

Dispute Resolution Pursuant to the NIP: Favorable Enough to Mobilize Investments in Infrastructure PPPs?

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ABSTRACT

Any country requires a robust legal framework not only to attract the inflow of investments but also to ensure that the project in which the money is invested is completed within the stipulated resources. As wide as the existing infrastructural market in India is, the nation has been consistently striving to cater to the needs of investors in order to strengthen its physical and social infrastructural needs. Although India made a noteworthy improvement in the Ease of Doing Business 2020 ranking, one of the six parameters that saw no significant improvement, according to the report, is enforcing contracts. Undoubtedly, India needs to work considerably on decreasing the time of disposal of cases and improve the index of the judicial process. The paper aims to analyse the legal regime that the government is striving to implement with the goal of making India an investor-friendly environment in infrastructure projects. Further, the paper also studies the possible obstacles an investor might face while seeking a legal remedy according to the persisting laws in India. Lastly, the paper puts forth some suggestions on the basis of the findings to strengthen the legal system.

Keywords: Dispute Resolution, Public Private Partnerships, National Infrastructure Pipeline, State-Investor Disputes, Mediation and Conciliation.

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Introduction

Public Private Partnership Model

Since the initiation of economic reforms in India, the private sector has been given utmost importance in the development of all kinds of infrastructural projects, be it telecom, power, transportation or social infrastructure in form of water supply, sanitation, sewage disposal, healthcare and education. When it comes to major infrastructure development projects, the responsibility of delivery and funding has not been completely delegated in the hands of the private sector. The partial delegation in the hands of the private sector can be commonly seen in forms of outsourcing, long-term leases, sale of assets and disinvestments. Operating under neither a nationalized nor a privatized structure, India does not have a standardized model for Public Private Partnerships (“PPPs”).

According to the 2011 Draft National Public Private Partnership policy, a PPP is defined as “*an arrangement between a statutory / government-owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well-defined allocation of risk between the private sector and the public entity, and the private entity receives performance linked payments that conform to specified and pre-determined performance standards, measurable by the public entity or its representative.*”¹ PPP models in India range from simple service agreements to complex concession contracts. India supports a diversified model for PPPs in terms of allocation of risks, financial assistance, return mechanism and profitability.

Focusing on the PPPs for infrastructure, the massive amount of investments is ascribable to the scale of operation, the timeline of the project, the number of stakeholders and the performance ability of the workers. The effect of corruption, red tapeism, lack of transparency and lack of effective management is hardly unknown to the nation. The public sector infrastructure in India has repeatedly failed. The debt figures of infamous Public Sector Undertakings (PSUs), BSNL and MTNL that were once contemplated to drive the telecom infrastructure in India continue to increase with every passing fiscal year. Seventy PSUs stood at a loss of over 31,000 crores collectively at the end of 2019. Considering the economic constraints of large-scale funding from the government sector, all major developing and developed countries have encouraged inflow from the private sector. By engaging the skillset and additional expertise of the private sector, the nation endeavors to strengthen the infrastructure delivery system.

Investor & Stakeholders Perspectives

Currently, India provides the largest markets for investments in PPPs, and along with the tremendous growth seen over the years, it becomes impossible not to pay attention to the increasing number of challenges and risks involved. Financial needs in PPPs are supported through various methods ranging from risk allocation, the project’s potential of attracting finance and the amount of securities and resources available with the stakeholder. In Design - Build - Operate model, the public stakeholder finances some part or a whole project wherein the private stakeholders bring in the specialized skills and

¹ InfrastructureIndia.gov.in, <https://www.pppinindia.gov.in> (last visited on May 30, 2021).

expertise to the project. Similarly, parties to the project can outsource project requirements in cases where the growth potential of the project is attractive enough to mobilize funds from infrastructure development finance companies or banks. The popular preference encouraged by the government in India to support project finance is to arrange finances while balancing local financial intermediaries and foreign investments.

At present, India can be seen to be facing an infrastructure deficit as there still exists a huge disparity between the demand and supply requirements. According to the economic survey 2017-18, it is estimated that by 2040 India will require investments of over USD 4.5 trillion specifically to meet its infrastructure needs. Out of which, India is capable to meet USD 3.9 trillion with a deficit of USD 526 billion.² The only way to meet this disparity is to attract more foreign investments into the sector. The continuous effort of the government to regulate the social, political and economic factors to meet the deficit has proved to be futile. While these changes are aimed towards attracting more investments, the dynamic and volatile policies have made India an unfavourable market to attract investor's interest because of the lack of security and uncertainties.

Regulatory Framework of Public Private Partnerships

Pursuant to regulate the formation of a Public Private Partnership, the 2005 Cabinet Committee of Economic Affairs (CCEA) authorized a detailed procedure to be followed by the Public Private Partnership Appraisal Committee (PPPAC), which would be responsible for approval of projects. The PPPAC has to mandatorily involve representation from the Department of Economic Affairs (DEA), NITI Aayog,³ Department of Legal Affairs, Department of Expenditure and any other department sponsoring a particular project. In order to set up a secretariat to the PPPAC, The DEA set up a PPP cell in 2006, which is responsible for all bureaucratic programs and schemes regulations inclusive of Model Concessions Agreements and Capacity Building of projects.⁴

All major infrastructure sectors in India are either regulated under some specific legislation or through some regulatory institutions. If and when a dispute does arise, administered under either one of these methods, the parties involved can then decide to resolve such an altercation according to their regulatory framework. Sectoral segregation of regulation policies evidently showcases either multiple regulators or no independent regulator at all. Airports in India are regulated under statutes like The Aircrafts Act, 1934,⁵ Airports Authority of India Act, 1994,⁶ Airports Economic Regulatory Act, 2008,⁷ as well as under institutional regulations of The Airport Economic Regulatory Authority

² ALL INDIA ECONOMIC STRATEGY TO 2035, <https://www.dfat.gov.au/geo/india/ies/chapter-9.html> (last visited on June 27, 2021).

³NITI AAYOG (Infrastructure and PPP Division), <http://niti.gov.in/verticals/ppp#:~:text=The%20PPP%20Vertical%20is%20tasked,inrastructure%20projects%3B%20suggesting%20institutional%2C%20regulatory> ((last visited on May 30, 2021).

⁴ National Infrastructure Pipeline, https://dea.gov.in/sites/default/files/Report%20of%20the%20Task%20Force%20National%20Infrastructure%20Pipeline%20%28NIP%29%20-%20volume-i_1.pdf (last visited on May 30, 2021).

⁵ The Aircrafts Act, 1934.

⁶ Airports Authority of India Act, 1994.

⁷ Airports Economic Regulatory Act, 2008.

of India (AERA).⁸ A similar regulation pattern is followed across other infrastructural sectors.

While multiple stringent regulations provide protection to investors resulting in an increase in private participation, an independent regulator does not only speed up the decision-making process but also helps in taking unbiased efficient managerial and operative decisions without any political or organizational pressure intervening in the process.

Infrastructural PPPs are not only bound by statutory and institutional regulations but the control is also delegated upon the consortium in certain cases after the completion of the project under the Build – Operate – Transfer (BOT), Build – Own – Operate (BOO), Build – Own – Operate – Transfer (BOOT), Design – Build – Finance – Operate (DBFO) and O & M (Operation & Maintenance) models of partnership. The Hyderabad Rajiv Gandhi International Airport, among all major airport projects is being managed under a similar manner. The Hyderabad International Airport Limited (HIAL) is a consortium entered upon for a period of 30 years between the GMR Group with a share of 63%, the Government of India (GoI) owning 13%, Government of Telangana owning 13%, and Malaysia Airports Holding Berhad having an 11% share in the project.⁹ The model adopted by them was the BOOT model.

Emphasizing the regulatory structure already in place, there exist insignificant policy measures to dissolve an altercation without intervening with the interests of the investors. This gap not only burdens the project with additional costs but also ends up freezing the funding for the rest of the project timeline. Under prolonged disputes and severe situations, investors could also be at risk of being insolvent.¹⁰

The National Infrastructure Pipeline (NIP)

To achieve the aim of a \$5 trillion economy by 2025, the government announced *sui generis* National Infrastructure Pipeline, which is completely focused towards the goal of attracting more investments according to India's infrastructure demographic needs. The NIP drawn up by a high-level task force under the DEA focuses on the infrastructure needs of each sector separately. A separate repository of data of upcoming and ongoing projects over a net worth of INR 100 crore compiled and provided to the stakeholders will help increase transparency and accessibility of data. According to the World Economic Forum's Global Competitive Index Report 2019, wherein institutions are ranked as the 1st pillar of competitiveness, India ranks 59th in the criterion of transparency.¹¹ The same report ranks India on 59th, as mentioned under efficiency of the legal framework in settling disputes.¹² In terms of infrastructure, India stands on the 70th rank globally.¹³

⁸ Airport Economic Authority of India, 2009.

⁹ Hyderabad International Airport, India, <https://www.gmrairports.com/airport-hyderabad.aspx> (last visited on June 27, 2021).

¹⁰ The World Bank, <https://ppp.worldbank.org/public-private-partnership/agreements/concessions-bots-dbos> (last visited on July 27, 2021).

¹¹ Klaus Schwab, The Global Competitive Index Report 279 2019.

¹² *Supra* note 7.

¹³ *Supra* note 8.

The NIP focuses on building a robust investment environment by creating a dedicated dispute resolution mechanism for issues arising out of contract deviation to be adjudicated in a timely manner. To achieve the same, a major focus has been directed towards two major elements, i.e., Optimal Risk Sharing and Safeguarding the sanctity of the contract.

The mechanism aims at dividing the risk immaculately between public and private entities with risk allocation to parties who are best equipped to handle the same. Further, the NIP suggests redesigning the already existing mechanism to procure clearances and permission prior to project awarding and bidding. Prior to initiation of the project, land acquisitions, environment clearances, awarding of tenders, and other authorizations consume a lot of time given the bureaucratic environment in India. If the mechanism is efficiently implemented, it could save investors and developers considerable financial as well as non-financial resources. The task force has also suggested adopting an international contract standard which allows more flexibility and possible options for the exit for parties.

Another reform proposed by the task force was finding ways to make Centre, State and local governments to ensure enforceability of a legally binding contract and in case of failure of a party to stand by the binding nature of a contract, a flexible payment termination can be established.

Considering the existing legal framework of India is improving but persists with several lacunas, which could curtail the process of dispute resolution, the task force also recommended that the resolution mechanism be institutionalized to all possible extents. Infrastructure contracts reflect a complex nature between multiple stakeholders, and while enforcing such convoluted contracts, there exists coherent anticipation of the conflict of interest of such stakeholders. Ministry level committees are advised to settle up complex contractual disputes outside the courts through mediation mechanisms.

Apart from the reforms that will either be rolled out as a new regime or redesigned in accordance with the propositions set forward by the task force, there exists a contemporary legal system that can be approached by the parties according to their feasibility and the applicability of such states on the subject matter of the dispute.

Legislative Context – What Does the Law Say?

Central Legislations

Although the Code for Civil Procedure was enacted in 1908 in India as a remedy to civil disputes, including disputes between public-private partnerships and other parties associated with such partnerships, the generic nature of such statutes has made it difficult for the parties to seek effective legal remedy in terms of cost and financial efficiency. The same has been an area of concern of investors for a long time. Moreover, the infrastructure sector does not have a particular comprehensive statute or a specific policy framework that delineates on the subject matter. Addressing the issue of a need for a robust legal framework in order to attract more infrastructure investments, the government enacted specific legislation governing the subject. The National

Infrastructure Pipeline aims to prioritize effective implementation of these legislations along with other policy initiatives of the state.¹⁴

Commercial Courts Act, 2015¹⁵

The Commercial Court, Commercial Division and Commercial Appellate Divisions of High Courts Act, 2015¹⁶ (“Act”) was enacted with an objective to establish commercial division in high courts, commercial courts where high courts do not have original jurisdiction and commercial appellate division to adjudicate upon commercial disputes with net value worth rupees one crore. The legislation was amended in 2018 for the speedy redressal of commercial disputes and simplification of litigation procedures. The amendment proposed the minimum value of pecuniary jurisdiction as Rs. 3,00,000/- (Three Lakh Rupees Only) instead of one crore rupees and introduced mandatory mediation before the filing of a suit to be completed within three months in cases where no urgent relief has been sought. The amendment also provides for setting up of commercial appellate courts at the district level where the High Courts do not exercise original jurisdiction and can hear cases that are below the level of a district judge.

Section 2(c)(vi) of the Act delineates the jurisdiction over construction and infrastructure contracts.¹⁷ The Act is also applicable to the appeals and applications arising out of The Arbitration and Conciliation Act, 1996, after the 2018 amendment wherein only High Courts are authorized to hear matters of International Commercial Arbitration.¹⁸ Therefore, if a commercial dispute falls under the pecuniary jurisdiction of the court, commercial courts established under the Act can act as an adjudication authority over such cases.

To enact the Act in consonance with The Civil Procedure Code, 1908, the Act specifies a Schedule amending certain provisions of the code which are applicable to the disputes of a ‘Specified value’.¹⁹ The Act has an overriding effect over the provisions of the code and in case of any conflict between the Act and the Code, rules of the jurisdictional High Court will hold applicability. According to the amendments made to Order V and Order VIII of CPC, the time period for filing a written statement has been changed to 30 days from service of summons to a maximum time period of 120 days. The Act for the first time, has introduced the practices of Summary Judgements and Case Management Hearing under Order XIII-A and Order XV-A, respectively.

Summary judgment, except for in cases of Summary Suits, is those judgements that a court can pronounce against the defendant or the plaintiff if it believes that either of the parties are unable to justify or defend the claim even before filing of oral evidence.²⁰ The court can proceed with an application for Summary Judgement only after the summons have been served to the defendant but before framing of issues. Through Case Management Hearing, the court has the power to fix timelines and dates for all stages of

¹⁴ Public Private Partnership in India, <https://www.pppinindia.gov.in> (last visited on June 27, 2021).

¹⁵ The Commercial Courts Act, 2015.

¹⁶ The High Court’s Act, 2015

¹⁷ The Commercial Courts Act, 2015, §2(c)(vi).

¹⁸ The Arbitration and Conciliation Act, 1996.

¹⁹ The Civil Procedure Code, 1908.

²⁰ Rules of Trial Procedure, https://www.in.gov/courts/rules/trial_proc/index.html (last visited on June 27, 2021).

the suit. The further time period for an infrastructure dispute to go forward with the first Case Management Hearing is four weeks from the date of filing of an affidavit of admission or denial of documents by all parties to the suit, and the arguments are to be concluded within 6 months from the first Case Management Hearing. The court is bound to adhere to the timelines fixed, and no adjournments are allowed for the reason of absence of counsel, which will prevent unnecessary delays and ramp up the dispute resolution process. Deviation from the timelines or hearing dates by the parties shall be condoned by the court only after the payment of costs by the parties. Additionally, Willful disobedience in exceptional cases can also lead to dismissal of the plaint.

It is evident that the intent of the statute is to reduce the delay in procedures in all kinds of commercial disputes, including infrastructure disputes which will help the nation improve the perspective of the investors in terms of ease of enforcing contracts in India. The Act has helped India attract substantial foreign investments as it strengthens the existing legal framework of the country. The NIP also aims at implementing and boosting any institutional framework that lacks efficiency.

Specific Relief Act, 1963²¹

The Specific Relief Act, 1963 (“SR Act”) has acted as an equitable remedy in cases where a party to a contract breaches such contractual obligations. By the authority of this Act, the court orders a party to perform its duties instead of awarding monetary relief to the party by way of which no additional costs are incurred in the project except for litigation costs. The Special Relief (Amendment) Act, 2017, provides for the setting up of one or more special civil courts in different states under the consultation of the Chief Justice of High Courts for the resolution of infrastructural disputes within its local jurisdiction. These courts are specifically set up to engage and effectively resolve disputes within a time period of twelve months from the date of receipt of summons by the defendant. However, the time period can also be extended for a duration of another six-month based on the discretion of the court. Even though the Act was passed and enacted in 2017, only the HCs of Allahabad, Karnataka and Madhya Pradesh have Designated Special Courts for trial and ordered the special hearing of infrastructure disputes. The Ministry of Law has addressed the matter to the rest of the HCs stating that setting up of these special courts is a fundamental step towards gaining the confidence and trust of the investors.

Furthermore, the Act restricts civil courts to grant an injunction to any infrastructure dispute, which could possibly act as a barrier in the enforcement of the contract and completion of work. These provisions will ensure that no unnecessary delays are made in the operations of an infrastructure project, consequently safeguarding parties and developers from any unanticipated costs.

State Legislations

The infrastructure sector in India covers various independent as well as interconnected sectors. According to the Seventh Schedule of the Constitution of India, the Central government has the authority to enact laws relating to Ports, Airports, Railways, National Highways, Inland Water Transport, Telecommunications, Oilfields and Mineral Resources, whereas the state holds authority over subject matters like Prisons and

²¹ The Specific Relief Act, 1963.

Corrective Facilities, Regulation of Local Governments, Public Health and Sanitation, State Highways, City Roads, Water Supply and Irrigation.

While there exist Central legislations on some specific sectors like The Electricity Act, which is a matter under the concurrent list, a specific statute does not regulate the infrastructure sector. Regulations of PPP in states are ensured in the form of policies, programs and rules. Although there is no specific recourse mentioned under these regulations, parties tend to resolve disputes amicably through settlements.

Considering the topography, population and resources of the country, infrastructure needs vary from state to state. Owing to different infrastructure needs, different states have enacted specific legislation to attract private investors and regulate PPP. Among them are the Andhra Pradesh Infrastructure Development Enabling Act, 2001 (“The AP Act”),²² Bihar Infrastructure Development Enabling Act, 2006,²³ Punjab Infrastructure Development and Regulation Act, 2002²⁴ and the Gujarat Infrastructure Development Act (1999).²⁵ The dispute resolution mechanism in these specific legislations is according to what their respective state governments consider appropriate to meet their infrastructure needs. For example, the Andhra Pradesh Infrastructure Development Enabling Act, 2001 requires the establishment of a Conciliation Board for settlement of claims and conflicts between the Central or State Government and developers. With the intention of minimizing the need and interference of court procedures, the AP Act specifically applies Section 66 of The Arbitration and Conciliation Act, 1996. Section 66 states that the provision of the Civil Procedure Code, 1908 and The Indian Evidence Act, 1872 do not hold applicability in conciliation matters. The Act also restrains the parties to go forward with any judicial or arbitration proceeding without going for conciliation first.

Are Alternative Resolution Mechanisms Supported by the NIP?

Dispute Resolution Clause

A popular and safe practice before entering into a partnership includes pre-defining of rights and liabilities of all the parties. When all the parties to the project agree on such pre-defined rights and liabilities, a binding contract is drawn up and signed by them. According to recent trends of drawing up agreements and contracts, a dispute resolution clause is inscribed wherein the parties agree to settle any dispute arising out of that contractual relationship pursuant to a pre-decided method of resolution or multiple alternatives. In a dispute resolution clause, the parties mutually decide to settle a matter in accordance with prevalent legislation or alternatives for litigation, which is inconsistent with their contractual obligations and the legal framework of the country.

Arbitration

Arbitration proceedings in India are governed under The Arbitration and Conciliation Act, 1996²⁶, which is based on UNCITRAL model law.²⁷ The Act provides for the

²² The Andhra Pradesh Infrastructure Development Enabling Act, 2001.

²³ The Bihar Infrastructure Development Enabling Act, 2006.

²⁴ The Punjab Infrastructure Development and Regulation Act, 2002

²⁵ The Gujarat Infrastructure Development Act (1999).

²⁶ The Arbitration and Conciliation Act, 1996.

²⁷ UNCITRAL model law on International Commercial Arbitration, 1985.

resolution of disputes within a specific time along with limited grounds available for challenging an arbitral award by parties who prima facie mutually agree on such proceedings. Arbitration laws have turned into a befitting popular choice for dispute resolution among parties entering into infrastructure contracts after diverse interpretations on questions regarding jurisdiction and enforceability are made clear under recent amendments or through adjudications of the Supreme Court.

Considering the increasing global popularity of arbitration proceedings in resolving disputes, India has faced a daunting challenge in gaining the trust of foreign investors after the investors and developers in the Nathpa Jhakri Hydro Electric Power Project were levied with additional costs because of the prolonging arbitration proceedings. The 1500-MegaWatt project was assigned for development to the Satluj Jal Vidyut Nigam Ltd. (SJVN), which included three major contracts.

The dispute resolution mechanism of the project comprised of a three-tier redressal mechanism.²⁸ Firstly, a contracting party had to approach the Engineer-in-charge (EIC), followed by the CMD and lastly the Dispute Review Board (DRB). The mechanism was included in the project to assure the presence of an in-house counsel for continuity of work even in cases of dispute. The DRB successfully resolved 16 disputes out of 26 disputes and the rest of the matters were escalated to arbitration. However, questioning the binding authority of the DRB, the contractors refused to implement the recommendations on Extension Time claims. An arbitral tribunal was constituted in 2005 in reference to the claims and in 2008 extension was awarded to the contractor. The dispute resolution cost the project three years of delay in the project along with an additional cost of Rs. 2186.17 crore. The delay in the project was caused by other geological and economic factors as well but the time taken up to resolve disputes with the contractors clearly reflected the hostile investment environment on a global scale since the project was funded by the World Bank.

The practice of constituting DRB was introduced by the World Bank in projects worth \$50 million or more. Since then, the formation of the DRB and Dispute Adjudication Board (DAB) has become a common practice in all major infrastructure projects. Even though the constitution of an arbitral tribunal and DAB/DRB includes expert or neutral members, the award recommended by a DAB/DRB lacks enforceability. After a party has decided to act in defiance of such an award or is unhappy with the same, the party seeking enforceability of the award will have to further refer the matter to arbitration or court.

Enforceability of Arbitral Awards

The Arbitration Act establishes well-defined grounds to challenge the enforceability of an arbitral award under Section 12 for domestic Arbitration and Section 34 for International Commercial Arbitration.²⁹ Amongst these grounds under Section 34 exists a very wide scope of interpretation in the name of '*Fundamental policy of India.*' The Apex Court has time and again interpreted the meaning and scope of the term public policy including in the infamous case of *ONGC v. Saw Pipes* and *Renusagar Power Co.*

²⁸ Aecon, <https://www.aecon.com/our-expertise/our-projects/landmark/nathpa-jhakri-hydroelectric> (last visited on June 27, 2021).

²⁹ The Arbitration and Conciliation Act, 1996, §12.

*v. General Electricals.*³⁰ Taking the dynamic political and economic changes in society into consideration, the interpretation of public policy still remains uncertain, which poses a threat to investors. Even after following the due process of dispute resolution, if an award is announced in favour of an investor, the possibility of not being able to enforce the award prevails. This discourages present as well as future investors seeking smooth operation of the business in return for profits.

State- Investor Dispute Resolution

Bilateral Investment Treaties (BITs) enables an investor to initiate a proceeding to seek legal remedy without any intervention from the state. The dispute resolution clause in a BIT specifies the remedies available to an investor. The popular choice for dispute resolution amongst countries signing BITs and prospective investors is International Commercial Arbitration (ICA) and the preferred institute for the same remains The International Centre for Settlement of Disputes (ICSID).³¹ However, India is not a signatory to the ICSID convention and follows the UNCITRAL model law.³² As of 2019, India has terminated 69 BITs which implies that all the investors seeking protection by way of these BITs will no longer be able to enjoy the same. As a result of the lack of protection offered in case of a State- Investor dispute by India, the nation is bound to face problems to attract FDIs in the infrastructure sector as well.

Mediation and Conciliation

Mediation and Conciliation act as the most amicable method of settlement of a dispute. A third impartial and independent party moderate concerns and conditions of both the parties and heads towards a viable solution for both. Both mediation and conciliation are very efficacious time and cost-wise because of the flexibility of the procedures that are offered by the structure of the proceedings. As cordial as the proceedings and the outcome of such proceedings be, the non-binding nature of both the settlement mechanisms still acts as a major drawback. In cases where one of the parties refuses to act in accordance with the settlement terms, the other party is left with no other alternative but to approach a binding authority which could be either arbitration or litigation. In the PPP model of infrastructure disputes where one party is in a position to exert political or bureaucratic burden over the other, the outcome of such an amicable mechanism might not necessarily help ensure equity and justice. There exists a number of external influences which could weigh down the interest of other stakeholders as compared to an entity with ample resources. At the same time, various major institutions have also established their own resolution mechanism that is bound in terms of implementation by the authority of framework they were enacted under.

NHAI is a major participant when it comes to the road infrastructure projects of India. The Ministry of Road Transport & Highways (MoRTH) has defined Standard Operating Procedure (SoP) for referring the disputes of the autonomous body with any Contractors/ Concessionaires/Consultants to a Conciliation Committee of Independent Experts (CCIEs). The parties to the dispute are at liberty to refer a dispute to the conciliation mechanism or court in consonance with their contractual obligation but if the party agrees

³⁰ Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd, (2003) 5 SCC 705 & Renuagar Power Co. Ltd. v. General Electric Co. ,1994 Supp (1) SCC 644

³¹ The International Centre for Settlement of Disputes (ICSID), 1996.

³² *Supra* note 24.

to refer the dispute to CCIE, then according to the SoP, the recommendation or settlement by the CCIE is to be followed in a time-bound manner by both the parties. The MoRTH is responsible for implementing and supervising the working of the CCIE in consistency with The Arbitration and Conciliation Act, 1996.³³ The timely and economic edge extended by Mediation and Conciliation can be used to the advantage of convenience to the investors.³⁴

The Existing Framework: Is It Enough to Propel the Nation's Aspirations?

There have been efforts from the government to enact and implement laws and policies to strengthen various infrastructure sectors, but the practice of exploiting public resources in order to escape accountability and liability by the government sector is not a surprise practice in the nation. With additional hurdles of court intervention and difficulty faced in enforcing awards in infrastructure projects. The government sector undertaking spares no chances to exploit the legal framework to the farthest as possible. Referring to the privileges and abundant resources with the Government sector enterprise, the Delhi HC highly discouraged the practice of filing challenges to an arbitral award by government companies and dismissed the appeal with costs. In the aforementioned case, NHAI was the party challenging the arbitral award after the successful completion of arbitral proceedings.

The arbitral award was announced against NHAI. The then acting Chief Justice of Delhi High Court, Justice C. Hari Shankar, stated - *"Despite wealth of judicial authority on this point, and repeated disapproval voiced by the Supreme Court and as well as several High Courts including this Court thereon, it is almost invariably seen that every award passed by the arbitrator/Arbitral Tribunal, especially, where the awards are commercial in nature, are challenged, first before the Single Judge and thereafter before the Division Bench merely because the "aggrieved party" possess the financial wherewithal to do so. It is a matter of concern that the majority of such challenges are by public sector undertakings, the appellant before us being one of the main contributors thereto. Such attempts contribute, in a great deal, to the menace of "docket explosion", which plagues our Courts and consumes valuable time which could be used for settling more important disputes. We unhesitatingly deprecate this practice."*³⁵

Analyzing the potential laws that were enacted with a view to efficiently resolve a dispute while strengthening the legal system in such a manner that also reflects as a positive investment market, it is fair to say that no material change can be seen as of now. Even though laws have been enacted to establish special courts for timely disposal of cases, the courts are nowhere near to incorporation, let alone reach a stage of efficient functioning. The government needs to assure the implementation of laws in accordance with the similar intent such laws were enacted for. Additionally, India needs to work on enforcing contracts without judicial intervention as it can save huge costs adding to a project. Pushing the parties to a dispute towards amicable settlement of disputes assuring completion of infrastructure projects and protection of investments simultaneously will prove to fulfil the interest of all the stakeholders.

³³ The Arbitration and Conciliation Act, 1996, §66.

³⁴ MoRTH, <https://morth.nic.in/> (last visited on June 27, 2021).

³⁵ NHAI v. M/S. Bsc-Rbm-Pati Joint Venture, 248 (2018) DLT 711.

Most of all, India lags considerably in terms of enforcing awards and settlements which discourages investments. With such lacunas affecting projects that are of national and public interest, there still exists a long way ahead for India to meet its rising infrastructure demands.

Conclusion

There exists an extensive need as well as the potential for investments in the infrastructure sector, but these opportunities need substantial improvements so as to meet with the interest of the investors.

The foremost concern of the government whilst strengthening the legal regime should be to provide investors with investment protection and safety to the maximum possible extent. Any entity or stakeholder joining hands with a PSU in India would primarily aim to gain maximum profits and secure these profits for a longer period of time.

This calls for a stable policy framework that an investor can rely upon under ordinary political and economic circumstances. Implementation of the NIP could prove to be a groundbreaking step if implemented with strict regulation and supervision. Additionally, all the efforts of the legislature towards successfully enacting laws to save time and financial resources for investors will yield outcomes as and when effectively implemented. Even after years of enactment of these laws, infrastructure disputes still continue to be among matters prolonged for years. Considering the number of stakeholders involved in a project, the disposal time of cases can still be decreased considerably if the nation overcomes the lacunas in the legal and regulatory system.

A contemplation of methods to invigorate the prevalent practices, a pro-enforcement approach is required with the object of providing stability and reliability to the private sector. The burden of piling infrastructure disputes can be brought to control if the awards rendered by DABs and DRBs are enforced with the same conclusiveness as compared to arbitral proceedings. While the government strives to pay significant emphasis to attract and substantiate the private sector, there is a need to monitor the accountability of the government sector. Essentially, when it comes to the government sector, public resources and public money ought to be used to the advantage of the development of the nation.

The fundamental concepts of optimal risk sharing and preserving the sanctity of the contract proposed under the NIP seems to cover these lacunas in a broader sense, and the similar concepts, if implemented specifically to each and every infrastructure sector, can help India attract investments to meet its growing infrastructure needs.

