
PUBLIC – PRIVATE PARTNERSHIPS IN INFRASTRUCTURE PROJECTS IN INDIA: LEGAL REGULATION AND IMPLEMENTATION CHALLENGES

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ABSTRACT

Public- Private Partnerships (PPPs) have become a major tool of financing and providing mega infrastructure in India. The integration of regulatory influence of the State and capital of the private sector, management experience, and performance efficiency are aimed at closing the vast infrastructure gap that in the past has limited the economic growth of India. This paper focuses on the legal and regulatory context of the PPP infrastructure projects in India, evaluates the judicial practice of Indian courts in terms of reviewing government contracts and its procurement, and outlines major implementation issues that still hinder successful implementation of PPP projects.

The paper follows the history of the PPP policy since the period of economic liberalization in 1991 to the current models with the help of NITI Aayog and the Department of Economic Affairs. It examines the principles of contract under the Indian Contract Act, 1872 and the public law duties that apply to government contracts such as the constitutional provision of nonarbitrariness and fair treatment. The judicial strategy is discussed based on landmark cases such as *Tata Cellular v. Union of India* (1994), *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation* (2007) and *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* (2016). The paper concludes that the PPP legal framework in India has developed sufficiently, but still has a lot of loopholes in the areas of risk allocation, institutional capacity, and dispute resolution, which needs specific focus on legislative and policy changes.

I. INTRODUCTION

Sustained economic growth, social inclusion and national competitiveness can only be achieved after infrastructure development. The physical infrastructure on which commerce and daily living are based is made up of roads, railways, ports, airports, power grids, and urban utilities. As one of the rapidly expanding major economies in the world, India has been facing a severe and chronic infrastructure shortage that has traditionally played a structural role in shaping its development process. The central role of infrastructure investment has been stressed in successive Five-Year Plans and national policy frameworks, but the amount of money available in public funds has never been adequate to fund the level of demand.

It is on this background that Public- Private Partnerships have taken on an increasing significance as a paradigm of delivering infrastructure. In its general meaning, a PPP is an arrangement whereby, a government and a non-governmental entity jointly design, finance, construct, run and maintain an infrastructure project with the distribution of risks and responsibilities being set out in a long term contractual framework.¹

Since the 1991 economic reforms, India has been involved in the PPP infrastructure projects in a significant way. With the liberalization of the economy, the opportunities of the economy have been opened to the participation of the private sector in the areas like telecom, energy and roads which were formerly monopolized by the State. A policy and legal framework of significant size has developed to regulate PPP arrangements over the past three decades, based on contract law, administrative law, and regulatory frameworks that are industry-specific.²

In this paper, this legal and regulatory framework is discussed. It follows the idea of PPPs in India, examines the legal principles that govern it and the judicial methodology, as well as determines the main implementation problems that persist. The key issue it shows is that the current framework has been sufficient in balancing the demands of commercial efficiency and private investment with the constitutional and public law demands of transparency, fairness and accountability in infrastructure governance.

¹ For the definition and key characteristics of PPPs, see Rajesh Chakrabarti & Kumar V. Pratap, *Public-Private Partnerships in Infrastructure: Managing the Challenges* (Springer, 2017), ch. 1.

² NITI Aayog, *Infrastructure PPP Projects in India – A Status Report* (2023), pp. 5–12.

The paper continues in the following way. Part II elaborates the idea and main peculiarities of the PPP arrangements and their chronological evolution in India. Part III looks at the legal framework looking at the contractual principles and obligations of the law. Part IV examines the judicial decisions that are relevant. Part V determines and addresses the key issues of implementation. Part VI provides a final review and recommendations to change.

II. CONCEPT AND DEVELOPMENT OF PPPs IN INDIA.

A. Connotation and Major Features of PPP Arrangements.

A Public–Private Partnership does not have any official definition. In the most general meaning, a PPP is a long-term contractual agreement between a state or local government and a commercial organization to provide a public service or asset infrastructure, in which the commercial party plays a considerable role in designing, funding, building, maintaining or operating the service or infrastructure, and compensation is paid by a user fee or government subsidy or both.³

Some of these features are unique to PPPs as compared to traditional public procurement. First, risk transfer: under a PPP, certain risks construction, demand, revenue, operational etc are distributed among the private and the public party based on the party that is best suited to handle the risk. Second, long term: PPP contracts are usually between fifteen to thirty years or more, which represents the period taken to recover infrastructure investment. Third, private finance: the project is usually financed by the private party to a large extent by the project finance structures which may include debt to be provided by banks and equity provided by sponsors. Fourth, output specification: PPP contracts do not specify the inputs but instead define the outputs and service standards that the private party should meet, and it is up to the operational methods to its own discretion. Fifth, value of money: reasons behind the PPPs are that the efficiency of privatization and the rigor of debt financing are sufficient to justify the extra expense of the privatization.

PPP structures are in different forms depending on the level of participation of the private. The most frequent are Build-Operate-Transfer (BOT) agreements, according to which the facility is built by the private party, it will operate within the timeframe of the concession, and upon

³ European Commission, *Guidelines for Successful Public–Private Partnerships* (2003); see also Department of Economic Affairs, Ministry of Finance, Government of India, *PPP Guide for Practitioners* (2010).

its expiry, it will be transferred to the government. They can be BOT-Toll, in which case the private party charges the user fees, BOT-Annuity, in which the government pays regular payments regardless of traffic, and Hybrid Annuity Models (HAM), a combination of both. Others are Engineering-Procurement-Construction (EPC) contracts, Design-Build-Finance-Operate (DBFO) contracts and management contracts.

B. India: Historical Development of PPPs.

The history of the involvement of the privates in Indian infrastructure can be dated back to the colonial era, when the railways and utilities were run by the privates under the Crown licence. The Nehruvian model of development based on the State led development in 1947 led to nationalisation of major industries and infrastructure and limited or absent involvement of the private in strategic sectors. The State had a vision of the public sector as the commanding heights of the economy and infrastructure was viewed as a public good, which could only be provided by the State.⁴

The economic crisis in 1991 and the liberalisation, privatisation and globalisation programme initiated the shift in the balance. The reforms had the effect of breaking down the licensing controls, cutting back on the State monopolies, and also liberalizing several sectors to the investment of the private and foreign sectors. This was an immediate need in the infrastructure especially in the telecom sector where the National Telecom Policy of 1994 and the reforms that followed established the platform of participation by the privates. There were efforts in the power sector to privately invest in Mega Power Projects policy but it did not succeed.

The first massive PPP initiative was in the road industry in the form of the National Highways Development Project (NHDP), launched in 1998 under the National Highways Authority of India (NHAI). NHDP leveraged on the private investment mobilisation of the construction and maintenance of the national highway corridors under BOT-Toll concession. PPP was the new infrastructure policy central in the mid-2000s. According to the Eleventh Five-Year Plan (2007/2012), the government had a vision of the private sector contributing about forty per cent of the total infrastructure investment.⁵

⁴ Isher Judge Ahluwalia & I.M.D. Little (eds.), *India's Economic Reforms and Development: Essays for Manmohan Singh* (Oxford University Press, 1998).

⁵ Planning Commission, Government of India, *Eleventh Five Year Plan 2007–2012: Infrastructure* (2008), vol. III.

The policy of PPP policy was increasingly enlarged in terms of its institutional structure. It was centrally coordinated by the Planning Commission (since 2015 by NITI Aayog) which made model concession agreements in various sectors, such as roads, ports, airports, and urban infrastructure. The Ministries of Finance in the Department of Economic Affairs created a PPP Cell and a Viability Gap Funding (VGF) scheme to commercially marginal yet socially necessary projects to appeal to the private investors. Public-Private Partnership Appraisal Committee (PPPAC) was formed to evaluate and approve PPP projects of the central government.

Although this was the institutional development, the PPP programme was under a lot of stress since the late 2000s. An aggressive bidding process, excessively optimistic traffic forecast, regulatory uncertainty, and funding problems caused project distress on a large scale. In 2015, the Kelkar Committee Report offered an in-depth diagnosis of the issues and offered a set of reforms, such as better contract design, regulatory independence, and better mechanisms of dispute resolution.⁶

The later period has been that of more careful and selective attitude towards PPPs, and more focus on hybrid approaches to the demand side of the project like the HAM approach where the private party is not as vulnerable to demand risk and on enhancing the institutional and regulatory framework to deliver the project. NITI Aayog has maintained the formulation and revision of model concession agreements and best practices in structuring and governance of PPPs.

III. LEGAL FRAMEWORK GOVERNING PPP INFRASTRUCTURAL PROJECT.

A. Contractual: Indian Contract Act of 1872.

The main legal device, which regulates the relationship between a governmental authority and its partner in a PPP project, is the concession agreement or project agreement. This contract establishes the rights and obligations of the parties, distribution of risks, payment system, the standard of performance, termination and default conditions and mechanism of resolving disputes. Since the concession agreement is a contract between parties in India, it is subject to

⁶ Report of the Committee on Revisiting and Revitalising PPP Model of Infrastructure (Kelkar Committee), November 2015, Ministry of Finance, Government of India.

the Indian Contract Act, 1872 (the Act).⁷

The Act offers the principles of a contract law to be used to the PPP agreements. Section 10 of the Act makes it obligatory that a valid contract should be made by the parties who are competent to engage in contract, who are in lawful consideration, free consent, and having a lawful object. The government officials who sign PPP deals do so under the provisions of law and the contract can only be enforced within the limits of the powers. The government party in the contract may have the authority to void or voidable contracts that are beyond their powers, or were made in defiance of statutory procedures.

The offer and acceptance, consideration, and free consent are doctrines, which are of general application to the PPP concession agreements. The provisions that are of importance to PPP contracts are the performance and breach provisions. The Act under section 37 entails that parties should undertake or offer to undertake their contractual duties. The remedies on breach, such as the right to terminate, the liability to pay damages, and the remedy of specific performance are regulated by Sections 73, 75 of the Act, with the Specific Relief Act, 1963.

The peculiarity of PPP contracts is that they last long and, therefore, require the mechanisms to deal with change and uncertainty during the duration of the contract. The Act does not clearly make a provision of contract renegotiation and adaptation to changed circumstances. Section 56 of the Act under the doctrine of frustration relieves parties of their liabilities where performance is now impossible because of a supervening event rather than when performance is now more burdensome or commercially unfavourable. This has been a major contention issue in the PPP projects that have been subject to the revocation of regulatory approvals, environmental clearance, or unexpected construction circumstances.⁸

The gap is normally filled in PPP concession agreement in India by the use of elaborate force majeure provisions, change-in-law provisions and compensation event mechanisms. The force majeure clauses absolve performance and grant the aggrieved party an extension of time and in others, an extra payment on the reason that performance is hindered by the occurrence of events that are beyond the control of the parties. The change-in-law provisions provide compensation to the private party in terms of the rise in cost or fall in revenue caused by the

⁷ Indian Contract Act, 1872; see also M.P. Jain & S.N. Jain, *Principles of Administrative Law* (LexisNexis, 7th ed.).

⁸ *Satyabrata Ghose v. Mugneeram Bangur & Co.*, AIR 1954 SC 44 (doctrine of frustration under s. 56 of the Indian Contract Act, 1872).

change in the law or regulation in the aftermath of the bid date. These contractual mechanisms are useful to make use of the limited common law doctrines that are present in the Act. B. Public Law Obligations in Government Contracting.

B. Public law Obligation in Government Contracting

The contract law is not sufficient to regulate the relationships between a government authority and a partner in a private PPP. Due to the fact that the government is a party, the relationship is at the same time governed by a body of constitutional and administrative law obligations which limit the way the government employs its contractual and regulatory powers.

The Indian constitution of 1950 has stipulated some fundamental rights which are directly applicable in government contracting. Article 14 provides equality before the law and does not allow arbitrary action of the State. The Supreme Court has understood Article 14 to provide a non-arbitrariness and reasonableness requirement to all State action, including government contracts awarding and performance. A governmental body whose action was arbitrary, capricious, bad faith in concluding, performing or terminating a PPP agreement may be judicially reviewed and liable to compensate the harmed party in the private sector.⁹

The right to the practise of any profession or to engage in any occupation, trade or business, subject to reasonable restrictions, is provided in article 19(1)(g) of the Constitution. This clause has been used to appeal licensing and regulatory rulings that would have an impact on the commercial feasibility of PPP projects. Also Articles 226 and 227 of the Constitution give the High Courts, and Article 32 of the Supreme Court, wide jurisdiction over State action, which is the means by which the obligations of the public law in government contracts are enforced.

Legitimate expectation doctrine is a doctrine that was created by Indian courts basing on the English administrative law and which has had an ample practical significance in the PPP disputes. In cases where the government authority has made an unequivocal and unambiguous representation to a private party, on the basis of which the private party has acted against it, the government may be barred to leave the representation without payment. This doctrine has been used in conflicts that have occurred as a result of having to change regulatory approvals,

⁹ E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3 (Article 14 and non-arbitrariness); see also Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

alterations to the scope of the project, and changes in payment mechanisms.¹⁰

The principles of the public law also extend to the procurement process of the PPP projects. Procurement by the government should be done in an open, just and non-discriminative way, which is in line with the article 14 of the constitution. The tender documents should provide objective and clear evaluation criteria; the evaluation of the bids should be done within the evaluation criteria; and award decisions should be reasonable and rational. In addition, there are the General Financial Rules, 2017 and sector-specific procurement guidelines that include further procedural requirements that are applicable in PPP procurements of the central government. The state governments have their procurement regulation that is used in the state level PPP projects.

C. Sector Specific Regulatory Frameworks.

Besides the overall legal framework, the PPP projects within the certain infrastructure sector are regulated by a variety of the sector-specific statutes and regulatory authorities. Such sector regulators have immense powers on the conditions of the PPP arrangements such as the setting of tariffs, access conditioning and licence conditions.

The statutory framework in the road industry where NHAI concludes PPP concession agreements is the National Highways Act, 1956 and the National Highways Authority of India Act, 1988. The NHAI Act gives the Authority the power to charge and collect fees to those who use national highways, which is the main basis of revenue approach in BOT-Toll PPP projects. The power sector has the Electricity Act, 2003 that forms the Central Electricity Regulatory Commission (CERC) and the State Electricity Regulatory Commissions (SERCs) that control the tariffs, entry of the grid, and conditions of power purchase agreements, which form the basis of PPP power projects. The framework of the involvement of the private entities in major ports is regulated by the Major Port Authorities Act, 2021 that regulates the sphere in the port sector.¹¹

Contractual and regulatory convergence presents a lot of legal complexity in the PPP projects. The application of statutory powers which cannot be contractually bound can alter the

¹⁰ Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499 (doctrine of legitimate expectation in government contracts).

¹¹ National Highways Authority of India Act, 1988; Electricity Act, 2003; Major Port Authorities Act, 2021.

commercial fundamentals of the PPP arrangement by regulatory decisions which are made by independent regulators. The conflict of contractual stability (the necessity of investors to trust the terms of their contracts when projects have a long life) and regulatory flexibility (the necessity of the regulators to react to the market changes and the needs of the population) is one of the recurrent issues in the PPP law and policy.

IV. COURTS AND THEIR APPROACH TO THE PROCESS OF ENTERING PPP INFRASTRUCTURE CONTRACTS.

A. Limits of Judicial Review Tata Cellular v. Union of India (1994).

The landmark decision of *Tata Cellular v. Union of India*¹² came into effect to formulate the initial principles in judicial review of government contracts in India. The case was about the grant of telecom licences by the Department of Telecommunications and the Supreme Court was approached to decide the extent at which the judicial review of government decisions in the commercial field could be conducted.

In a historic ruling, the Supreme Court stated that the State is not above a judicial review even as it is exercising its contractual powers. The Court realised that even the government authorities, when acting in the commercial capacity, are still bound by the constitutional limitation, such as the need to act fairly, reasonably, and not arbitrarily. The Court was also categorical that the judiciary should be very restraining when they oversee commercial decisions of the executive, as they are aware that the executive has more technical and commercial experience as compared to the judiciary.

The Court expressed a more relaxed version of the standard of review: procedural anomalies, bad faith and infringement of constitutional guarantees would draw judicial review, but the merits of commercial decisions, i.e. the process of evaluating technical bids and the process of selecting between competing offers, would be left to the executive. The courts would not replace the commercial judgment that the procuring authority made as long as the decision was not unreasonable in the *Wednesbury* sense.

The postulates laid down in *Tata Cellular* have turned out to be the benchmark of the judicial review in cases of government contracting and have served as a consistent benchmark in the

¹² *Tata Cellular v. Union of India*, (1994) 6 SCC 651.

PPP case. They represent a delicate compromise: the judiciary would secure the protection of individual parties against arbitrary and discriminatory or bad-faith actions by the government officials, but not to review reasonable business choices and would not conduct the procurement decisions on the merits. This is the key to the appeal of PPP investment: the investors need to be assured that they will be treated fairly, yet the authority in charge of the procurement should be given enough operational leeway so that they will make commercially informed decisions.

B. Openness and Equity in PPP Procurement: Reliance energy Ltd. Maharashtra State Road Development Corporation (2007).

Principles of transparency and fairness regarding the PPP procurement were further expanded by the ruling of the Supreme Court on *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation*¹³. The case was a challenge against awarding of a BOT concession on a road project by the Maharashtra State Road Development Corporation (MSRDC) on the ground that the bids evaluation had been done in a manner inconsistent with the published evaluation criteria and that the award was arbitrary.

The Supreme Court supported the significance of congruency between the published evaluation criteria and the real basis of award. It was held that a procuring authority is constrained by the criteria it has put in its bid documents and may not leave those criteria, by either using other undisclosed criteria or by disregarding such criteria which it has promised to use. Any noncompliance with the published standards would breach the constitutional right of equality under Article 14 and the integrity of the competition procurement process.

The Court further pointed to the fact that the essence of competitive tendering in PPP procurement is to make sure that the government achieves a value of money, the process of selection is transparent and all the qualified bidders are given a fair and equal competition. These goals would be frustrated in case procuring authorities were not bound to their own rules and could grant contracts according to undisclosed considerations.

Meanwhile, the Court upheld the *Tata Cellular* principle of respect to expert commercial judgment. It refused to go into the technical assessment of bids, as it understood that the evaluation of engineering, financial, and operational proposals need experience which it lacks

¹³ *Reliance Energy Ltd. v. Maharashtra State Road Development Corporation*, (2007) 8 SCC 1.

in court. The Court did not interfere with a commercial judgment of its own, but only the regularity and consistency of the procedures and the published standards.

Reliance Energy decision has resulted in considerable practical implications on the PPP procurement. It has promoted the procurement authorities to take extra care in the composition of the bid documents and evaluation criteria to be used in the procurement to make sure that the criteria are clear, objective, and uniformly applied. It has also granted a legal redress to the private bidders against the arbitrary exit of published criteria which has enhanced the rule of law in the PPP procurement process.

C. Courts Intervention in the Dispute in an Infrastructure Project: Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. (2016).

In the case of *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*¹⁴, significant issues that arose were the proper extent of judicial interference in a dispute that arose in the course of the implementation of infrastructure projects. The case was about a contract between a construction contractor and Nagpur Metro Rail Corporation over termination of a contract and right to compensation.

When the Supreme Court adjudicated the substantive dispute, it also seized the chance to consider more broadly the problems of infrastructure contract disputes in India. The Court recognised the need to have specialised adjudicative processes that are expedited, more professional and more expert in addressing technical issues that are involved in complex construction and infrastructure disputes than ordinary court litigation.

The Court pointed to the relevance of the contractual dispute resolution mechanisms, especially arbitration to the PPP. It pointed out that PPP contracts regularly have arbitration clauses, and parties are obliged to stick to their contracts to arbitrate, as opposed to going to court. This policy of the Court was in line with the wider national and international policy of encouraging arbitration as the method of settling commercial disputes, even the infrastructure sector.

Another factor that was tabled at the *Afcons* case was the danger of project stalemate in the infrastructure projects that would be in the face of legal proceedings. The Court observed that, interim orders which had the effect of stopping infrastructure projects may have a huge

¹⁴ *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818.

negative impact on society due to stalling the supply of vital services and result in uncertainties in project financing arrangements. The courts are therefore advised to exercise caution in granting interim relief in cases involving infrastructure, in balancing the interest of the private against the interest of the people to ensure that infrastructure is completed in good time.

The combination of these three decisions has formed a coherent judicial approach to PPP infrastructure contracts: a general adherence to constitutional principles of fairness, transparency and non-arbitrariness; deference to expert commercial judgment in procurement decisions; endorsing the mechanisms of contractual dispute resolution; and being mindful of the public interest impacts of judicial intervention in infrastructure projects.

V. IMPLEMENTATION CHALLENGES IN PPP INFRASTRUCTURE PROJECTS

A. Contract Design and Risk Allocation.

The basic issue of the PPP contract design is effective risk allocation. The economic justification of PPPs is based on the argument that risks are to be transferred to the party that is in the best position to understand them, which in this case is the private party that is the party that incurred the construction and operational risk and the government that is the party that incurred the political, regulatory and force majeure risk. In reality, the process of arriving at the correct risk allocation is complicated and contentious and ill-designed risk allocation has been the primary reason of project distress in India.¹⁵

The PPP arrangements normally leave the construction risk (the risk of the project costing and/or taking longer to be completed than anticipated) to the private party. Such a risk is however prone to factors beyond the control of the private party such as failure to secure statutory clearances in time, difficulties in acquiring the land and change of scope of the project that is dictated by the government. Where these aspects result in cost increase or time slippage, there is controversy over whether the risk is on the private party on the contractual provisions or a claim to compensation is made against the government.

The issue of demand risk such as the fact that the traffic volumes or the levels of usage are less than expected has been a very acute issue in the road sector. The bids made by private parties that bid on the concession of BOT-Toll was based on traffic estimates that were in most

¹⁵ Chakrabarti & Pratap (n 1), ch. 4 (risk allocation in PPP contracts).

instances highly exaggerated. When the real traffic was less than what was projected, the revenue base that was to finance project debt was worn out causing financial distress. Both the government and the private sector reacted by shifting towards the models of demand-risksharing, especially the Hybrid Annuity Model, which shifts a substantial amount of revenue risk to the government.

A cause of major uncertainty among PPP investors is regulatory risk, which is the risk that a variation in the law, policy, or regulatory choices will have some variation in the commercial fundamentals of the project. The legal and regulatory climate and environment in India has long been prone to regular and unpredictable change, which has impacted on the viability of project in places such as environmental clearances, tariff regulation, among others. Although PPP contracts contain change-in-law clauses, the extent of the clauses is frequently contested, and the execution of the clause depends on the goodwill and ability of the dispute resolution system to provide damages.¹⁶

B. Environmental Clearances and Land Acquisitions.

One of the greatest practical constraints to the delivery of PPP project in India has been the timely availability of land and environmental clearances. The land needed to carry out infrastructure projects is often large and sometimes spans a number of administrative jurisdictions and the processes used to acquire the land includes the processes of notification, valuation, compensation and resettlement which may take several years to complete.

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act) is another legislation that greatly changed the land acquisition system. The Act brought about improved levels of compensation, compulsory social impact assessment and consent on some type of acquisitions. Although these reforms were aimed at long-standing issues that included poor compensation and displacement, the reforms also raised the length and expenses of acquiring land to be used in the infrastructure projects. Agreements of PPP concession in the road industry such as road construction typically entail the government giving away land to the concessionaire before construction can begin;

¹⁶ Kelkar Committee Report (n 6), pp. 18–24.

any delay in land acquisition will directly translate into construction and cost overruns.¹⁷

The environmental clearances have also contributed immensely to the project delay. The environment (protection) Act, 1986 and regulations that follow it mandate environmental impact assessment and statutory clearances in case of large infrastructure projects. Criticism has been raised against the clearance process with regard to delay as well as inconsistency whereby the process has been criticized as taking a long time to issue clearance and in other instances, due to lack of consistency with regard to clearance of projects which may be challenged in the courts or by the national green tribunal as a result. The environmental litigation has contributed to shunning private investment and problems with financial structuring of PPP projects due to the uncertainty that it has generated.

C. Financing issues and use of Debt.

India PPP infrastructure projects are mostly funded via project finance structures, whereby special purpose vehicle (SPV) is set up by the sponsors who are mostly private and who own the project assets and liabilities. The SPV increases the debt, usually funded by the Indian commercial banks and development finance institutions and collateralized by the cash flows of the project in the future with little or no reference to the balance sheets of the sponsors. This organization forms an intricate network of relations between the sponsors, the lenders, and the governmental power whose interests and legal rights are different.

Indian banking industry has been a victim of infrastructure lending portfolio. Non-performing assets (NPAs) in infrastructure loans significantly increased in the 2010s as a result of a large accumulation of project delays, cost overruns, demand shortfalls, and regulatory problems. Banks were becoming more hesitant to finance infrastructure projects, tightening credit and lending guidelines and reducing the length of loan tenors, leaving a big financing gap on new PPP projects. The Insolvency and Bankruptcy Code, 2016 (IBC) has become a new tool of resolving distressed infrastructure assets, although its extension to PPP projects creates difficult issues of the relationship between insolvency proceedings and concession agreements.¹⁸

¹⁷ Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

¹⁸ Insolvency and Bankruptcy Code, 2016; see also IBBI Discussion Paper on PPP Projects and the IBC (2019).

Creation of a more extensive corporate bond market in infrastructure financing has been a policy goal over a long period but little has been achieved. The majority of infrastructure projects in India still lack the use of bond markets in financing their debts instead of bank lending. The regulatory constraints and risk aversion of institutional investors which are the long-term liability profiles appropriate to invest in infrastructure have limited them to a substantial increment in their infrastructure investments.

D. Regulatory Uncertainty and Institutional Capacity.

The success of PPP arrangements is a critical factor that is determined by the quality of the regulatory and institutional climate in which they are implemented. The investors need to be assured that the regulatory regime will not change during the project life, that the regulatory decisions will be taken in a systematic and transparent manner in respect of the established rules, and that the conflicts will be efficiently and fairly solved. The infrastructure regulatory environment in India has been constantly criticized on all the three dimensions.¹⁹

The major areas of infrastructure, such as electricity, telecom and ports, have been subjected to independent regulators. The autonomy of these regulators has however been doubted as they are reliant on the government in terms of funding, personnel, and appointments. At times, such regulatory decisions have been politically affected and this has made it unpredictable to the individual investors. The ability of regulatory institutions to manage technically complex infrastructure problems, especially problems of tariff determination, cost pass-through and performance monitoring, has also been fluctuating.

The governmental structure of dealing with PPP projects has not been even. Most government authorities do not have a specific PPP units that has the technical, legal, and financial know-how to organize, purchase and administer PPP contracts effectively. Such shortcoming is reflected in ill-written concession agreements, inefficient bid assessment, and poor contract management in the course of operations, which all lead to conflicts and poor performance of the project.

¹⁹ World Bank Group, *Benchmarking Infrastructure Development 2020: Assessing Regulatory Quality to Prepare, Procure, and Manage PPPs and Traditional Public Investment in Infrastructure Projects* (2020).

E. Dispute Resolution

The conflict between the government and individuals is an unavoidable characteristic of longterm contracts in the infrastructure. The fact that the PPP arrangements are complex, the concession terms are lengthy, and the events that may change the project economics provide sufficient opportunities to disagree over the contractual entitlements and obligations. Efficient and effective mechanisms of dispute resolution are thus key to the well being of the PPP programme in India.²⁰

Arbitration clauses are the universal use of PPP concession agreement in India, which is the major method of dispute resolution. The reason why arbitration is mostly preferred to litigation in the courts is speed, expertise, confidentiality and enforceability. Practically though, PPP arbitrations in India have been marked with a lot of delays and difficulties. Government has occasionally taken adversarial platforms in arbitration and also attempted to appeal against unfavorable awards in the courts greatly increasing the duration and expense of dispute resolution.

The statutory basis of arbitration is the Arbitration and Conciliation Act, 1996 that has been revised a number of times to overcome the perceived gaps. The changes in 2015 and 2019 aimed at decreasing the court interference in the arbitral process and speeding up the enforcement of the arbitral award. Although the nature of these reforms has been generally favorable, there are still issues with the quality and consistency of the arbitral decision-making process, the ability of arbitral institutions, and the good will of the parties involved in the government to accept an unfavorable award without appealing to the court once more.

Before specialised adjudicatory bodies, infrastructure disputes in India are also brought before them. The National Company Law Tribunal (NCLT) is the body that deals with insolvency cases concerning PPP projects under the IBC. The sector regulators resolve disputes that fall under their statutory jurisdiction. Judicial review of decisions made by the government concerning projects in PPP is done by High Courts and the Supreme Court. The many forums present the risk of inconsistent results and issues of jurisdiction, further complicating and increasing the cost of PPP dispute resolution.

²⁰ Arbitration and Conciliation Act, 1996, as amended by the Arbitration and Conciliation (Amendment) Act, 2015 and the Arbitration and Conciliation (Amendment) Act, 2019.

VI. CONCLUSION: ASSESSMENT AND AREAS OF REFORM.

This paper has looked at the legal and the regulatory context surrounding the PPP infrastructure projects in India and the major implementation issues that emerge in the delivery of such projects. The discussion results in some conclusions regarding the sufficiency of the current framework and the spheres where reform is the most necessary one.

Over the last thirty years, India has established a large legal and institutional framework of the PPP projects. The model concession agreements, which are devised by the government and founded on the Indian Contract Act and further elaborated by the contractual framework, offer a fairly consistent foundation of the PPP arrangements. The constitutional and administrative law structure, which is represented by the judicial rulings discussed in this paper, sets valuable limitations on the actions of arbitrary government, but leaves the executive operating room flexibility in business affairs. The sector-based regulatory regimes despite their imperfections offer the statutory basis of PPP arrangement in major infrastructure sectors.

Meanwhile, there are still great gaps and shortcomings. The model concession agreements in the field of the contract design have not necessarily been in line with the changing issues of PPP implementation. Provisions of risk allocation, especially on the delay in land acquisition, change in regulations, and force majeure events, should be better adjusted to the actualities of project delivery. The HAM road model is an innovation that is worth applying in risk sharing, and other sectors might need to have the same done.

Land acquisition and environmental clearance processes remain key limitations to the delivery of projects in good time. The LARR act has advanced the level of compensation however, the quantity and predictability of the clearance process should be enhanced by ensuring smooth operations, special clearance organizations, and better communication between the central and state government agencies. The environmental review process must be both comprehensive and efficient and the scope of legal challenge to the approved projects must be clarified more to lessen the uncertainty to the investors.

The financing climate of PPP projects needs to be maintained. The concentration of NPAs in the portfolio of bank infrastructure has lowered the access to project finance and the creation of alternative sources of finance especially the corporate bond market and long-term institutional investment is a pending agenda. Alteration of regulations to allow issuance of

infrastructure bonds and allow more insurance and pension funds to participate would contribute to the further enrichment of the financing base of PPP projects.

The quality of regulation as well as the institutional capacity should be enhanced in the infrastructure sectors. Regulators of the sector should be made independent by transparent appointments, sufficient funding and well defined statutory mandates which are not subject to any political interference. Government officials in PPP contracting require special, wellresourced PPP units that can organize, acquire, and administer contracts in a manner that these deals require.

Lastly, the dispute resolution mechanism of PPP projects must be streamlined to make it more efficient and effective. The arbitral process should be refined, and institutionalised procedural rules should be used more as well as specialist arbitrators. The trend of government authorities appealing against unfavorable arbitral awards ought to be reduced, possibly by internal control structures where such appeals are premeditated before they are undertaken. Establishment of a tribunal specifically dealing with infrastructure disputes with the expertise of a specialist would offer a more streamlined and authoritative platform to deal with significant PPP disputes.

Conclusively, the PPP model is a tool that cannot be ignored in delivering infrastructure in India as there is still a gap in the provision of resources and the investment requirements in the country. Nonetheless, the full potential of PPP cannot be achieved unless the legal and institutional framework is gradually changed towards dealing with the issues identified in this paper. The aim should be a structure that is commercially advanced, institutionally competent, legally sound and publicly answerable one that allows private financiers to invest capital over prolonged project periods but where infrastructure is supplied in the common good and with due responsibility to the populace.²¹

²¹ NITI Aayog (n 2), pp. 45–52.

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