PUBLIC PRIVATE PARTNERSHIPS

India

LEXOLOGY
Getting The Deal Through

Public Private Partnerships

Quick reference guide enabling side-by-side comparison of local insights into jurisdiction-specific legislative frameworks governing PPP; procurement processes; design and construction in greenfield PPP projects; operation and maintenance; risk allocation; default and termination; financing; governing law and dispute resolution; and recent trends.

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GENERAL PPP FRAMEWORK

Overview

How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

The prevalent framework in India is perhaps more appropriately characterised as private sector participation (PSP), rather than as PPPs. Nevertheless, the broad term 'PPP' is often used to cover all types of private sector participation across various sectors. For the purposes of this chapter, we will use the term 'PPP'.

PPP is prevalent in India and took root out of the economic crisis the country faced in the early 1990s. As a response to the crisis, PPP was a conscious policy choice of both the central government and the governments of various states to enable private sector participation in the development of infrastructure within their respective jurisdictions.

Many states in India have enacted specific statutes or policy frameworks to support PPP in infrastructure development within their states. Such state-level statutes or policies usually provide a definition of PPP. For example, the state of Andhra Pradesh has enacted the Andhra Pradesh Infrastructure Development Enabling Act 2001 .

The Act defines PPP as 'investment by Private Sector Participant in an infrastructure project of the Government Agency or the Local Authority in the State'. The term 'private sector participant' is defined as:

> *'any person other than Central Government or State Government or Government Agency or any joint venture between Central Government or State Government Departments or any Statutory Body or Local Authority or any corporation or company in which Central Government or State Government or Government Agency, statutory body or authority or local body is holding not less than 51% paid up share capital.'*

This definition under the Andhra Pradesh law is usually reflected in most state-level statutes. This definition of PPP in state laws illustrates the fact that private sector participation is broadly referred to as PPP.

There is no statutory framework at the level of the central government, except a notification dated 29 November 2005 under which the Cabinet Committee on Economic Affairs (CCEA) created the Public Private Partnership Approval Committee for approving proposals for PPP projects to be implemented at the level of the central government.

The major development in case law in PPP in India during 2022–23 was the decision of the Delhi High Court in Delhi Airport Metro Express Private Limited v Delhi Metro Rail Corporation Ltd (2023 SCC OnLine Del 1619), to apply the doctrine of lifting the corporate veil to enable enforcement of an arbitration award against the Delhi Metro Rail Corporation Ltd (DMRC). This is an important development supporting the enforcement of arbitration awards against government entities. DMRC had lost an arbitration to Delhi Airport Metro Express Pvt Ltd and was directed to pay certain amounts aggregating to Rs 48 billion (approximately US$645 million) to Delhi Airport Metro Express Pvt Ltd, the concessionaire that had developed the airport link from the Delhi Airport to the Central Business District of Delhi under a Concession Agreement executed in 2012. DMRC had failed to pay the amount, stating that it was only a special purpose vehicle implementing the metro project and did not have the funds, as its funds are based on grants and investments made by its shareholders, which are essentially the government of National Capital Territory of Delhi and the government of India. The High Court of Delhi directed enforcement of the arbitration award against the main shareholders of DMRC and lifted the corporate veil. It, inter alia, held that the Union and Delhi Government are the principal shareholders of DMRC (ie, sovereign governments). Government cannot shirk from its liability to abide by binding judgments, decrees and awards.

Earlier decisions by the Supreme Court of India in high-profile litigation on PPP issues in the railway sector (bullet train case) and airport sector (airport charges case) have also strengthened the framework of PPP in India.

In the case of National High Speed Rail Corporation Limited v Montecarlo Limited & Anthr (2022) 6SCC 401, the dispute was over the terms of the tender conditions relating to tenders issued in relation to the 'bullet train' project for a high-speed rail link between the cities of Mumbai and Ahmedabad. The Supreme Court of India clearly held that the bullet train project is a fully foreign-funded project envisaged between the Japanese and Indian governments, which is fully funded by a concessional Official Development Assistance loan by the Japan International Cooperation Agency that was made on the basis of specific terms and conditions, including terms on which the contractors would be chosen to implement the project. The Supreme Court held that a foreign-funded agency that invests large funds for a mega project pursuant to bilateral talks is justified in having such clauses and to insist that information relating to the evaluation of bids and recommendation be not disclosed, and also that it can call certain bidders for negotiations and not others. Although factually this is a very specific case, the ratio in relation to interference by courts in matters of tendering process will benefit all PPP projects in India. The Supreme Court in relation to the scope of interference in the tendering process of PPP projects has held that a court, before interfering in a contract matter in exercise of powers of judicial review, should pose to itself the following questions:

- whether the process adopted or decision made by the authority is mala fide or intended to favour someone, or whether the process adopted or decision made is so arbitrary and irrational that the course can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'; and
- whether the public interest is affected.

If the answers to the above questions are in the negative, then there should be no interference.

The Supreme Court also held that the scope of judicial review In a foreign-funded contract should be far much less than in ordinary government-funded contracts funded from the Consolidated Fund of India, and in such projects should be limited to a minimum. In such foreign-funded projects, the only ground for judicial review ought to be on a limited aspect (ie, the action of the executing authority does not suffer from favouritism or nepotism) and based on grounds that have been concealed from the foreign financing authority. This provides a certain level of protection and certainty to foreign-funded PPP projects that do not rely on government funding.

The Supreme Court in the case of Delhi International Airport Limited v Airport Economic Regulatory Authority of India and others (2022 SCC Online SC 850) has re-emphasised that judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the 'feel of the expert' by its own views.

Law stated - 09 August 2023

Covered categories

What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

The Constitution (see the Seventh Schedule) has allocated between the central government and the state governments legislative powers and corresponding executive powers over various sectors. Each category of the infrastructure sector is governed by an applicable statute enacted by the legislature vested with jurisdiction over the relevant sector.

Over the years, PPP projects have been adopted in almost all infrastructure sectors. The only exceptions are sectors relating to policing, or law and order, which do not have PPP projects. Almost all critical categories of the infrastructure sectors – including highways, airports, railways, power, natural gas, ports, telecommunications, water, renewable energy, schools, hospitals, government buildings and township development – are open to PPP projects.

In the absence of a PPP framework for a particular segment, a proposal can be submitted to the central government seeking its specific approval for the same, with approval being at the discretion of the central government.

Law stated - 09 August 2023

Legislative framework

Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

Most states have enacted legislation for enabling PPP projects. The central government has created an administrative framework enabling PPP projects in various sectors. A website has also been created to provide an information database and facilitate potential developers and investors in PPP projects.

Law stated - 09 August 2023

Relevant authority

Is there a centralised PPP authority or may each agency carry out its own programme?

The government has streamlined the appraisal and approval mechanism for central sector PPP projects to ensure the speedy appraisal of projects, eliminate delays and have uniformity in appraisal mechanisms. The CCEA in its meeting on 27 October 2005 approved the approval procedure for central sector PPP projects (see Notification OM 2/10/2004-INF of 29 November 2005).

Pursuant to this decision, in 2006, the government announced the appraisal mechanism by setting up the Public Private Partnership Appraisal Committee (PPPAC), which is responsible for the appraisal of PPP projects in the central sector (see Notification OM 1/5/2005-PPP of 12 January 2006).

During the Budget Speech for 2023–24, the Finance Minister of India announced that to attract private investment in sectors predominantly dependent on public resources, an Infrastructure Finance Secretariat (IFS) has been established to assist all stakeholders with more private investment in infrastructure sectors like railways, roads, urban infrastructure and power. The IFS has been established at the Department of Economic Affairs, Ministry of Finance, and has two divisions: the Infrastructure Support and Development Division and the Infrastructure Policy and Planning Division.

The IFS is reportedly preparing a reference framework for establishing state-level PPP units and undertaking appraisal of PPP projects. It is also developing project implementation mode selection guidelines to help sponsoring authorities make better decisions regarding project mode selection.

The IFS has also recently released a revamped toolkit to guide Project Sponsoring Authorities in identifying and developing projects on PPP mode, to help improve decision-making and project preparation by guiding the adoption of suitable PPP models. Presently, the toolkits are available for five sectors:

- highways;
- ports;
- solid waste management;
- water and sanitation; and
- urban transport.

Law stated - 09 August 2023

Procurement

Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

In relation to sectors that fall under the jurisdiction of the central government under the Constitution, the administrative framework created through the CCEA and the PPPAC provides the national-level framework.

In relation to sectors that are under the jurisdiction of state governments, most states have enacted PPP enabling laws and have put in place enabling administrative mechanisms.

Law stated - 09 August 2023

Remuneration

How is the private party in a PPP remunerated in your jurisdiction?

The private party's remuneration is usually user fee collection over the period of the concession agreement. Availability payments are provided only in very specific categories (eg, power generation, liquefied natural gas terminals and natural gas pipeline capacity) that are reflected in commercial agreements with base load customers for those facilities and then passed to the end user as a pass-through charge on end user fees.

Law stated - 09 August 2023

Sharing revenue and usage risk

May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Revenue sharing is not the preferred mode; however, revenue-sharing models do exist in certain categories, such as those regarding national highways and telecommunications. The revenue-sharing model has typically been a source of disputes and therefore has not been adopted in a widespread manner.

Law stated - 09 August 2023

Government payment obligations

In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Most PPP projects in India are structured in such a way that they are not dependent on regular payments by the government but instead rely on user fees. Support is typically provided through land or other support.

PPP projects that depend on a statutory or government authority for making regular payments are often subject to the risk of budgetary allocation being required from the relevant government authority. Municipal projects carry the highest risk of lacking budgetary allocation (eg, municipal waste management projects). This results in a high risk of litigation or arbitration proceedings to recover payments.

For example, the National Highways Authority of India (NHAI), which is the statutory authority that implements the largest number of concession arrangements for the development of national highways in India, has the largest number of payment-related disputes. However, it is actively seeking to resolve and mitigate the disputes, and to this end has set up a Dispute Resolution Board and a Conciliation Committee of Independent Experts to settle claims. It is reported that during the 2021–22 financial year, the NHAI settled 60 cases worth 40.76 billion rupees.

Law stated - 09 August 2023

Rate of return caps

Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

Most PPP projects have a formula-linked user fee, which incorporates the rate of return. For example, the toll–operate–transfer model for national highway projects implemented by the NHAI provides for a rate of return of 12–13 per cent. Other fields (eg, electricity generation, transmission and distribution, and natural gas pipeline transmission) have sector-specific regulators that regulate the rate of return through tariffs fixed under the statutory framework.

Law stated - 09 August 2023

Restriction of ownership transfer

Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Yes. Any direct or indirect transfer of ownership or interest in project companies is regulated for a specified duration. This is to prevent squatting or trading in concession agreements and binds entities to the development of the infrastructure if they have been awarded the project rather than the possibility of trading the concession with a third party.

Law stated - 09 August 2023

PROCUREMENT PROCESS

Relevant procedure

What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

The competitive bid route is the usual route for PPP procurement. This has arisen on account of judgments by the Supreme Court of India that have mandated that the distribution of public largesse, as a general rule, be undertaken through the competitive bid process, subject to limited exceptions.

The ‘Swiss challenge’ route is also adopted by authorities when proposals are received from potential developers. The evaluation criteria are usually in two broad parts. One set of evaluations is undertaken to select eligible bidders that meet the specified threshold criteria of technical experience, track record of implementation and financial net worth. The second set of evaluations is undertaken to select the successful bidder, which is usually in the nature of financial bid criteria, such as lowest user fee.

Law stated - 09 August 2023

Consideration of deviating proposals

May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

Deviations are typically not permissible in a competitive bid process. Although it is possible for bidders, during the pre-bid consultation stage, to seek clarification and provide input, the government authority does not usually amend the parameters of the bid based on bidder interactions. The government authority may cancel a bid process and initiate a separate bid process if it decides that it needs to amend the scope of the project.

Law stated - 09 August 2023

Unsolicited proposals

May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

Yes. In respect of unsolicited proposals, the government considers alternative procurement options based on induced competition, which is often used with the intent of introducing competitive pressure to the process. The Swiss challenge or margin of preference strategies are used for this purpose, although they are not strictly competitive.

Some states, such as Andhra Pradesh, Bihar, Punjab, Gujarat and Karnataka, characterise unsolicited proposals as direct negotiations. Specific cases may require reference to the individual PPP legislation or policies of the respective states.

Unsolicited proposals for PPP transactions do not usually receive government viability grants or funds.

Law stated - 09 August 2023

Government stipend

Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

No. The cost of participation in projects falls to the bidders. It is not permissible for government authorities to provide any benefit to unsuccessful bidders, nor can they induce bidders through monetary benefits to participate in bid processes.

Law stated - 09 August 2023

Financing commitments

Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

The PPP project structures usually adopted by government authorities place the financing risk on the private sector participant. The private sector participant is required to assess the feasibility and bankability of the project and the project agreements. Once awarded, it is very difficult to restructure or amend project documents.

Law stated - 09 August 2023

Legal opinion

May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

It is not usual for a government authority to take legal opinions on the enforceability of a PPP agreement. It is for the bidders or private sector participants to undertake the legal analysis and obtain comfort regarding the enforceability of the agreements.

Law stated - 09 August 2023

Restrictions on foreign entities

Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

If the sector is open to foreign investment, foreign entities can invest and exercise control over the relevant project company.

India's foreign investment policy presently prohibits foreign investment in only eight sectors. All other sectors permit foreign investment; however, a few sectors still have specified limits to the extent of foreign investment permitted.

Certain sectors do not require any prior approval from the government for foreign investment, while other sectors require prior government approval. For example, publishing newspapers and periodicals dealing with news and current affairs has a foreign direct investment cap of 26 per cent, and any foreign investment requires prior government approval. Foreign direct investment in railways is also limited to permitted activities in which private investment is allowed, that is, construction, operation and maintenance of the following:

- suburban corridor projects through PPP;
- high-speed train projects;
- dedicated freight lines;
- rolling stock, including train sets, and locomotive or coach manufacturing and maintenance facilities;
- railway electrification;
- signalling systems;
- freight terminals;
- passenger terminals;
- infrastructure in industrial parks pertaining to railway lines and sidings, including electrified railway lines and connectivity to a main railway line; and
- mass rapid transport systems.

Law stated - 09 August 2023

DESIGN AND CONSTRUCTION IN GREENFIELD PPP PROJECTS

Form of contract

Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

Indian laws governing PPPs do not mandate a particular form of contract; however, the central government, in particular an independent body known as NITI Ayog that provides policy advice to the government, has formulated model contracts for various sectors that are generally adopted by government entities that receive central government funds. No choice of governing law is provided. Concession agreements for infrastructure projects in India will usually be governed by the laws of India.

Law stated - 09 August 2023

Design defect liability

Does local law impose liability for design defects and, if so, on what terms?

In some laws enacted by different states for regulating PPP projects, an indemnity by the developer against design defects has been specifically imposed, while other state-level laws do not have such a provision. For example, section 66 of the Andhra Pradesh Infrastructure Development Enabling Act 2001 stipulates the following indemnity for design defects:

> *'66. INDEMNITY BY THE DEVELOPER: The Developer shall be bound to indemnify the Government Agency or the Local Authority against any defect in design, construction, maintenance and operation of the Project and shall undertake to reimburse all costs, charges, expenses, losses and damages in that behalf.'*

Law stated - 09 August 2023

Warranties

Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

Under Indian law, there is an implied warranty in a contract of sale that the buyer shall have and enjoy quiet possession of the goods and that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer, or at the time when the contract was made, unless the circumstances of a contract show a different intention (refer to section 14 of the Sale of Goods Act 1930).

There are very limited circumstances where an implied warranty on quality or fitness for a particular purpose is provided (see section 16 of the Sale of Goods Act 1930). These include circumstances such as when:

- the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required to show that the buyer relies on the seller’s skill or judgment and the goods are of a description that falls within the scope of the seller’s business to supply;
- goods are bought by description from a seller who deals in goods of that description; and
- such implied warranty or condition in respect of the quality or fitness for a particular purpose is annexed by the usage of trade.

Law stated - 09 August 2023

Damages for delay

Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Yes, liquidated damages for delay in construction are enforceable against the concessionaire. In some model agreements, there is a requirement on the part of the concessionaire to provide performance security, from which liquidated damages are charged.

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, regardless of whether actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount specified under the contract or, as the case may be, the penalty stipulated under law.

Law stated - 09 August 2023

Indirect or consequential damages

What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

When a contract has been broken, the party who suffers the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him or her thereby that naturally arose in the usual course of things from the breach or that the parties knew, when they made the contract, to be likely to result from breach of the contract.

The general principle with regard to claiming consequential damages by a private party is that the private party is only entitled to recover or claim the part of the damage or loss resulting from the breach by the government (defaulting) party that were, at the time of execution of the contract, reasonably foreseeable as liable to result from the breach.

The damage or loss that is reasonably foreseeable would, among other things, depend on the knowledge possessed or shared between the parties in the ordinary course; however, regarding 'special circumstances', which are outside the purview of the ordinary course, the defaulting party should be aware of the special circumstances that would result in consequential losses for the non-defaulting party at the time of executing the contract.

Law stated - 09 August 2023

Non-payment

May a contractor suspend performance for non-payment?

The obligation to perform any work and the obligation to make payments as agreed are considered reciprocal promises. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order, and where the order is not expressly fixed by the contract, they shall be performed in the order that the nature of the transaction requires.

When a contract comprises reciprocal promises of which one cannot be performed, or its performance cannot be claimed until the others have been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise and must compensate the other party to the contract for any loss that the other party may sustain by the non-performance of the contract; therefore, if payment has not been made in accordance with the terms of the contract, the contractor has the right to suspend performance of its relevant obligations.

Law stated - 09 August 2023

Applicable clauses

Does local law restrict 'pay if paid' or 'paid when paid' clauses?

Indian law does not restrict 'pay if paid' or 'paid when paid' clauses in contracts between entities; however, it does not enforce nor recognise such provisions in relation to mandatory payments to be made to workers under applicable labour laws (eg, in relation to workers' minimum wages and payment of wages to contract labour).

Law stated - 09 August 2023

Are 'equivalent project relief' clauses enforceable under local law?

There is no limitation for parties to expressly agree to and provide for equivalent project relief clauses; however, such clauses must be expressly provided for and will not be inferred merely on the basis of general words, such as 'back to back'. The provision must be sufficiently clear on the intention of the parties to deviate from the general covenant that there is a distinct and separate relationship between the main contract and the subcontractor.

In the absence of a clear covenant in the main contract to the contrary, the rules in relation to privity of contract mean that the jural relationship between the employer and the main contractor on the one hand and between the subcontractor and the main contractor on the other will be quite distinct and separate.

Law stated - 09 August 2023

Expansion of scope of work

May the government party decide unilaterally to expand the scope of work under the PPP agreement?

PPP contracts typically have a provision relating to change in scope that would govern the possible expansion of the scope of work under a PPP project. In the absence of a clear provision governing change in scope, the government party will not have an enforceable right to unilaterally change the scope of work.

In certain PPP agreements, the governing statute regulating the development of the relevant infrastructure may vest a statutory right with the government agency to require additional works to be undertaken in specific circumstances; therefore, it is critical to evaluate the governing statutory law of the relevant sector in which the PPP work is intended to be undertaken.

Law stated - 09 August 2023

Rebalancing agreements

Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

There is no law entitling a party to rebalance or set aside an unduly burdensome PPP agreement unless it falls under the general law of frustration of contracts; however, PPP agreements usually have force majeure provisions that contractually enable suspension of obligation if performance is affected by identified force majeure events. Most force majeure provisions provide for termination in the event of prolonged force majeure events.

Law stated - 09 August 2023

Lien laws

Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

Although statutory liens (eg, taxes and workers' compensation) are not capable of being contractually excluded, such liens relate to and attach only to the property of the relevant entity and the work it is undertaking for another authority. Since PPP projects are developed by an entity for a government or statutory authority, these will not be considered as assets of the relevant PPP contractor.

PPP arrangements will usually have a clear demarcation on vesting of title and a demarcation of project assets as distinct from contractor assets, which would prevent the statutory lien applicable on a contractor from being claimed in relation to assets of the underlying PPP project.

Law stated - 09 August 2023

Other relevant provisions

Are there any other material provisions related to design and construction work that PPP agreements must address?

The statutory framework governing the relevant project must be reviewed to assess if specific aspects or obligations need to be addressed. Generally, matters that should be covered by the PPP agreement are aspects relating to land availability, ingress and egress from the project site, acquisition and vesting of the project site, possession and security of the project site, usage of land during the concession period, the process for approval of design and verification of construction and compliance with applicable laws and standards and commissioning of the project.

Law stated - 09 August 2023

OPERATION AND MAINTENANCE

Performance obligations

Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

In a PPP arrangement, the obligations of the private party to the PPP arrangement are governed by applicable laws and regulations and the framework created by the contracts comprising the PPP arrangement. The PPP agreement will usually provide references to the standards and codes that the facility must comply with, or the same would be prescribed under applicable regulations.

Law stated - 09 August 2023

Failure to maintain

Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

The governing framework relating to the operation and maintenance of a PPP project will be based on the contractual provisions. There is no statutory framework imposing liability on failure to meet operation and maintenance standards other than the general law applicable to damages; however, in the event that an infrastructure facility is notified as an essential service, it will be mandatory to ensure its continued operation and not voluntarily cease services.

Law stated - 09 August 2023

Refurbishment of vacated facilities

Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

The governing concession agreement provides the framework that governs the mechanism for handing back the facility to the government authority, including the standard of its maintenance. In the absence of a detailed framework in the PPP agreement, the general law applicable to bailment may be applicable, under which the general obligation is to return the goods bailed upon the expiry of the period of bailment.

Law stated - 09 August 2023

RISK ALLOCATION

Delay

How is the risk of delays in commercial or financial closing customarily allocated between the parties?

The risk of achieving financial closure is vested with the concessionaire, and the concessionaire is required to submit a bank guarantee for the purpose of securing the discharge of the obligations of the concessionaire.

Law stated - 09 August 2023

How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The obligation of obtaining relevant approvals is the primary responsibility of the private party. In certain cases, at the time of executing the concession agreement, the government entity may have already obtained a number of clearances, which are then identified in the concession agreement.

Law stated - 09 August 2023

Force majeure

How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties’ control or is it defined with reference to specific enumerated events?

The treatment of force majeure and geotechnical environmental and weather risks is under force majeure provisions. The concession agreement usually has an elaborate force majeure provision that allows for the suspension of obligations for the duration of the force majeure, as well as until the effect of the force majeure is overcome; however, this is dependent on specific provisions of the relevant concession agreement.

Prolonged force majeure results in termination of the concession agreement. Termination on account of prolonged force majeure would usually result in the transfer of the project to the government agency, with no additional compensation to the PPP concessionaire. The government entity may take over the loans from lenders associated with the relevant project on a case-to-case basis.

Law stated - 09 August 2023

Third-party risk

How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Under PPP agreements in India, risk distribution is usually as follows:

- land acquisition and land access-related risks are assumed by the government agency for the identified land comprising the project site; and
- all other aspects of construction, approvals, workers and third-party liability are vested with the concessionaire.

Law stated - 09 August 2023

Political, legal and macroeconomic risks

How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The model concession agreement usually provides the following.

- Political and legal risks are covered under ‘political events’ of the force majeure provisions.
- Upon the occurrence of a political event, all force majeure costs attributable to the event will be reimbursed by the government party.
- Regarding changes in the law, the private party is entitled to compensation for qualifying changes in the law or fundamental change in law.
  - Regarding qualifying changes in the law, the private party is only entitled to relief that is reasonable for the change. The increased costs must be directly attributable to the change. Any disputes regarding such attributability of costs will be resolved through the dispute resolution mechanism provided in the agreement (conciliation, arbitration, etc). The private party is then expected to bear all costs resulting from any one or more qualifying change in law events up to an aggregate amount equivalent to 0.5 per cent of the total bid project.
  - A fundamental change of law must cause a material adverse effect despite the private party taking reasonable measures to mitigate the damage caused. Upon notifying the government party, it could agree to amend the agreement. If no agreement is reached within 90 days, the private party can ask the government party to pay an amount equivalent to 50 per cent of the additional cost as determined or certified by the authority or state government based on the facts and circumstances and verification of information submitted by the private party.

Law stated - 09 August 2023

Mitigating events

What events entitle the private party to extensions of time to perform its obligations?

The model concession agreement usually provides for a time extension on account of force majeure events or a change in scope issued by the government authority.

Law stated - 09 August 2023

What events entitle the private party to additional compensation?

The model concession agreement usually provides for the ability of the concessionaire to claim additional compensation in the event of a change in scope issued by the government authority or certain identified categories of force majeure events (including political events) or owing to a change in law.

Law stated - 09 August 2023

Compensation

How is compensation calculated and paid?

The terms of additional compensation, in relation to the identified events that enable the claim, will depend on the specific governing framework.

In the case of additional compensation arising on account of a change in scope, the compensation would be mutually agreed based on compensation for the works involved.

In other events, such as those identified as force majeure or change in law, there is a limitation on the extent of the additional compensation under the model concession agreements.

Law stated - 09 August 2023

Insurance

Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

Most model concession agreements require the concessionaire to effect and maintain at its own cost, during the agreement period, insurance for:

- all sums that may be required under the agreement;
- applicable laws;
- such as may be necessary or prudent in accordance with good industry practice; and
- mitigation of the risks of acts or omissions of the private party.

The government party is usually co-insured in the same insurance cover.

If the concessionaire fails to obtain insurance, the concession agreement usually provides an option for the government to keep in force the insurance and pay the premiums and recover the costs thereof from the private party.

Law stated - 09 August 2023

DEFAULT AND TERMINATION

Remedies

What remedies are available to the government party for breach by the private party?

The government party has the following options in the event of default by the private party:

- temporary suspension of the concession and takeover of the project;
- termination and takeover of the project; and
- replacement of the concessionaire by allowing project lenders to select a replacement to the defaulting concessionaire and, upon failure of project lenders to replace the defaulting concessionaire, to terminate the PPP arrangement.

Law stated - 09 August 2023

Termination

On what grounds may the PPP agreement be terminated?

Grounds for termination of a PPP agreement include default by the private party and the government party.

Private party defaults include:

- defaults in payments;
- material breaches of maintenance requirements or safety requirements;
- a material adverse effect resulting from a material breach of any of the project agreements by the operator;
- a change in ownership in breach of the relevant clause governing it;
- material adverse effects resulting from the transfer of rights, obligations or assets;
- bankruptcy or insolvency, or the appointment of a trustee or receiver for the private party;
- amalgamation or reconstitution of the private party that could cause material adverse effects; and
- any representation or warranty that is found to be materially false.

Government party defaults include:

- the government committing a material default while complying with any of the provisions of the agreement and the default having a material adverse effect on the private party;
- failure to make any payment to the operator within the period specified; and
- the government repudiating the agreement or otherwise taking any action that amounts to or manifests an irrevocable intention not to be bound by the agreement.

Law stated - 09 August 2023

Is there a possibility of termination for convenience?

The model concession agreements do not typically provide for termination for convenience. However, the Model

Concession Agreement of BOT (Toll) Project released on 26 May 2023 provides for mutual foreclosure of the agreement in two categories:

- foreclosure with mutual consent without any liability or consequential future liability of either party; or
- foreclosure with mutual consent with compensation to concessionaire including pending settlements or claims.

Law stated - 09 August 2023

If the PPP agreement is terminated, is compensation available?

The model concession agreements provide for the following compensation framework in the event of termination:

- termination due to force majeure events;
- non-political events – the government makes a termination payment to the operator in an amount equal to 90 per cent of the debt due minus insurance cover;
- indirect political event – the government makes a termination payment to the operator in an amount equal to:
  - the debt due minus insurance cover, provided that if any insurance claims forming part of the insurance cover are not admitted and paid, 80 per cent of the unpaid claims shall be included in the computation of the debt due;
  - 110 per cent of the adjusted equity; and
  - an amount equivalent to the additional termination payment minus insurance cover, provided that if any insurance claims forming part of the insurance cover are not admitted and paid, 80 per cent of the unpaid claims shall be included in the computation of the amount payable; and
- political event – the government makes a termination payment to the operator in the amount that would be payable had it been an authority default.

Law stated - 09 August 2023

FINANCING

Government financing

Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

The government has limited funding schemes for PPP projects, which are in the nature of viability gap funding for projects that meet the criteria of requiring certain funding to make them viable, while at the same time being strategically important.

Other than viability gap funding indirectly through various public sector banks and financial institutions, funding is provided for the infrastructure sector as each bank and financial institution is required to ensure that a certain percentage of its debt financing is given to infrastructure sector projects. The government has created specific institutions for infrastructure funding, such as the National Investment and Infrastructure Fund.

The government launched the National Infrastructure Pipeline (NIP) in 2020 with projected infrastructure investment of around 111 trillion rupees during the 2020–25 financial years to provide high-quality infrastructure across the country. PPP has been identified as a valuable instrument to speed up infrastructure development and investments envisaged under the NIP. As of January 2023, the NIP has 8,964 projects with a total investment of more than 108 trillion rupees under different stages of implementation.

On 3 November 2022, the government of India introduced the India Infrastructure Project Development Fund Scheme

(IIPDF Scheme) to support the central and state governments and local bodies through financial support for project development activities for PPP projects, such as feasibility reports, project structuring, legal reviews and development of project documentation. The IIPDF Scheme has an outlay of 1.5 billion rupees for a period of three years from the 2023 financial year to the 2025 financial year. Funding under the IIPDF scheme can be availed to finance the cost of consultants and transaction advisors on a PPP project. Ordinarily, under the IIPDF Scheme, up to 75 per cent of the project development expenses will be provided, and on successful completion of the bidding process the project development expenditure would be recovered from the successful bidder.

Law stated - 09 August 2023

Privity of contract

Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Yes, the model concession agreements provide for direct agreements and tripartite agreements, with project lenders being given step-in rights in the event of the concessionaire's default and to prevent termination for the concessionaire's default.

Law stated - 09 August 2023

Step-in rights

Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Yes, model concession agreements provide for a direct agreement enabling step-in rights for project lenders. Further, PPP agreements are usually hypothecated in favour of a security trustee.

Law stated - 09 August 2023

Cure rights

Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

Yes, this is accorded under the direct agreement providing for step-in rights.

Law stated - 09 August 2023

Refinancing

If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

No.

Law stated - 09 August 2023

GOVERNING LAW AND DISPUTE RESOLUTION

Local law governance

What key project agreements must be governed by local law?

All project agreements are governed by the law. The proper laws, under general Indian law, that governs agreements relating to the development of infrastructure projects in India are the laws of India.

Law stated - 09 August 2023

Government immunity

Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

PPP agreements are treated as commercial agreements, and sovereign immunity does not apply.

Law stated - 09 August 2023

Availability of arbitration

Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

Yes. Model concession agreements prescribe a distinct conciliation phase for disputes. If the dispute is not settled through conciliation within a specified period, arbitration under the Arbitration & Conciliation Act 1996 is prescribed.

Law stated - 09 August 2023

Alternative dispute resolution

Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

Yes, most model concession agreements require the parties to amicably resolve any disagreements through mediation and conciliation before proceeding to arbitration.

Law stated - 09 August 2023

Special mechanisms

Is there a special mechanism to deal with technical disputes?

Model concession agreements provide for oversight by an independent engineer during the construction phase. It also contemplates certain identified technical disputes to be settled through determination by an expert; however, there is no general requirement under Indian law for settlement of technical disputes through an expert body.

Law stated - 09 August 2023

UPDATE AND TRENDS

Key developments of the past year

What are the current issues of note and trends relating to public-private partnerships in your jurisdiction? Are there any identifiable trends in the financing of PPP projects in the jurisdiction?

The government is actively seeking to hand over the development of infrastructure to the non-government sector on a PPP basis. Government policy has consistently been to promote participation of the private sector in infrastructure development. To this end, the government has introduced the India Infrastructure Project Development Fund Scheme to provide funding to finance the cost of consultants and transaction advisors on a PPP project, and also released new model concession agreements for PPP in storage of food grains, and for BOT (Toll) projects. The Union Budget 2023–24 proposed that coastal shipping will be promoted as the energy-efficient and lower-cost mode of transport, for both passengers and freight, through the PPP mode with viability gap funding. It is reported that the Ministry of Ports, Shipping, and Waterways has constituted a high-level committee for drafting revised guidelines for the operationalisation of Ro-Ro and Ro-Pax ferry services. The committee would simultaneously draft a Model Concession Agreement for Ro-Ro and Ro-Pax terminal operators and a Model Licence Agreement for the operation of Ro-Ro, Ro-Pax and fast passenger ferries.

Law stated - 09 August 2023

Jurisdictions

China	Shanghai JianLingChengDa Law Firm
Ghana	AB & David Law Affiliates
India	Clarus Law Associates
Japan	Mori Hamada & Matsumoto
Mexico	Galicia Abogados SC
Pakistan	RIAA Barker Gillette
Panama	Ivette Martinez Attorney at Law