repugnant to, the provisions of the statutes and statutory notifications referred to in it, such element should be deemed amended to the extent required to bring it into compliance. Reliance was also placed upon the definition of capital costs at paragraph 9 of schedule 3 and the reference to CEA approval of the "Actual Completion Costs Report". TNEB contended that it was for CEA alone (or rather its successor TNERC) to determine the Actual Capital Costs (ACC) which is an essential parameter in calculating the Tariff. That Tariff is made up of four components, being the Fixed Capacity Charge, the Variable Fuel Charge, the Monthly Adjustments and the Incentive Performance Payments, three of which

(not the Variable Fuel Charge) are materially affected by the ACC. The higher the ACC the higher the Tariff payment.

16. As a matter of application of English conflicts of laws principles, TNEB also maintains that effect must be given to the present statutory regime in India, as it relates to the fixing of prices and that questions relating to the ACC or excess costs arise in that context. This regime requires determination of these elements, it is said, by TNERC.

17. Further or alternatively, TNEB runs a case in estoppel by which, it says, ST-CMS is precluded from asserting that any entity other than CEA can decide these issues.

The Underlying Dispute Between the Parties

18. The request for arbitration submitted to the ICC includes the following:-

"3.2 The provisional Capital Cost as per the terms of the PPA and agreed between the parties is Rs. 1295.9922 Crores. Once the Actual Capital Cost is determined, the Tariff is to be recalculated based thereon and is to be applied retrospectively from the first Tariff invoice. The Actual Capital Cost computed by the Claimant in terms of the PPA is Rs. 1365.854 Crores. Using this Actual Capital Cost, as compared to the provisional Capital Cost, Respondent should pay to the Claimant an additional amount of approximately Rs. 55.16 Crores (not including interest for delayed payment) for Tariff invoices raised up to 17 October, 2006 (i.e. the last invoice prior to this Request).

…..

3.4 The actual Completion Cost Report, detailing the Actual Capital Cost computed in accordance with the terms of the PPA, was submitted by the Claimant to Respondent on 15 July 2003. Subsequently, the Claimant has provided to Respondent, over the last three (3) years, all clarifications and additional information as was requested by Respondent from time to time.

3.5 During this period contrary to its contractual obligations under the PPA to have agreed to the Actual Capital Cost at Rs. 1365.854 Crores, Respondent has sought to recommend an Actual Capital Cost of only Rs. 1232.831 Crores. In computing the Actual Capital Cost, Respondent has used a computation methodology not provided for by the PPA. In addition, Respondent has disregarded certain key terms of the PPA. For example, Respondent refuses to give complete benefit of the foreign exchange rate variation on the foreign currency elements of the Actual Capital Cost for which specific provision is made in the PPA. The Respondent also does not recognize the EPC price. Similarly, an increase in the Capital Cost due to an increase in statutory levies are not being recognized by the Respondent, despite the PPA clearly providing for the same.

…..

4.11 Following the Respondent's receipt of the Actual Completion Cost Report, per the PPA, the Actual Capital Cost was required to be determined between the Claimant and the

Respondent, with the Claimant and Respondent's mutual agreement on the Actual Capital Cost formally approved by CEA. However, as a result of a Change in Law, determination of the Actual Capital Cost is a matter now entirely between the Claimant and Respondent. Under the Electricity Act 2003 (India), the Electricity Supply Act 1948 (India) under which CEA was constituted has been repealed. Although, CEA continues to exist, they do not any longer have authority to approve the Actual Capital Cost, a fact Respondent has direct knowledge of. CEA has itself so informed the Respondent in a CEA/Respondent meeting held on 22 November 2005.

……

10.3 As stated above, the Respondent has agreed with the Claimant on the methodology for calculating provisional Capital Cost. The PPA methodology adopted by the Claimant in computing the provisional Capital Cost has been used by the Claimant in computing the Actual Capital Cost. The Respondent cannot therefore, refuse to recognize the PPA methodology in computing the Actual Capital Cost."

19. The relief sought by the Request, together with interest and costs, is as follows:-

"13.1 Claimant seeks the following reliefs:

(a) An award declaring that the Actual Capital Cost as defined in Schedule 3 to the PPA, which the Respondent is bound to accept between the Claimant and the Respondent is the sum of Rs 1365.854 Crores;

(b) An award directing the Respondent to pay, within fourteen (14) days of the Claimant submitting an invoice for the differential in tariff that it is entitled to as a result of the Actual Capital Cost so determined;

……..

(e) All such other or further reliefs as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

20. It can be seen that there is reference in the request for arbitration to a change in the law of India, the effect of which, ST-CMS maintains, is that matters of contractual costs are solely for the parties, as CEA's statutory function of excess cost approval has disappeared. TNEB contends that a new 2003 statutory regime is now in place in India and that both as a matter of contract and of Indian law, the effect is to require determination of ACC , any excess costs and the tariff in the hands of TNERC.

The Dispute as to the Scope of the Arbitration

Construction of the Arbitration Agreement in the PPA

21. The starting point is the issue of construction of the English law Arbitration provision in the PPA. By the terms of s 7 of the Arbitration Act 1996, this is a separate agreement from the PPA

of which it forms part. I have already drawn attention to Article 15.2 of the PPA, which is very wide in its terms, in referring "any disputes, controversy or claim arising out of or relating to the Agreement or the breach, termination or validity thereof" to arbitration (Article 15.2 (a)). For good measure, the PPA also provides in Article 15.1(c) that "any arbitration proceedings or award rendered hereunder and the validity, effect and interpretation of this arbitration and agreement shall be governed by the laws of England and by the New York Convention…". Moreover, Article 15.2 (d) makes it plain that Indian law is not to apply to the arbitration agreement, a matter of some significance in the context of the arguments put forward by TNEB.

22. Article 15.2(a), however, includes the exceptive words "except as otherwise provided in this agreement". In order to see the ambit of the exception, regard must be had to the rest of the PPA, which is governed by Indian law, but in respect of which no special Indian rules of construction were said to apply. I therefore construe it as a matter of English language, and in the light of the fact that the arbitration clause itself is governed by English law and specifically excludes the application of Indian law, providing that it is to be a foreign award for the purposes of enforcement under the Indian statute enacting the New York Convention.

23. Two clear excepting provisions are to be found in the PPA, where the parties expressly agreed for the decision on a disputed matter by someone other than the arbitrators to be binding instead (see earlier in this judgment). There is no other provision in the PPA with any similar wording; nor is there any provision in the PPA stating that, where the proper law of the PPA provides for a decision to be taken by a statutory body, that body is to have jurisdiction over any dispute in relation to that decision, let alone exclusive jurisdiction. The parties have gone out of their way to provide that Indian law is to have no application in the context of the Arbitration provision, but TNEB submit that the effect of having Indian law as the proper law of the PPA is to bring its provisions into the Article, so as to give rise to another exception to the arbitrators' jurisdiction.

24. The fact that the PPA refers in paragraph 1(d) of Schedule 3 to the Indian Electricity Act of 1948 and various statutory Notifications, does not, as a matter of construction, in itself bring in any exception to the arbitration agreement found in Article 15. There is no wording in paragraph 1(d) which suggests that, on its face. The "repugnancy" set out in that paragraph, relates to the provisions in the PPA relating to Tariff, not to the Arbitrators' jurisdiction. On the face of the paragraph, without referring to the provisions of any relevant Indian Law, the conclusion must be that any dispute as to repugnancy of the Tariff with those provisions of Indian law, which are set out in that paragraph of the Schedule, is a matter for the arbitrators to determine under the arbitration provisions. On its face, the "repugnancy" is a matter of substantive law, not of jurisdiction.

25. (TNEB also contended that the repugnancy provision should also be read as referring to all Indian Electricity legislation subsequently enacted or concerned with the same subject matter as the statute and notifications expressly referred to. I reject that submission, because of the particularity of the words used but, in any event, it would make no difference to the jurisdictional argument even if it could be so read, for the reasons just given.)

26. Equally, the provision in the Addendum which provides for compliance with the 1948 statute (as amended) and notifications given thereunder before August 1998, does not, on the wording used, import any such a suggestion. (This again cannot be read as referring to any subsequent legislation because of the specific wording of the new subparagraph 6 (t) which is introduced.) Once again, the question of compliance with such provisions of Indian law would appear to be a matter of substantive dispute for the arbitrators to decide, if relevant and necessary.

27. When attention is focused on paragraph 9 of Schedule 3 and the definition of "Capital Cost" for the purpose of calculating the Tariff, there is again, on the face of the words used, no reference to any jurisdictional exception to the Arbitration Provision. As part of the calculation of "Capital Cost" reference is made to a "Capital Cost Ceiling" beyond which nothing is to count, except to the extent it is approved by CEA. That reference to approval of the excess ties in with the Statutory Notification current at the time of the PPA (see later in this judgment) but conveys no suggestion of any limitation on the arbitrators' jurisdiction. The arbitrators would merely take account of the presence or absence of such approval in their deliberations.

28. Reliance is placed by TNEB on the second sub-paragraph of this paragraph which deals with "Capital Cost", but once again that sub-paragraph refers to "approval" by CEA of a Capital Costs report and not, on its face, to any decision making process which limits the arbitrators' jurisdiction. As a matter of contract, any approval needed would be a matter for the arbitrators to take into account, in much the same way as any contractual provision which referred to the need for an approval by any other third party or state body. Insofar as it was suggested that the construction of this definition of capital costs was to be construed in the light of the present provisions of Indian law, I reject that submission. The only law which the parties could have had, and did have, in mind was that in being at the time of concluding the PPA (and when later making any amendments to it).

29. In order to achieve the result for which TNEB contends, it is necessary to examine, in some detail, the provisions of Indian law, both at the time of the conclusion of the PPA in 1996 and as at today's date. That appears an unlikely task for construction of an English law arbitration provision, where Indian law has been expressly excluded. If there had been an intention to derogate from the arbitrators' jurisdiction, by reference to an element of Indian law which provided for determination of one element of, or all of, the Tariff, the parties could be expected to spell that out. The very idea that, as a matter of construction under English law, a determination must be made on questions of Indian law, in order to decide the ambit of the arbitrators' jurisdiction seems inherently unlikely. That unlikelihood, and the unreasonableness of such a suggestion, is something that can properly be taken into account in construing the arbitration provision.

30. Two further provisions of the PPA come into play, both in the context of the argument on construction and in relation to the argument on private international law. Article 9.2 (d) provides that "in the event of any dispute as to all or any portion of an invoice, TNEB shall nevertheless pay the full amount of the disputed charges when due and may serve notice on the company that the amount of an invoice is in dispute, in which event the provisions of Article 15 shall be

applicable…. To the fullest extent permitted by the Laws of India, TNEB irrevocably waives the right to dispute any invoice after a period of 120 days from the due date of such invoice…". Whilst the cross-reference to Article 15 can be said also to bring in with it the exceptive words in Article 15.2 (a), it is significant that full payment is to be made under an invoice and it is then for TNEB to use Article 15 to deal with a "dispute as to all or any portion of an invoice". This may very well, and is perhaps likely to, constitute or include a dispute under the Tariff. This provision therefore indicates the express acceptance of the arbitrators' jurisdiction in this context, whilst also referring to Indian law in the limited context of a full waiver of the right to challenge the invoice at all.

31. Additionally, Article 14 deals with "changes in law", by which ST-CMS suffers an increase in costs, or reduction in net after tax returns, or other economic burdens. In such circumstances, if no agreement can be reached as to the means by which to put ST-CMS back into the same economic position that it would have occupied in the absence of such detriment resulting from the change in law, the matter is to be referred to arbitration under Article 15 for the arbitrators to decide how to put ST-CMS back into its previous position. The parties thus had specific regard to questions of changes in Indian law which might affect ST-CMS' monetary entitlement under the PPA, whether in the context of ACC, Tariff or otherwise. There is no suggestion of any derogation from arbitration in this context at all.

32. In the PPA the parties have gone out of their way in Article 15.2(c) to provide that the validity, effect and interpretation of this arbitration agreement shall be governed by the laws of England and by the New York Convention. The clear intention is that English law should prevail over Indian law in determining the ambit or scope of the arbitration agreement, whatever Indian law might itself provide. The objections which are open under Indian law are solely those which are available under the New York Convention at the enforcement stage, in respect of a foreign award, as Article 15.2(d) makes plain. Under Article V of that Convention, enforcement may be refused only on limited grounds, one of which is where the arbitration agreement in question is "not valid under the law to which the parties have subjected it" (Article V(1)(a)), in this case English law.

33. As a simple matter of construction, therefore, I am unable to hold that the proper law clause and/or Schedule 3 to the PPA constitute provisions in the PPA which provide for a dispute resolution other than arbitration, so as to fall within the exception to Article 15.2(a) and the words "except as otherwise provided in this Agreement".

34. In these circumstances, the only route by which TNEB can succeed in its jurisdictional arguments is its contention that, as a matter of English rules of private international law, Indian law itself is brought to bear on the arbitration agreement, or that, as a matter of English public policy, the arbitration agreement should not be enforced or given the width or effect that its proper construction, as a matter of English law, requires.

Principles of English Private International Law

35. As to the first suggestion, Indian law is expressly excluded from the separate arbitration agreement. Furthermore, it is nothing to the point if, under Indian law, the proper law of the PPA,

the dispute in question cannot be decided other than by an Indian tribunal or Indian statutory body, according to Indian law. That is an irrelevance to an English court, the court of the seat of the arbitration, dealing with an arbitration provision specifically governed by English law. Whether or not a foreign court would insist on its own jurisdiction or the jurisdiction of a statutory tribunal in India in matters of this kind is an irrelevance. This is made plain from the decisions in Akai v Peoples Insurance Co. [1988] 1 LLR 90 at pages 98-100, OTA Africa v Magic Sportswear [2005] 2 LLR 170 at pages 177-179 and C v D [2007] EWHC 1541 Civ at paragraph 56. The parties have agreed to arbitration in accordance with English law and it is by that law alone that the ambit of the arbitration provision can be determined, as a matter of construction. To delve into the proper law of the PPA to seek for any provision mandatorily applicable by that law to the issue of jurisdiction, is impermissible.

36. This thinking is fortified by the conclusions of the Court of Appeal in Fiona Trust & Holding Corporation v Yuri Privalov [2007] EWCA Civ 20 at paragraphs 17-19. This decision also shows, by analogy, that, when regard is had to the arbitration agreement as a separate contract under section 7 of the Arbitration Act 1996, it is that agreement itself which must be impeached as a matter of public policy- see paragraphs 28 and 29.

37. Despite the argument of TNEB to the contrary, it is, in my judgment, clear as a matter of English law and the application of English conflicts of law principles, that Indian law has no relevance to the issues that I have to decide, therefore, unless questions of English public policy are involved, or there is an issue about enforcing, in a friendly foreign state, performance of a contract contrary to the law of that state.

38. It is to correct to say that, as TNEB submits, that where parties choose the law of a country as the proper law of a contract, it is that law, as it stands from time to time, which has to be applied. Changes to that law which take place whilst the contract subsists would have to be applied. In the present case, any changes to that law in the thirty year term of the PPA would have to be applied to substantive disputes under it, but with possible repercussions under Article 14. Changes brought about to the India Electricity (Supply) Act 1948 by the 1998 Electricity Regulatory Commission Act and the Electricity Act of 2003 would have to be considered by any tribunal determining rights and obligations under the PPA, in any dispute which arose for determination during their applicability.

39. TNEB submits that, under the 2003 Act, all questions arising in connection with determination of the Tariff payable by TNEB to ST-CMS must, as a matter of Indian law, be determined by the state Electricity Regulation Commission alone (the SERC), here the Tamil Nadu Commission (the TNERC). Consequently, in its submission, the determination of ACC which, it is common ground between the parties on any basis of calculation, forms a component in determining Tariff payments, is now within the exclusive jurisdiction of the TNERC and the arbitrators have no jurisdiction to determine it, or any consequences flowing from it. Payment of any sums ordered to be paid by the arbitrators would, in TNEB's submission, be illegal and give rise to offences in India punishable with penal sanctions falling on the directors as well as TNEB and ST- CMS.

40. The fallacy in this argument is that to which I have already referred. Whatever the changes in the substantive law of India, which constitutes the proper law of the PPA, and whatever Indian issues of policy inform those changes, that cannot affect the proper construction of the separate arbitration agreement which is governed by English law and which will take no account of such changes unless matters of English public policy so require.

41. TNEB relied on Kahler v Midland Bank [1950] AC 24 and R v International Trustee for the Protection of Bond Holders [1937] AC 500, as showing that English courts would take account of the proper law of the contract at the time of the trial, in determining the obligations which arose under it. This is entirely unexceptionable but has nothing to do with jurisdiction under an English law jurisdiction or arbitration agreement, as opposed to substantive rights.

42. Whether or not there might be a defence to enforcement in India under Article V.2 (b) of the New York Convention, as a matter of the public policy of India, is neither here nor there for these purposes, but in the context of an international treaty, "public policy" means international public policy and differs from public policy in a domestic context. The courts of many parties to the Convention have expressly recognised this - see The New York Arbitration Convention of 1958 – towards a Uniform Judicial Interpretation by van den Berg at pages 359-368, illustrated in the decision of Hobhouse J (as he then was) in the Marques de Bolarques [1984] 1 WLR 642 at 658-659. Furthermore, on the evidence of ST-CMS' expert on Indian law this distinction is clearly recognised in the law of India. In his second affidavit, Mr Jaitley referred to the decision of the Supreme Court of India in Renusagar Power Company Ltd v General Electric Co., AIR 1994 SC 860. There, when looking at Article V(2)(b) of the New York Convention and the section of the Foreign Awards Act which enacted it in India, it was held that the expression "public policy" in the Act must necessarily be construed in the sense that the doctrine of public policy is applied in the field of private international law. Consequently, "it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law or (ii) the interests of India or (iii) justice or morality." In order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. In an earlier decision, the Supreme Court, in Murlidhar Aggarval v State of Uttar Pradesh (1974) 2 SCC 472, it was held at paragraph 28, by reference to English law authorities, that the expression "public policy" had an entirely different meaning from "the policy of the law" and depended upon "customary morality" and "social consequences" with regard to the "current needs of the community".

43. TNEB sought to rely on Article 3.3 of the Rome Convention, which is reflected in Dicey, Morris and Collins (ibid) at Rule 205. Article 3.3 provides as follows:

> "The fact that the parties have chosen a foreign law, whether or not accompanied by a the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are concerned with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'."

44. This provision is, as is accepted by TNEB, rendered inapplicable to arbitration agreements and to jurisdiction agreements by the very terms of Article 1.2 of the Rome Convention itself. Additionally, the UK, by section 2(2) of the Contracts (Applicable Law) Act 1990, which gave the Rome Convention the force of law in this jurisdiction, exempted from its application Article 7.1, which provided that effect might be given to the mandatory rules of law of another country, with which the situation had a close connection. TNEB contended that there was an analogous principle of common law to the same effect as Article 3.3. The very terms of the English statute appear to me to determine the issue contrary to that submission. In any event, freedom of contract, including choice of law, was the basic principle of English common law prior to the statute, and there is nothing which could gainsay that in the context of the parties' choice of ICC arbitration in England, subject to English law, and the express exclusion of the Indian Arbitration Act.

45. No other basis for engagement of English public policy considerations was put forward and I can seen none which would fall within the "ordre public" of English law, which is what would otherwise be required, if the application of English law to the arbitration agreement was to be refused, as set out in Dicey, Morris and Collins (ibid) at rule 210, paragraph 32.230-237 and paragraph 32.238-241. There is no fundamental principle of English Public Policy engaged here, no "fundamental principles of justice, good morals or deep-rooted tradition of the common weal".

46. It is arguably the case, as recognised in Ralli Bros. v Compania Naviera SA [1920] 2 KB 287, as well as in Kahler (ibid), that a contract (whether lawful by its governing law or not) is invalid or at least would not be enforced by an English court, insofar as performance of it is unlawful by the law of the country where the contract has to be performed. There is debate as to whether this principle applies after the adoption of the Rome Convention, but since, as appears below, the Rome Convention does not apply to arbitration agreements, I am prepared to assume, for current purposes, that the Ralli Bros. principle is extant, as a matter of English common law.

47. For the principle to be applicable, however, it is necessary that performance includes the doing in a foreign country of something which the laws of that country make it illegal to do (emphasis added). It not enough that an act of performance is unlawful by the law of the country in which it happens to be done, or that the contract is contrary to public policy, according to the law of the place of performance (see Dicey, Morris and Collins, 14th edition at paragraph 32-145, by reference to Lemenda Trading v African Middle East Petroleum Co. Ltd. [1988] QB 448 at 455-456). The act must be unlawful by the law of the country in which, according to its express or implied terms, the contract has to be performed, as the decisions in Kahler (ibid) and Reggazoni v Sethia Ltd [1956] 2 QB 490 make clear.

48. The question then is as to what element of performance, illegal by the law of India, has, under the PPA, to be effected in India itself, as opposed to anywhere else, whether on TNEB's case or a proper view of the PPA. Under the terms of Article 15, the arbitration is to be held in London, England, which is therefore the seat of the arbitration. Participation in that form of dispute resolution will therefore occur here, in this jurisdiction, and no question of compulsory performance of the arbitration agreement arises in India, certainly up to the point where the

award is issued.

49. There is an implied term in any arbitration agreement to perform any valid award made pursuant to the agreed arbitration procedure (see AEGIS Ltd v European Reinsurance Co. of Zurich [2003] 1 WLR 1041 (PC), per Lord Hobhouse, at paragraph 9). No provision in the PPA was however relied on by TNEB as obliging TNEB to make Tariff payments specifically in India and nowhere else, nor to pay any sum awarded there, as opposed to anywhere else. Although, no doubt, the parties would have expected that payment would be made in India, whether Tariff payments or payment under an award, there would appear to be no requirement to that effect. In these circumstances there can be no agreement requiring performance of the arbitration agreement in India, to which the Ralli Bros. principle can apply

50. In these circumstances, I can see no principles of English private international law, or any English public policy basis, for not adopting the construction of the arbitration agreement in Article 15, as a matter of English law. This means that TNEB's application must fail.

51. Because matters of Indian law have been fully explored before me, I will go on to determine them, without the need to explore every aspect of the Indian law evidence.

Indian Law

The Experts on Indian Law

52. Each of the experts called by the parties was a distinguished Indian lawyer. Each expressed his view with clarity in relation to statutes and decisions of the Indian courts and statutory tribunals. As is often the case, the apparent differences which appeared from their reports, or, at least, from the cases put by the parties instructing them, regardless of their reports, diminished as the hearing progressed. At the end of the day it seemed to me that there was little between them on the application of the 1948 Electricity Supply Act (as amended in 1991) and the statutory notification of 30 March 1992 (The Statutory Notification).

53. There were significant differences between them as to the application of the 1998 Act, which is no longer in force and therefore of no direct application to the PPA, whatever the position may have been between 1998 and 2003 or 2005. TNEB's expert relied on two Supreme Court decisions to support his position with regard to construction and application of the Act, neither of which concerned a PPA. ST-CMS Indian lawyer was bound to accept that these decisions were binding in Indian law for what they decided, but considered that they did not help in relation to PPAs under the 2003 Act, and that their reasoning was, in some respects, questionable. Issues in respect of the 1998 Act came forward at a late stage, essentially appearing for the first time, in TNEB's skeleton argument, rather than in the expert's report. The reliance placed on the 1998 Act was however taken up by TNEB's expert.

54. Under the different wording of the 2003 Act and the 2005 Regulations made thereunder for Tamil Nadu, ultimately, the significant difference between the experts was whether or not, despite the terms of section 185 of the 2003 Act and regulation 28.2 and 35.2, which apply to existing PPAs, there still had to be an application to the SERC to determine a Tariff, although it

was accepted that such Tariff would inevitably have to be determined in accordance with the norms and tariff provisions of the PPA itself. TNEB's expert took the view that this was required under section 61, section 62 and section 86(1)(a) and relied on a first instance decision of Delhi High Court. ST-CMS' expert considered that section 86(1)(b) alone applied to PPAs and that this applied solely to prospective PPAs. His opinion was that, by virtue of section 185 (and section 6(c) of the General Clauses Act 1897) and the 2005 Regulations, the relevant PPA had already been approved by the relevant statutory body when the TEC was fixed, so that no further regulation was required. Reliance was placed in particular on a decision of the Electricity Appeal Tribunal, whose decisions are binding on all SERCs in India.

55. TNEB's expert rightly conceded, in the course of cross-examination, virtually all of the differences between TNEB's case and ST-CMS's case in relation to the 1948 statute and Statutory Notification. The suggestion previously made by TNEB, appearing also in its expert's report, was that the CEA was bound, as a matter of statute, to determine the ACC and not merely to approve the excess costs over the TEC. That, in my judgment, was always untenable given the clear wording of the Statutory Notification.

56. There was, as I have said, late reliance upon the 1998 Act by TNEB's expert, with a passing mention of it in both his first and second affidavits, the second of which was served without permission shortly before the hearing. The reliance upon it was brought out in cross-examination of both experts and by reference to the two Indian Supreme Court decisions, which were then said by TNEB to apply to the situation under the 2003 Act. The late reliance on the 1998 Act, for these purposes and in this way, detracted from the force of the argument, suggesting that it was not one immediately apparent to its expert and that there was a need for such reliance because of the weakness of TNEB's case on the 2003 Act, with its different wording and different regulations, which fell to be construed on their own terms.

57. When I heard the evidence on the 2003 Act I could see why this was and I preferred the evidence of Mr. Jaitley and the reasoning of the Electricity Appeal Tribunal, to that of TNEB's expert and the Delhi court in GVK Industries v CEA [2006] 111 AD Delhi 523.

The relevant Indian law at the time of conclusion of the PPA in 1996

58. In 1993 and 1996, the critical statute, for current issues, was the Electricity (Supply) Act 1948. On the opening up of the Electricity Industry to private investment (required because of the parlous state of the electricity industry in India), section 43A was added with effect from 15 October 1991. Prior to that, all generation of electricity had been in the hands of nationalised industry. The Act set up CEA and state electricity boards and set out their powers and duties, including matters relating to the operation of generating stations. Sections 46 and 49 provided for the supply by the state electricity boards to licensees authorised to supply electricity to others in accordance with a Grid Tariff, to be fixed, from time to time, whilst s 49 provided for the framing of uniform tariffs for supply to others, who were not licensees. When the 1991 amendment was introduced, a further section was added to cater for supply to the state board (and others) by independent generating companies, as opposed to supply by the Board. Section 43A provided as follows:-

"43A. Terms, conditions and tariff for sale of electricity by Generating Company

(1) A Generating Company may enter into a contract for the sale of electricity generated by it -

(a) with the Board constituted for the State or any of the States in which a generating station owned or operated by the company is located;

(b) with the Board constituted for any other State in which it is carrying on its activities in pursuance of sub-section (3) of section 15A; and

(c) with any other person with consent of the competent government or governments.

(2) The tariff for the sale of electricity by a Generating Company to the Board shall be determined in accordance with the norms regarding operation and the Plant Load Factor as may be laid down by the Authority and in accordance with the rates of depreciation and reasonable return and such other factors as may be determined, from time to time, by the Central Government, by notification in the Official Gazette:

Provided that the terms, conditions and tariff for such sale shall, in respect of a Generating Company, wholly or partly owned by the Central Government, be such as may be determined by the Central Government and in respect of a Generating Company wholly or partly owned by one or more State Governments be such as may be determined, from time to time, by the government or governments concerned."

59. In circumstances which are referred to later in this judgment, this section was expunged for Tamil Nadu by statutory instrument, with effect from 2 August 2002. In the interim period, or at least until the Electricity Regulatory Commissions Act 1998 and regulations made thereunder, the tariff for the sale of electricity by the new species of generating company was to be determined in accordance with the norms laid down by CEA (the Authority referred to in the section) and in accordance with other factors as might be determined by central government. The relevant Statutory Notification which set out the factors was S.O.251(E) which, insofar as it refers to Thermal Power Generating Stations (the relevant category in this dispute), included the following wording:-

"S.O.251(E) In exercise of the powers conferred by sub-section (2) of section 43A of the Electricity (Supply) Act, 1948 (54 of 1948), hereinafter referred to as the Said Act, the Central Government hereby determines the factors in accordance with which the tariff for sale of electricity by Generating Companies to the Board and to other persons shall be determined, as follows:-

1. Thermal Power Generating Stations

The two-part tariff for sale of electricity from Thermal power generating stations (including gas based stations) shall comprise the recovery of annual fixed charges consisting of

interest on loan capital, depreciation, operation and maintenance expenses (excluding fuel), taxes on income reckoned as expenses, return on equity and interest on working capital at a normative level of generation, and energy (variable) charges covering fuel cost recoverable for each unit (kilowatt hours) of energy supplied and shall be based on the following norms:

1.1 The norms of operation and Plant Load Factor as has been laid down by the Authority, for the time being, subject to modifications thereof, if any under sub-section (2) of section 43A of the Said Act, namely:

……

1.2 The capital expenditure of the project shall be financed as per the approved financial package set out in the techno-economic clearance of the Authority.

The project cost shall include capitalised initial spares. The approved project cost shall be the cost which has been specified in the techno-economic clearance of the Authority.

The actual capital expenditure incurred on completion of the project shall be the criterion for the fixation of tariff. Where the actual expenditure exceeds the approved project cost the excesses as approved by the Authority shall be deemed to be the actual capital expenditure for the purpose of determining the tariff.

Provided that such excess expenditure is not attributable to the Generating Company or its suppliers or contractors:

Provided further that where a power purchase agreement entered between the Generating Company and the Board provides a ceiling on capital expenditure, the capital expenditure shall not exceed such ceiling."

60. It is self-evident that the definition of "Capital Costs" in paragraph 9 of schedule 3 of the PPA was intended to relate to or reflect the terms of the Statutory Notification. In both there is reference to approval by CEA of excess costs in relation to capital cost. Sections 29 and 30 of the 1948 Act provided that every scheme, which was estimated to involve capital expenditure exceeding a particular level fixed by the Government from time to time, had to be submitted to CEA for its "concurrence". Estimates of the completion costs of the project were to be provided and, after taking into account various matters set out in section 30, CEA could give techno-economic clearance (TEC) for the scheme. Hence the reference in paragraph 1.2 of the Statutory Notification to capital expenditure being financed "as per the approved financial package set out in the techno-economic clearance of the authority" and the reference in the following paragraph to "the approved project cost" as that specified in the TEC.

61. The third sub-paragraph of paragraph 1.2 of the Statutory Notification provided that the actual capital expenditure incurred was to be the criterion for fixing the tariff for payment, but that any expenditure which exceeded the TEC would not count for this purpose, unless it was approved by CEA. The extent to which such additional expenditure was approved, then created

the ceiling for the ACC, upon which the tariff would then be determined, provided that the excess expenditure was not attributable to the generating company or its suppliers or contractors.

62. The terms of schedule 3 of the PPA, as construed earlier in this judgment, reflect this, because the "capital cost", used in the formula set out in the PPA for determining payments by TNEB, was defined as meaning the actual cost incurred in completing the project, provided that costs in excess of a figure there set out, should not be included, except to the extent that CEA approved such costs as unattributable to the company, its suppliers or contractors.

63. On 19 August 1994, CEA had granted TEC for a capital cost of 1325.11 crores. By the date of the amended and restated PPA, 20 November 1996, ST-CMS and TNEB had agreed to the figure of 1200 crores as a Capital Cost Ceiling. This is the figure which appears in paragraph 9 of schedule 3, as being less than the TEC, but fixed in accordance with the foreign exchange rates assumed in the TEC. The definition paragraph of "Capital Cost" expressly then provided that, in calculating the ACC, as compared with the contractual ceiling, account should be taken of increases in the project cost resulting from changes in the rates of exchange of the foreign currencies in which expenditures were incurred as authorised, as compared with the rates in schedule 11. The Base Exchange Rate was to be used for this purpose.

64. On 22 January 1999 the parties concluded addendum 3 to the PPA which reduced the capital cost set out in schedule 11 to 1170 crores, with exchange rates as set out in the addendum. Additionally a new Article 6.1(t) was added, by which ST-CMS covenanted to comply with the provisions of the 1948 Act, the Statutory Notification of 30 March 1992 (as amended up to that date) and the norms of operation laid down by CEA under section 43A of the Act.

65. Under the terms of the Statutory Notification any excess costs over and above 1325.11 crores had to be approved by CEA, before it could be included in any Tariff calculation under the PPA but, TEC having been already given, there was no other need to ask CEA for approval. If some lower capital cost ceiling was agreed between the parties, the Statutory Notification provided that capital expenditure should not exceed it, but there was no reference to any form of approval needed. At the end of the expert evidence, it was common ground that CEA's only concern, under its statutory duties, was with determining the initial TEC figure and thereafter with approving any capital expenditure in excess of that figure, should that arise and should application be made for its inclusion in the Capital Costs figure for calculation of the Tariff.

66. Paragraph 9 of schedule 3, refers to costs in excess of the capital cost ceiling (1200 crores, later reduced to 1170 crores), as being less than the TEC figure and to the non-inclusion of such excess figures in the calculations unless approved by CEA as unattributable to ST-CMS or its contractors or suppliers. Unlike the TEC figure however, the PPA expressly requires account to be taken of foreign exchange movements in calculating the lesser contractual capital cost ceiling. The PPA also spells out the position where the actual incurred cost is less than the contractual ceiling, whereupon that cost is the capital cost to be taken into the Tariff calculation, as provided in the Statutory Notification. Despite initial evidence of Indian law from TNEB's Indian law expert to the contrary, it is clear to me that there would be no need for CEA approval in those circumstances, whether under the statute or under the contract. Ultimately it was common ground

that CEA's role was not engaged below the TEC and the parties to a PPA were free to agree any level of capital cost below that figure which had already been approved as an upper limit by CEA. In those circumstances, no policy considerations would arise. A dispute about such matters, if below the TEC limit could be negotiated, mediated, agreed or arbitrated. TNEB's expert maintained, illogically, in my view, that if one party put forward a figure in excess of the TEC, then CEA was automatically engaged, even though there was every possibility of arrival at a figure of ACC below that figure and CEA's role only arose once an ACC figure appeared which was in excess of the TEC. That cannot be correct. If the parties agree on a figure, or by means of a dispute resolution procedure, arrive at a figure below the TEC, CEA has no statutory need, duty and nor power to be involved as there is no role for it to play in approving an excess over the TEC.

67. The high point of TNEB's submission in this respect was its reliance upon the reference to the approval by CEA of the Actual Completion Costs Report in paragraph 9 of Schedule 3 to the PPA. That second sub-paragraph of paragraph 9 is however clearly subsidiary to the first long paragraph which sets out the definition of "Capital Costs" and makes it clear that CEA approval is required in respect of the excess costs over the TEC figure or contractual costs ceiling. Under its statutory duties, according to the evidence of both Indian law experts, approval of "the Actual Completion Costs Report" could only arise where there was an excess put forward upon which future Tariff payments were to be based, whereupon there would be a need for CEA to determine, in respect of that excess, whether it was caused by the generating company, its suppliers or contractors. The words "and its approval by CEA", when referring to the Actual Completion Costs Report, can readily mean "and its approval by CEA, if required", in the context of its determination of the cause of any excess. This second paragraph is not aimed at the definition of ACC, nor the role of CEA. It is specifically aimed to cover the interim position, following the Commercial Operation Date and the delivery of the Actual Completion Costs Report on completion of the project (and any necessary approval by CEA). In that period a provisional figure of 1200 crores, adjusted for foreign currency exchange rates, would be used in the Tariff calculation. This paragraph cannot and does not change the statutory basis upon which CEA approval is needed and does not appear to set out a different contractual regime, in that respect, from that set out in the statute, which it is clearly intended to reflect.

68. I thus conclude that, whether considered as a matter of contract or in the statutory scheme, CEA approval was only needed for excess costs over the TEC or contractual costs ceiling. There was no all pervading requirement for CEA determination or approval of ACC, although, of course, if it was thought that there would be excess costs, it was inevitable that there would be a reference to CEA, which when isolating the excess costs and looking at their causation, would have to satisfy itself as to the actual costs incurred and the cause thereof. In order to see where the extra costs lay, over and above the TEC projected costs figure, an examination of total costs and causation would be part of the exercise of determining what excess costs existed, what had caused them and whether approval should be given for them. This element of approval, however far it went, did not involve a determination of a kind which excluded the parties from resolving their differences on the ACC figure, whether by negotiation and agreement or arbitration, before submitting a figure to CEA for its approval.

69. Under the 1948 Act as amended in 1991, there was therefore nothing which impinged on the right to arbitrate or carved out an exception from Article 15. 2, as a matter of Indian law. If approval of CEA was or is needed for an element of ACC, as part of tariff determination, that was a matter which the arbitrators could and can take into account in deciding what relief should be given, whether with it, without it, or conditionally upon obtaining it.

The Current Position in Indian Law under the 2003 Electricity Act.

70. On a straightforward reading of the 2003 Act and the 2005 Regulations made for Tamil Nadu, it appears to me that ST-CMS' expert is correct in the approach he adopts. I felt unable to accept TNEB's expert's views which gave no real weight to the regulations made under section 61 of the 2003 Act and the terms of section 185 of the Act itself.

71. It was common ground between the experts that the 2003 Act introduced a new regime. Under the 1948/1991 regime, to which I have already referred, a generating company only had to obtain TEC approval for a PPA, with its tariff provisions, which appears to have followed a customary form in relation to the component parts, including ACC, and then to obtain approval for any excess capital expenditure over the TEC figure. The 2003 Act then consolidated and replaced all earlier legislation including the 1998 Electricity Regulatory Commissions Act which had been the precursor of this new regime. Under the 2003 Act, CEA was reconstituted by section 70 and its functions were set out in section 73, as such as the Central Government of India might prescribe, but in particular to advise it on matters relating to national electricity policy and to specify technical standards and safety requirements for the electricity industry in India. Its functions were essentially those of collecting information, reporting and advising.

72. A new Central Electricity Regulatory Commission and new State Electricity Regulatory Commissions (SERC's) were established by sections 76 and 82. The SERC's were to discharge the functions set out in section 86 which includes the following wording:

"86. Functions of State Commission – (1) The State Commission shall discharge the following functions, namely:-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licenses or from other sources through agreements for purchase of power for distribution and supply within the State;

(f) adjudicate upon the disputes between the licensees and generating companies and to

refer any dispute for arbitration;"

73. Section 61 provides that the appropriate SERC "shall subject to the provisions of this Act, specify the terms and conditions for the determination of tariff", and in doing so, is to be guided by the various factors set out in the section, including "safeguarding of consumers' interest and, at the same time, recovery of the costs of electricity in a reasonable manner".

74. Section 62 then provides for the appropriate SERC to determine the tariff "in accordance with the provisions of this Act", for (inter alia) the supply of electricity by a generating company to a distribution licensee, including the fixing of maximum and minimum limits in an agreement, with a duration of one year or less, between either generating companies and a licensee or between licensees, where there is a shortage of electricity supply.

75. Under section 61, the TNERC specified the terms and conditions for determining the tariff in the shape of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations 2005. The Regulations were expressed to be made under sections 61 and 181 of the 2003 Act and were to be applicable for determination of tariffs in accordance with section 62. Chapter II of the Regulations is headed "Determination of Tariff" and refers to determination under section 62 for (inter alia) the supply of electricity by a generating company to a distribution licensee, with a proviso to the same effect as that found in section 62. Tariff setting principles are set out by reference to section 61 of the Act.

76. Section 64 of the 2003 Act provides for the procedure for a tariff order, stating that an application for a declaration of tariff under section 62 "shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations". Regulation 6 in chapter II then sets out the procedure, referring to the application of a licensee, not a generating company.

77. Chapter III of the Regulations deals with capital costs, both in respect of generating companies and licensees. It also sets out various elements which go towards the computation of any tariff. The return on equity is specified at 14%, 2% less than the return in the PPA. Regulation 28 reads as follows:

"28. Deviation from Norms;

(1) Norms of operation specified in these regulations are the ceiling norms and the Generating Company and the user may agree for improved norms. In such cases, the improved norms on the basis of their agreement shall be considered for the purpose of tariff determination.

(2) In respect of the Generating Companies covered under Power Purchase Agreements the norms in the Power Purchase Agreements will be applicable till the expiry of the contract."

78. Chapter IV is headed "Thermal Power Generating Station and regulation 35 reads as follows:

"35. Application for Determination of Tariff:

(1) The Generating Company may file application for determination of tariff in the manner specified in Chapter II of these Regulations.

(2) In respect of existing Generating Companies covered under Power Purchase Agreement already entered, the tariff and norms shall be as per the terms agreed to. However, modification of the existing Power Purchasing Agreement may be undertaken through mutual discussion between the parties to the agreement to explore possibilities of reducing costs and aligning the Power Purchase Agreement with the new market structure."

79. Room is thus made for a generating company to make an application for a determination of tariff in the same way as a licensee, but both Regulation 28(2) and 35(2) make it clear that, where a generating company has concluded a PPA prior to the 2003 Act coming into force, both questions of tariff and norms have already been resolved and there is no room for determination of tariff by the TNERC thereafter. The words in the first sentence of Regulation 35(2) state that the "tariff and norms shall be as per the terms agreed" in the existing PPA (emphasis added). The second sentence reinforces the binding nature of the PPA under the new regime, in stating that modifications to the PPA can be the subject of discussion and negotiation with a view to amendment. TNEB's expert opined that the Regulations could not go beyond, nor change, the statute, which set out a compulsory regime for applications by generating companies for determination of tariff, under section 61 and 62, regardless of the existence of a PPA. He accepted that the effect would be a determination in accordance with the terms of the PPA, because of the terms of Regulation 35, but he maintained that this procedure had to be adopted. I cannot accept that construction of the statute. Since section 61 imposes the duty on the TNERC to "specify terms and conditions for the determination of tariff" and the regulations constitute the TNERC's exercise of that function, there is no conflict between Regulations 28 and 35 on the one hand and the Act itself on the other. The terms and conditions for the determination of the tariff are set out in the Regulations, which provide, in clear terms, that the tariff for generating companies under existing PPA's is to be in accordance with that set out in the PPA in question.

80. The effect of this is clear. There is no scope for any determination of tariff by the TNERC in relation to the PPA in issue in these proceedings.

81. TNEB relied on the GVK decision, to which I have already referred. In that decision of the Delhi Court, Vikromajit Sen J held, without referring to any operative regulations in Andrha Pradesh, on an application by the petitioner to compel CEA to take a decision on the approval of the completed cost of a power project, that CEA had no capacity to do so, because its functions were as stated in the 2003 Act.

i) He held that the role of CEA had devolved upon the SERC. TEC had been obtained in 1993 and a PPA concluded in 1996, with similar language to that in ST-CMS' PPA, in relation to approval by CEA of the excess of capital costs over the agreed cost.

ii) There had been delay by CEA, in giving approval from October 2001 onwards up until

after the date when the 2003 Act came into force. No decision had yet been taken at the time of the hearing.

iii) The judge held that capital cost was one of the criteria for fixing tariff under the 2003 Act and, wrongly, stated that capital cost under the Statutory Notification of 30th March 1992 had previously to be determined by CEA.

iv) The judge held that any distinction between "tariff" and "capital cost" had been merged into one composite exercise to be carried out by the SERC and that it was now the appropriate body to do the exercise, as successor to CEA which was previously entrusted with the task, both as a matter of statutory construction and contract.

82. Mr Jaitley's evidence was that this decision was wrong and I agree with him, insofar as the court misconstrued CEA's role under the statutory notification. CEA's role under the statutory notification was limited to approval of the excess over the TEC figure, once that figure had been determined by it at an earlier stage. It had no tariff-making powers under the 1943 Act, since setting of tariff for generating companies was not contemplated by that Act. The new regime reconstituted CEA with different advisory functions and created the SERC's to carry out a new and different tariff-making role. Under the new regime, no statutory body has been entrusted with the approval of any excess over the TEC figure, as this is a concept which does not exist under the 2003 Act for future tariff determination. It is hard to see how the SERC can be the successor to CEA, when the task done by CEA no longer exists as a task to be done by the SERC under the new regime. The essential tasks of the entities are different, and CEA, for good measure has not ceased to exist.

83. The key distinction however between the GVK Decision and the ST-CMS PPA situation is the existence of the regulations for Tamil Nadu, which determine the position in Tamil Nadu. The existence and content of any regulations in Andrha Pradesh did not surface in the court's deliberations.

84. Mr Jaitley also said that the GVK decision failed to note the distinction to be drawn between section 86(1)(a) and section 86(1)(b) of the 2003 Act. The court certainly made no mention of that and relied on section 86(1)(a) and (f) as being applicable to the PPA. I need not decide, whether or not Mr Jaitley is right in saying that section 86(1)(a) is a subsection which refers to the generality of tariff determination, primarily for outward supplies by the licensee to consumers and users, whilst 86(1)(b) is a subsection which deals with the particular situation of future PPAs for inward supply to the licensees, with the result that section 86(1)(a) has no application to that situation. I see considerable force in the argument because, if section 86(1)(a) was to apply to PPAs, section 86(1)(b) would be rendered redundant. The difference in wording between "determining the tariff for the generation …. of electricity", on the one hand (which can apply to the provision of electricity by private generating companies to the grid and sales under the open access provisions of section 42), on the one hand, and "regulate electricity purchase of distribution licensees including the price… through agreements for purchase of power and distribution….", on the other hand, appears significant. Additionally, common sense suggests that the need for an annual application and review of tariff, under the terms of section 64 (6) of

the 2003 Act and Regulation 6.1, sits ill with a 30 year PPA, where the price mechanism provisions take account of all the relevant factors and have already received approval when the contract was put before the SERC as a matter of regulation under s 86(1)(a). If I had to decide the point, I would accept Mr Jaitley's view.

85. I do not however consider that Mr Jaitley's view is much fortified by the chapter divisions in the Regulations since chapter II does apply specifically to the supply by generating companies to distribution licensees, although these provisions appear to be largely concerned with determination of retail sale tariff by distribution licensees. Chapter III also expressly applies to both generating companies and licensees. There would therefore appear to me to be no neat division between factors relating to the determination of tariff in chapter II (corresponding to section 86(1)(a)) and factors relating to the regulation of price in chapter III (corresponding to section 86(1)(b)).

86. The reasoning set out in the decision of the Appellate Tribunal for Electricity in Small Hydro Powers Developers Association v APERC appears to me, as it did to Mr Jaitley, to be compelling. There, the tribunal, whose decisions bind all SERCs, drew the distinction between section 86(1)(a) and section 86 (1)(b), holding that a PPA, effective under Andrha Pradesh law, fell within section 86(1)(b) and outside the terms of section 62, section 64 and section 86(1)(a). Once a PPA is approved, with the inbuilt regulation of the price mechanism contained within it, the SERC has exhausted its regulatory function under section 86 (1)(b) and section 86(1)(a) has no application. At paragraph 54 and paragraphs 87-93, the tribunal held that tariff was fixed when the SERC regulated the purchase of electricity by approving the PPA, with different parameters from those which applied to tariff determination under sections 61 and 62. Whilst section 86(1)(b) or section 62(1)(a) could be utilised to fix price, section 62 is a general provision which cross-relates to section 86(1)(a) (and section 79(1)(a) and (b)) and is to be read in that context. The specificity of section 86(1)(b) must be given full weight so that, once regulation is effected under it, there is no room for further tariff determination under section 86(1)(a). Thus, under PPAs already concluded and approved, price has been regulated under section 86(1)(b) and it is not open to the SERC to invoke a process of tariff determination, as the PPAs continue until their expiry and the 2003 Act cannot, without clear provision, remove vested rights (paragraphs 60-62).

87. When regard is then had to section 185 of the 2003 Act and section 6(c) of the General Clauses Act 1897, it is clear that any act done under repealed legislation is effective, unless inconsistent with the new Act. Equally, accrued rights cannot be abrogated unless the statute so provides. There is no such provision in the 2003 Act.

88. The consequence of this is that under the 2003 Act there is no room for the SERC to revisit the PPA which has received TEC clearance in order to determine tariff. Contrary to TNEB's case, I find that the position is as stated by Mr Jaitley and that there is no need for any application to the TNERC to determine tariff since the terms of the PPA continue until expiry, with all of the vested and accrued rights set out therein.

89. As part of those vested rights, ST-CMS is entitled to arbitrate disputes under article 15. This

is a vested, indefeasible right as the decision in Svenska Handelsbanken v M/sIndian Charge Chrome Limited (1994)2SCC155, at paragraph 43, shows. There is, as I have held, no relevant exception which prevents ST-CMS from arbitrating in respect of the matters it wishes to refer and it will be for the arbitrators to decide whether, as a matter of contract or statute, the approval of CEA or any other body is required for any excess in the ACC over the TEC figure or any contractual ceiling. As I have already found, that issue does not go to the arbitrator's jurisdiction.

The 1998 Act

90. I have not dealt thus far with the parties' submissions or the expert evidence relating to the 1998 Act which was in force for some 5 years. On the evidence that I heard however, it could only have affected this PPA as from 2nd August 2002 at the earliest, since it was only then that Tamil Nadu, under the powers given it by section 51 of the 1998 Act, issued a notification "omitting" section 43(A) of the 1948 Act from that statute. As the SERC, though established on 17th March 1999, did not specify the terms and conditions for regulation of tariff under the 1998 Act until 2002 and under the 2003 Act until 2005, it could not, on TNEBs own expert evidence, fulfil any functions before then, though TNEB's expert said that an application should have been made to it in March 2003. The parties to the PPA were thus beating the air in the interim period.

91. The 1998 Act is now of no application since the 2003 Act came into force and the 2005 regulations were published. For the sake of completeness however, I should say that sections 22 and 29 of the 1998 Act, on which TNEB has recently put such weight, in the light of 2 Supreme Court decisions, are different from provisions of the 2003 Act. They afford me no real assistance in construing the 2003 Act and none at all in relation to the 2005 regulations, which speak for themselves.

92. Mr Jaitley wished to argue that section 22 (a) and section 22(c) of the 1998 Act contained the same distinction as section 86(1) (a) and (b) of the 2003 Act. This was a matter not argued or addressed in Dabhol Power Company v Maharashtra State Electricity Board, where it was held that, under the 1998 Act, there was no room for the arbitration provision in the agreement to operate in respect of determination of the tariff, which was within the sole and exclusive jurisdiction of the SERC. Although the PPA was dated 8th December 1993 and amended in 1995, 1996 and 1998, the 1998 Act was held not to be retrospective in operation but applicable because its provisions applied to the future determination of tariff which had not yet been determined.

93. It is worth pointing out that argument about the applicability of the arbitration agreement, which was governed by English law, proceeded on the basis of Indian law alone. Furthermore the Maharashtra regulations provided, in regulations 72 and 73, for existing prices, charged by generating companies, to be reopened under section 22 of the 2003 Act. I therefore draw no help from this decision on the construction of the 2003 Act where the relevant provisions took a different form and where section 185 and the 2005 regulations have to be taken into account.

94. The 2 Supreme Court decisions upon which TNEB relied were West Bengal Electricity Regulatory Commission v CESC Limited (2002) 8 SCC 715 and BSES v Tata Power Co Limited 2004 1 SCC 195. Both are of limited relevance, being decisions on the 1998 Act.

i) The former concerned the supply by a generating company to consumers within section 22(1)(a) of the 1998 Act, so no issue arose as between subsections (a) or (c) of section 22 (1). The court held that the right of a licensee or utility to determine tariff had been removed and put into the hands of the relevant SERC, as the sole authority able to make that determination.

ii) The latter concerned Tata Power's desire to give notice to increase charges for a standby facility which it provided, in its capacity as licensee, to a distribution licensee for onward transmission to consumers. The court held that the charges in question fell within the ambit of section 22 (1)(a) and (c) and that any determination of tariff other than by the SERC was impermissible and thus, an application had to be made to the SERC for that determination. The charging of an increased tariff which had not been approved by the SERC would constitute a criminal offence. Once again, no argument was addressed on any distinction between section 22 (1)(a) and (c) and the charges clearly fell within section 22 (1)(a) in any event, as TNEB's expert accepted.

95. No real assistance is therefore to be gained from these earlier decisions of the Supreme Court on the 1998 Act provisions. The conclusions I have reached on the 2003 Act are sufficient to determine this application on current Indian law quite apart from the questions of construction I have previously decided.

96. TNEB maintains that, if the 2003 regime is inapplicable, because of its terms, the terms of the Regulations and/or the PPA, and the 1948/91 system is no longer operative, there is a "black hole" in respect of the approval of excess costs, which cannot be right. The short answer to this point is that this is a matter for the arbitrators to decide, but when framing the 2005 Regulations, the policy considerations which underlie the 2003 Act must have been in mind and the TNERC knew of its existing four PPAs where no final approval of excess costs had been given. If there is an apparent hiatus, it must be because the TNERC can be taken to have considered that adequate approval had been given at the TEC stage and that issues of ACC and causation could be adequately dealt with by the dispute resolution process. If there is no hiatus, because there is scope for approval to be given by the CEA or some other entity, such as the TNERC itself, no issue arises. Either way, the arbitrators are not prevented, as a matter of jurisdiction, from determining that issue and taking the answer into account in the determination of tariff, if some approval is required. They can determine issues and give such relief as is appropriate, taking into account whether or not such approval has been given or conditionally upon such approval being obtained.

Section 8 of the General Clauses Act

97. I should at this point mention the ruling which I made on 5 July 2007, the third day of the hearing, to which reference can be made. In addition to the late second affidavit from TNEB's expert, TNEB sought to raise fresh issues of Indian law in relation to section 8 of the Indian General Clauses Act 1897, or alternatively to rely upon section 17(2) of the English Interpretation Act 1978. Reliance on the latter was to be based upon the presumption that, absent evidence to the contrary, Indian law is to be treated as the same as English law. For case management reasons, in particular on the basis of the order of Simon J of 3 May 2007, I refused TNEB's application to adduce fresh evidence of the law of India or to raise a new point of Indian

law upon which neither expert had expressed any view in any report, not even in the TNEB expert's very recent unauthorised affidavit. The reasoning of that ruling applies equally to attempts by Mr Gee QC to introduce the same point by putting in a copy of the relevant Indian Act, which he maintained he was entitled to do, under the Evidence (Colonial) Statutes Act of 1907, as a matter of right, regardless of any expert evidence. This would be to introduce by the back door what TNEB was debarred from doing by the front.

98. Equally I can see no basis for allowing TNEB to rely on any presumption as to the equivalence of Indian law with English law. The artificiality of such a presumption, when the parties have been permitted and have produced expert evidence of Indian law, is obvious. In order to overcome this, TNEB wished to put the Indian General Clauses Act before the Court, for a different purpose, now relying on it, in order to show that it was similar to the English Interpretation Act of 1889, upon which it was said to be based. (The 1889 Act is materially identical to the 1978 Act on the point in question). This however would not establish the current state of Indian law in relation to the section in question, and whether Indian law is truly similar to English law on the issue. Actual expert evidence would be needed to establish that, which I have already ruled out, as a matter of case management.

99. It would not be right to allow this issue to be determined in the way that TNEB submits. The Order of Simon J referred to an agreed list of issues, of which this issue did not form part. The whole purpose of the list of issues, and of the order for expert evidence on Indian law, was for the parties to set out and prove their respective cases on Indian law on the defined issues. It would be wrong to subvert that, by allowing reliance on the presumption of similarity in law, when, as a result of its own actions or inactions, the Indian law evidence provided by TNEB, in accordance with the Court's case management order, did not cover the issue now sought to be raised. I was referred to Foreign Law in English Courts, by Richard Fentiman, at pages 60-64 and 143-153, from which the following propositions can, accurately, in my judgment, be garnered:

i) There is no adequate support in the decided authorities for the principle that English law should govern by default, where foreign law is relied on by a party, who declines to, or is unable, to prove it.

ii) It would be wrong to allow the presumption to be used by a party where he pleads or wishes to rely on foreign law but declines to prove it. That would reward a person who alleges foreign law without proving it. The presumption is aimed at the situation where foreign law is neither pleaded nor proved and the parties and the court are to be taken as content to proceed on the basis of the presumption, since no one has sought to establish that there is any relevant difference.

iii) If the failure to prove foreign law by a party is the result of a tactical decision, after seeking to rely on it, reliance by that party may amount to an abuse of process, depending on the circumstances.

100. Here, TNEB has, by its own default failed to adduce evidence of Indian law on a point upon which it now wishes to rely. There can in those circumstances be no basis for relying on fresh

Indian law evidence, nor putting in an Indian law statute as representing Indian law, whether in order directly to rely on it or in order to use it to show that the presumption is not invalid, and then to rely on the presumption that English law is the same. The mischief is obvious.

101. The argument which TNEB wishes to raise is not catered for in the list of agreed issues. The mischief of putting the point in English law, rather than Indian law, remains the same in the context of case management, because a new issue is raised, which is not covered by the agreed list, whether in Indian or English law. I decline to allow it to be raised in this way at this late stage, although ordinarily pure questions of English law, which involve no new evidence, can be argued at any stage of a current hearing. This is not, however, a pure question of English law- it is a presumption which the Court could not properly accept, in the situation where foreign law evidence had been admitted on the specific issues requested by the parties.

102. I consider that there is in any event nothing to the point. The argument is that section 8 of the Indian statute or the equivalent section of the 1978 English statute means that the references to the Indian Electricity (Supply) Act of 1948 and other instruments made under it, in paragraph 1(d) of Schedule 3 to the PPA (to which TNEB refers as "the repugnancy provision") have to be read as referring to the 2003 Indian Electricity Act, which repealed it. This is not correct, because the 2003 Act brought in an entirely new regime and it is impossible to read paragraph 1(d) of Schedule 3, or Article 6.1(t) or paragraph 9 of Schedule 3 as referring to that statute with its different requirements. The provisions of the former Act are not, on a straight reading of them, re-enacted in the 2003 Act. It is not simply re-enactment with modification. There is no comparable provision in the new legislation, and regulations made under it, to the 1948 Act and the Statutory Notification, with a TEC clearance and a need for approval of excess capital cost. The argument therefore could not succeed.

Estoppel

103. TNEB's case, which has changed from time to time and the exact formulation of which has been difficult to pin down, appears to be that, by their words and conduct, the parties provided information to CEA on the mutual understanding that this would lead to a binding decision by CEA about the ACC which would be then used in the Tariff calculations. This is said to give rise to an estoppel by convention, as opposed to an estoppel by misrepresentation, which appeared to be the basis of the argument on the written evidence put forward and until skeleton submissions were exchanged shortly before the hearing.

104. The basis of such an estoppel appears from the Court of Appeal decisions in Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 and The Vistafjord [1988] 2 LLR 343, both in the context of assumptions before concluding a contract and assumptions shared after its conclusion. If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which, each of them, to the knowledge of the other, acts and conducts their mutual affairs, they are bound by that interpretation. When parties to a transaction proceed on the basis of an underlying assumption, either of fact or law, on which they have conducted their dealings, neither of them will be allowed to go back on that assumption when it would be unjust or unfair to allow him to do so.

105. There is however a further principle to take into account, when the alleged assumption arises during the course of a contract. It is clear that it cannot continue to apply after the assumption is revealed to be erroneous, in respect of future dealings. This is made clear in a number of authorities, the most recent of which is Centrica plc v British Gas Trading Ltd [2006] EWHC 3068 (Civ), per Gloster J at paragraphs 136-137, by reference to the earlier authorities there cited. The estoppel cannot apply to future dealings once the discovery of the error is made.

106. TNEB had previously summarised its case on estoppel in the following terms:-

"TNEB's case is that ST-CMS submitted to the jurisdiction of CEA until they discovered that the ruling was to go against them; they furnished the completion certificate on 15 July 2003 and since then the company had been continuously knocking at the doors of CEA with requests to finalise their capital cost. Between 15 July 2003 and January 2006, ST-CMS submitted itself to and engaged itself in CEA determination process. They addressed letters to CEA. They participated in the meetings with CEA. During none of these exchanges did ST-CMS challenge the jurisdiction of CEA. TNEB's case is that it will have acted to its detriment in going along with ST-CMS's submission to the jurisdiction of CEA. It has expended time and resources in addressing ST-CMS's submissions which cannot be compensated for in a costs award. It would be inequitable and unfair for ST-CMS to be allowed to go back on its submission."

107. I heard evidence from Mr Solomon Ponnudurai who was the Chief Engineer of TNEB as from 26 April 2006 but had no first hand involvement in matters relating to the PPA or CEA before then. His evidence was therefore of very limited value in the context of this dispute, although he said that, whilst in another department, he had a lot of interaction with those who were dealing with these matters and that he had input from them for his evidence, which was otherwise based upon the documents. He had not been involved in any relevant decision making prior to April 2006. No internal documents were produced by TNEB to show the understanding of those who were involved or that they relied upon any given understanding in acting as they did. Reliance was placed solely upon written exchanges with ST-CMS and CEA.

108. I heard evidence also from Mr Manoj, the Vice President (Commercial) of ST-CMS, who was able to speak to the position of ST-CMS for the whole period from 15 July 2003 to January 2006.

109. On all of the different ways of putting the case, TNEB allege that, in reliance on the assumption or representation, it:-

i) paid ST-CMS' invoices on the basis of the Provisional Capital Cost, being the capital cost ceiling adjusted for foreign currency variations, which (it appeared to be undisputed) was what the PPA required until the ACC was "finalised" and

ii) incurred time, effort and expense in studying ST-CMS' expenditure.

110. I found no evidence of any unequivocal representation by ST-CMS that it at any stage accepted any exclusive jurisdiction in CEA to determine capital costs, or ACC, in a final and

binding way, to the exclusion of arbitrators, nor of any common assumption to the same effect. The parties referred matters to CEA, as appears in the correspondence, but not in such a way as to affect the issue of any jurisdiction of arbitrators that might exist. By the end of the correspondence, they were being told that any assumption that they might have shared as to the good status of CEA to make any decisions under the current Indian law electricity regime, were ill founded.

111. It was on 22 November 2005 that CEA, in a Standing Committee Meeting with TNEB, to which ST-CMS was not invited, informed TNEB's representatives that it had no status to deal with the issue of ACC, by reason of the Electricity Act 2003. It stated that it could however advise the state government and TNEB on the reasonableness of the completed cost and its views could be taken into account, whilst the finalisation of the ACC should be taken up with TNERC, the state commission. It was accepted by Mr Ponnudurai that, up to this point, no one at TNEB was saying that Schedule 3 of the PPA should be treated as affected by the new Indian legislation, in the shape of the 1998 and 2003 Acts. I find that TNEB was proceeding on the basis of the prior regime and the PPA's provisions, as they stood.

112. He maintained however that there was never any intention that ST-CMS and TNEB should agree a figure to go to CEA for approval. He considered that the final decision on capital cost had to be made by TNEB and approved by CEA and said that a lot of guidance was obtained from CEA in that connection. Negotiation and agreement between ST-CMS and TNEB on such costs was not therefore within TNEB's expectations. There was little he could say to a paragraph in the minutes of a standing committee meeting of 13 January 2005 which stated that TNEB was still looking into the completion costs and would like to negotiate with ST-CMS on the capital cost as well as the rate of exchange "in line with recent recommendations of CERC", which suggested the contrary.

113. CEA, on the correspondence, was looking for TNEB's recommendation, in response to the figure put forward by ST-CMS on 15 July 2003 to TNEB, and copied to CEA. It was over two and a half years before, on the disclosed correspondence, TNEB put forward any figure to CEA (doing so without informing ST-CMS). When it did so it sought advice from CEA as to the course of action to be adopted by it. ST-CMS pressed TNEB for a response in this interim period and pressed CEA also for its reaction, which it delayed, plainly in part because of the lack of response to the figure from TNEB, as appears from its letter of 18 September 2003.

114. In cross-examination Mr Ponnudurai accepted (in the context of a meeting with the CEA in January 2005) that neither party was asking CEA to do anything other than deal with the approvals required under the PPA and the Statutory Notification. He also agreed that CEA was seeking TNEB's input, because the figure put forward by ST-CMS was in excess of the TEC. He accepted also that everyone was proceeding on the basis that CEA was doing whatever it was required to do under the 1992 Statutory Notification. Mr Manoj, in his evidence, pointed to CEA's letter of 7 January 2004 to ST-CMS which enclosed CEA's guidelines for submission of final completion costs to CEA. In the very first paragraph, this referred to the Statutory Notification of 30 March 1992 under which, where actual capital expenditure exceeded the approved project costs, the excess, as approved by the authority, was to be deemed to be the

actual capital expenditure for the purpose of determining the tariff, provided that such excess was not attributable to the generating company or its suppliers or contractors. In paragraph 2, the guidelines referred to the need for the completion cost of the scheme to be submitted to CEA within three months from the Commercial Operation Date and for the completion costs not to exceed the TEC figure, except by reason of changes in foreign exchange rates and changes in taxes, duties and Indian law.

115. Thus the guidelines made it clear that completion costs were to be submitted to CEA, as ST-CMS did, but the approval required was for the excess over the approved project costs. The parties thus talked loosely of either "approval" by CEA or "determination" by CEA of the ACC. It was on this basis that ST-CMS were acting and I find that TNEB must have been aware of this. I find too that this is reflected in the correspondence on which TNEB places reliance. ST-CMS made its submissions to CEA in the format required by CEA and answered its questions and requests for further information on capital costs on this footing, drawing little distinction between TNEB and CEA in relation to establishing ACC and seeking approval of the excess, as required under the PPA and the 1948/1991 regime. If CEA approved the ACC, no doubt TNEB would too, particularly since, as is now known, TNEB was looking to CEA for advice.

116. I cannot see how TNEB could have laboured under any illusion as to the role of CEA, since it must have been aware of these guidelines as well as the terms of the Statutory Instrument itself. Mr Ponnudurai said that TNEB was more interested in the actual costs and what was approved and what was genuine, reasonable and in line with the market than the "variance analysis" to which the guidelines referred (which was the exercise for CEA) and looked for CEA's advice on this because of its expertise.

117. Three letters in 2005 from ST-CMS to TNEB illustrate the confused way in which ST-CMS saw the matter. In a letter of 13 May 2005, ST-CMS refers to TNEB and CEA "making progress on the determination of the final capital costs", whilst also referring to the final capital cost being "determined by CEA", and to the PPA, with its provision that, should the ACC come out lower than the Provisional figure, ST-CMS would be obliged to refund the resulting difference in Tariff. By a letter dated 16 September 2005, ST-CMS "request that TNEB finalise the Final Completion Cost and recommend the same to CEA". By a further letter of 31 October 2005 ST-CMS told TNEB that it wished to bring "to your notice that as per the provisions of the PPA the Company is required to submit papers to CEA at the time of approval of the final cost" but continues, in the same letter, to say: "should there be any further observations or delay in recommending the Final Completion Cost to CEA, the Company reserves its right to amend its position on the above". ST-CMS did not adopt a uniform position on this subject during the course of the exchanges on which TNEB relies.

118. The corporate undertaking given by ST-CMS on 26 September 2005, upon which Mr Gee QC for TNEB placed heavy reliance, was regarded by TNEB, according to Mr Ponnudurai, as nothing more than a re-affirmation of the PPA and an additional source of comfort. It referred to a possible future determination by the Government of Tamil Nadu (which owned TNEB) and CEA of an ACC figure below the provisional capital costs and undertook to refund any difference in Tariff payments consequent thereon. It was not treated as altering the contract

obligations in any way by TNEB and did not add to the contractual obligations to pay, whilst inaccurately referring to CEA's role under the PPA. To add to the confusion, the accompanying letter referred to the "approval" by CEA of the Final Capital Costs.

119. Payments were thereafter made to ST-CMS in line with the Provisional Capital Cost figure, doubtless in reliance on the PPA and the Corporate Undertaking which reinforced it, but I do not find that any of this evidences any mutual shared assumption, manifested by conduct crossing the line between the parties (and particularly from ST-CMS), that the ACC was to be determined once and for all by CEA to the exclusion of arbitrators, even if the parties proceeded on the basis that TNEB and CEA would, between them, determine ACC, for the purpose of CEA then approving the excess over TEC.

120. Mr Manoj was cross-examined at length in relation to the corporate undertaking and the wording of it. It was suggested to him that this illustrated the understanding and assumption of ST-CMS that CEA was to make a final and binding determination of ACC, which meant that there was no room for arbitration on this. Mr Manoj's evidence was that the focus of the undertaking was the question of refund, in accordance with the PPA and not the CEA process. He pointed to the wording of the accompanying letter and stated that there was no intention to depart from the terms of the PPA, which this document was meant to confirm. He could, of course, not speak to the understanding of the recipients but thought that TNEB had come to a position where it realised that it had to comply with the contractual terms which required payment on a provisional basis, pending finalisation of the ACC. He thought that the word "determined" was a mistake, if it conveyed the idea that ST-CMS was agreeing to anything beyond what the PPA and the Statutory Notification provided.

121. I do not think that much can be made of the wording of the corporate undertaking or of many other letters upon which reliance was placed which used phraseology which talked of CEA "determining the ACC" or language of a similar kind. It was plain from the figures which were being put forward by ST-CMS from 15 July 2003 onwards that ST-CMS were looking for an ACC in excess of the TEC. Thus it was inevitable that CEA would be involved in assessing that excess and, in the process of deciding whether or not to approve it, would be assessing the causation of it and of the ACC as a whole, in that context, regardless of whether or not TNEB and ST-CMS reached agreement on a figure in excess of the TEC. In that context it matters little whether ST-CMS referred to "final approval" by TNEB/CEA, "approval" from TNEB, "final capital cost approval" from CEA, "determination" of ACC, "finalisation" by TNEB of the Final Completion Cost with a recommendation to CEA, as it did, on various different occasions. Equally it matters little whether similar language was used by CEA or TNEB. Whatever shorthand form any of these entities used, it is plain, in my judgment, that they must all have appreciated the terms of the Statutory Notification, which were plain on their face, and the terms of the PPA which, although not so clear, were plainly intended to reflect the Statutory Notification. Both required approval of the excess costs over and above the TEC and no- one was thinking or intending to change the PPA or the statutory regime or could have understood the other as doing so.

122. TNEB persistently failed to put forward any figure to CEA, although both ST-CMS and

CEA pressed it to do so and ST-CMS, as Mr Manoj said in evidence, pressed CEA to agree to the ACC, as part of obtaining its approval to the excess costs over the TEC figure, which were necessarily part of the ACC figure. It is noticeable that in many of the letters, ST-CMS refer to TNEB and CEA in one and the same breath. As Mr Manoj put it in his first statement, ST-CMS was engaged with TNEB in seeking to agree ACC, with CEA intervening and mediating in the process. Mr Ponnudurai's evidence was that TNEB looked to CEA for advice because it had so much experience in assessing whether costs were incurred and reasonably incurred. Mr Manoj also sought to use CEA, hoping that it might serve to expedite and facilitate TNEB's agreement to the ACC, following extensive delay by TNCB in agreeing to make the appropriate provisional payments as well as in finalising the ACC itself.

123. Whilst reliance was placed by TNEB on a large number of exchanges of correspondence, as set out in a reading list given to me and a Memorandum on Estoppel, the same points apply to each of the letters, faxes or minutes on which reliance was placed.

124. As Mr Manoj said, so far as he was concerned, there was little or no difference in commercial understanding between the use of the word "approved" or "determined" and it was inevitable, if ST-CMS was to succeed on the figure for ACC for which it contended, that "approval" by CEA of the excess above the TEC would be needed. References to "natural justice" in the context of CEA making decisions or TNEB rejecting items of expenditure, without reference to ST-CMS, also take the position no further. There is no doubt that the requirement for approval of the excess cost was a statutory exercise of power by CEA under the 1998 Act and Statutory Notification, for as long as those provisions remained effective. Insofar as the requirement might exist independently of statute, as a matter of contract, it does not appear that any of the parties gave this aspect any thought at all, because it was not until the end of 2005 and early 2006 that the parties respectively came to understand that CEA had no status to give any statutory approval.

125. There is therefore no evidence of any shared assumption that there was no room for arbitration of the figure of the ACC, whatever other shared assumption there might have been as to the role of CEA. Whilst the parties were expecting CEA to perform its statutory function and decide on approval of none, part, or all of the excess cost claimed over TEC, there is no evidence at all, that they acted on the understanding that there was no scope for arbitration on ACC, particularly if CEA lost its statutory function.

126. It was clear from Mr Ponnudurai's evidence that there were members of TNEB who had been involved in the events at the time who were available to give evidence. TNEB's internal documents were, on his evidence, not exhibited because they were considered "not required" and "not relevant".

127. In these circumstances I am also unable to find that TNEB acted on any shared or agreed assumption with ST-CMS that CEA were to make a final and binding decision on the ACC, to the exclusion of any jurisdiction of the arbitrators on the issue of ACC. The absence of any evidence, from any person directly involved in events until after CEA had stated that it could not make such a decision, is telling. However the correspondence is read, TNEB fail in showing that

it or its representatives acted on the shared assumption upon which the alleged estoppel by convention is based.

128. As was inevitable, Mr Ponnudurai accepted that, from 22 November 2005 onwards, TNEB knew that CEA would not be making a final and binding decision of any kind in relation to capital costs. On this basis, once the erroneous assumption had been corrected, neither party could insist, for future purposes that CEA had authority to fulfil its statutory functions in relation to the PPA. All it could do, as it actually did on 16 March 2005, was to give an advisory recommendation on completion costs (of 1222.426 crores). CEA did not consider, nor did either TNEB or CS-CMS consider, this to be binding.

129. It is clear that TNEB understood this and acted on it, whatever it might have thought the position to be beforehand. When ST-CMS sought to institute the informal dispute resolution provided in Article 15.1 of the PPA, Mr Ponnudurai replied in writing, on behalf of the Chairman of TNEB, to the effect that the disputes raised were not arbitrable, because the capital cost had not been finalised and invocation of the dispute resolution procedure was premature. When asked about TNEB's Reply Statement in proceedings in Madras on ST-CMS's application under the Right to Information Act, he said that paragraph 17 reflected the Board's position in September 2006. That paragraph stated that if the informal dispute resolution process failed, ST-CMS could initiate arbitration as provided in the PPA, although the completed capital cost had not been finalised and there was no arbitrable dispute at that moment.

130. By this time, it is clear the TNEB was accepting the jurisdiction of the arbitration in respect of any dispute in tariff calculation, whilst maintaining that none had yet arisen. Given this acceptance, I cannot see that any unconscionability can arise, even if there had earlier been a shared assumption as alleged.

131. Moreover, all the work done in relation to checking capital cost is work which TNEB would have to do under the PPA in order to consider the ACC figure put forward by ST-CMS for the purposes of tariff calculations. No detriment was suffered and nothing was done which was not necessary for the purposes of the PPA, regardless of any mutual understanding. Since TNEB looked to CEA for advice and assistance, both before and after it became aware of the termination of its statutory function, even its exchanges with CEA could not have been the result of any mutual understanding or convention. Nor was there any detriment suffered in relation to the corporate undertaking, since the payments which were made following it, were those which TNEB was required to make under the PPA in any event. As the corporate undertaking added nothing further to the PPA obligations and there was no evidence before me of inducement, I cannot see anything unjust, unfair or unconscionable in any change of stance by ST-CMS, even if there had been an agreed assumption/convention and subsequent change of stance.

132. There is therefore no unconscionability, unfairness or injustice in ST-CMS contending that CEA do not have the sole and exclusive jurisdiction to determine ACC, whatever previously may have been said or understood. The only reason for the requirement of CEA's approval of excess costs was its statutory role under the Statutory Notification, which is no longer effective, as TNEB have recognised, and continue to recognise, in putting forward TNERC as the body which

is now to determine ACC and/or excess costs over ACC and/or tariff payments.

133. For all these different reasons TNEB's case on estoppel cannot succeed.

Conclusion

134. The Request for Arbitration seeks a determination of the ACC at the figure ST-CMS puts forward, an Award directing payment of the differential in tariff resulting from that ascertainment of ACC. I find, as a matter of construction of the English law arbitration provision, that there is nothing in the terms of the PPA which can prevent ST-CMS referring such matters to arbitration in accordance with Article 15 of the PPA. The Arbitrators may have to grapple with the contractual issue of CEA approval, referred to in the PPA, and if and how that impacts on the determination of tariff, in the light of their findings on ACC, but that has no impact on their jurisdiction to make the determinations sought, though perhaps subject to any approval required.

135. I also find that there is nothing which vests the sole and exclusive jurisdiction, as a matter of Indian law, in CEA or TNERC, of the determination of ACC or tariff as such.

136. There are plainly elements of ACC, such as fuel charge, which do not impact on ACC but do impact on tariff, where CEA would never have been concerned. CEA could never have made any order for payment as the Arbitrators may. Should the ACC come out at a level below the TEC, the statutory powers of CEA would never have been and cannot now be engaged.

137. The only area where approval of a statutory body was required, under the 1948/1991 regime, related to the excess costs over and above the TEC. Whether or not, on the basis of Regulation 28 and 35 of the 2005 Regulations, that is still the case, because the PPA requires it, neither that issue nor the issue of the identity of any entity whose approval is needed, go to the jurisdiction of the arbitrators, who may have to decide whether any such approval is still required and who has to give it.

138. Under the 2003 regime, the statutory functions of the TNERC are not engaged, because the terms of the 2003 statute and the 2005 Regulations do not provide for any such approval and the determination of tariff provisions are inapplicable to an existing PPA.

139. TNEB's case on estoppel also fails for the reasons set out in this judgment.

140. In these circumstances, TNEB's applications for declarations and injunctions must fail and be dismissed and it follows inevitably that ST-CMS is entitled to the declarations it seeks.

141. In the absence of any unusual factor of which I have not been made aware, costs must follow the event and ST-CMS would be entitled to an order in its favour on the standard basis. I will hear any submissions from the parties on the formal handing down of this judgment on the issues of consequential relief and costs, but I would hope that the form of the order can be agreed on the basis of this judgment.

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