Confederation of Indian Industry

POLICY watch

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Focus: Liquidity Crisis and Dispute Resolution in the Infrastructure Sector

The infrastructure sector in India is traversing through one of its most challenging phases. An acute liquidity crisis has gripped the sector, pulling down its overall growth prospects.

While banks (both public and private) are taking a cautious approach towards fresh funding in the infrastructure sector, private sector investments, too, are witnessing a major slowdown. This, coupled with mounting number of arbitration matters have hampered growth, causing unnecessary lock up of working capital.

After a boom in the late 1990s and early 2000 - which was based more on speculation and optimism rather than taking the actual industry fundamentals into account - several projects have been put on the backburner over the past few years.

Today, half of the country's PPP projects are under stress – be it for delay in land clearances, escalation in project costs or developers unable to fund equity.

Current PPP contracts are not responsive to externalities that impact long-term concession frameworks such as change in law, demand risk and cost overruns arising from delay grant of approvals, payments, right of way, etc. Both public and private sectors are affected by these externalities.

In view of the aforesaid, it is important to recognize the need for flexibility in infrastructure contracts and incorporate a section on contract reset framework in new as well as all ongoing contracts through a standard amendment based on discussion with stakeholders. Besides, there is also an ardent requirement for national baseline jurisprudence and economic approach for infrastructure regulation and development by sectoral regulators.

In course of a survey conducted by CII, it has become evident that India is facing a deficit of at least USD 70 billion per annum in infrastructure financing. Add to that, there are over 1.8 lakh cases pending with six tribunals dealing with key sectors such as telecom, electricity, consumer disputes, taxes and environmental matters, which signify the delay in resolving contractual disputes and arbitration matters.

The brighter side to this is that most of the projects that are stuck for various reasons remain economically viable.

Road Ahead

In this context, it becomes imperative to adopt measures and establish a framework that will enhance investor confidence, unclog resources, increase investments and quicken decision-making by untangling institutional conflicts. Even a 1% increase in physical infrastructure in the country has the potential to raise India's GDP growth by as much as 1-2%.

CII is undertaking active policy advocacy work to improve productivity and cash flows to provide a much-required breather to the infrastructure sector.

Currently, the legislative framework seeks to put a balance between viability and affordability but that's clearly not enough as implementation in certain areas remains a challenge, affecting cash flow and productivity.

It may be noted that as per the annual report of 2017-18, the contingent liability against capital works in 2017-18 for 14 major Public Sector Undertakings (PSUs) and Government agencies stood at around Rs 89,391 crore.

To sum up, the infrastructure sector is in an urgent need for attention and policy relief to address the funding needs of the sector. This is of paramount importance now for India's economic growth to ease the stress on availability of working capital with the concessionaires. ■

Chandrajit Banerjee
Director General
Confederation of Indian Industry

Inside this Issue

Easing Enforcement of Contracts in India: The Specific Relief (Amendment) Act, 2018

The Ease of Doing Business in India

In a gratifying development, India leapt 23 places to rank 77 out of 190 countries in the World Bank's Ease of Doing Business rankings for 2019. This improvement comes as a timely endorsement of recent reform initiatives, particularly given doubts over India's commitment to fostering economic growth in the wake of the disruptive effects of demonetisation and the new indirect tax regime.

While the improvement is encouraging, some sobering realities need to be acknowledged. First of all, given that India is the world's sixth-largest economy in GDP terms, there is much room for improvement. Secondly, India is ranked an abysmal 163 on enforcement of contracts (with an improvement of only one rank over the previous year). Thirdly, disputes in India take nearly four years to be resolved, compared to 164 days in Singapore and 400 days in Indonesia, Vietnam and Malaysia.

In the context of the infrastructure sector, the last two trends are particularly worrying, since the sector continues to be plagued by disputes and delays. Against this backdrop, some recent and ongoing initiatives hold out the promise of bettering conditions in India – the new insolvency regime, designation of special courts for commercial matters, amendments to the arbitration laws, and the amendments to the Specific Relief Act, 1963 (Act).

New Insolvency Regime

With the view to improving the ease of doing business and facilitating more investment, the Government enacted the Insolvency and Bankruptcy Code (the IBC) in 2016. The IBC, inter alia, provides for a consolidated time-bound mechanism for reorganisation and insolvency resolution, and designates the National Company Law Tribunal and Debt Recovery Tribunal as adjudicating authorities for resolution of insolvency, liquidation and bankruptcy.

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The rationale behind the IBC is that easy exit is essential to ease of business. The IBC has for once brought the concept of 'time value of money' to the forefront of how authorities deal with bad debts.

Amendments to Arbitration Law

In 2015, the Arbitration and Conciliation Act, 1996 was significantly amended to make arbitration more cost-effective, more user-friendly and the preferred mode of dispute settlement. The changes include time limits for making arbitral awards, fast-track procedures for resolving disputes, measures to ensure no conflicts of interest on the part of arbitrators, a comprehensive costs regime to avoid frivolous litigation/ arbitration, and the empowerment of arbitral tribunals to grant interim measures.

Now with a view to further improve the arbitration environment in India, a fresh amendment is pending passage in Parliament whereby, inter alia, the Arbitration Council of India is sought to be established with a view to promoting institutional arbitration in India.

Commercial Courts

In 2015, the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Courts Act, 2015 (Commercial Courts Act) was enacted to make litigation concerning commercial disputes (arising from investment agreements, supply contracts, distribution agreements, et. al.) faster, and more efficient. The Commercial Courts Act contemplates a two-tier institutional framework. At the first instance level, it envisages commercial courts and a commercial division in High Courts with original civil jurisdiction to deal with commercial disputes of a specified value. At the appellate stage, it envisages a Commercial Appellate Divisions in High Courts to hear appeals against decision of the aforesaid commercial courts and commercial divisions.

The new dispensation, being time-bound, is expected to aid in bringing certainty to conclusion of disputes. To further strengthen this framework, an ordinance has been promulgated whereby (a) the threshold value of a commercial dispute has been reduced from Rs 10 crore to Rs 3 lakh, and (b) pre-institution mediation will be introduced in cases where urgent/ interim relief is not contemplated.

Amendments to Specific Relief Act

More recently, the Specific Relief (Amendment) Act, 2018 (the Amendment Act) was introduced with the objective of bringing the Act in tune with the rapid economic growth in India, and the need to expand infrastructure activities for overall development. Some of the key changes brought about by the Amendment Act, which came into effect in October of 2018 are recounted below.

First, specific enforcement of contracts was hitherto available only if monetary compensation was inadequate or could not be easily ascertained. The Amendment Act reverses this position – specific performance is now the rule, with only limited exceptions (e.g. if the applicant has violated any essential terms of the contract, or has acted fraudulently, or subverts the contract, or is unable to prove they are ready to perform their obligations). This change can enable easier, efficacious and timely enforcement of contracts by ensuring that paying damages

Source: MuchMania

for breaching commitments is not an easy escape for unscrupulous players.

Secondly, if a contract is breached due to non-performance, the counterparty may substitute said performance through a third party or its own agency and recover from the defaulting party the costs incurred in this respect. This right is subject to the parties agreeing otherwise and does not preclude claims for compensation from a defaulting party for such breach. This dispensation for substituted performance – in a legal eco-system that is otherwise generally geared towards judicial remedies – can aid quicker and more practical remedies.

Thirdly, new mechanisms are in place specifically for contracts relating to infrastructure projects, which are defined by reference to the sectors set out in the schedule to the Amendment Act (transport, energy, water and sanitation, communication, and social and commercial infrastructure). Courts cannot grant injunctions in suits involving such contracts if such injunction would delay on impede progress or completion of such project. State Governments are required to designate one or more Civil Courts as special courts for suits under the Act in respect of contracts relating to infrastructure projects. Further, suits under the Act are to be disposed of within twelve months from date summons are served (with a maximum extension of six months for reasons recorded in writing).

Fourthly, courts are now empowered to take recourse to experts if it is considered necessary to assist on any specific issue. Due process of sharing such expert testimony with parties to proceedings and of testing it has been also provided for.

Many a mile before we sleep...

The reforms are laudable efforts that showcase the intent to streamline contract enforcement and dispute resolution processes. However, as with any reform initiative, a lot depends on how effectively they are implemented and taken forward – the process of reform is not a one-time affair but a continuum. The stage is now set for the Government and judiciary to determine how best to translate these initiatives into successful action.

The changes introduced by the above reforms are intended to have far reaching impact on improving resolution of disputes and enforcement of contracts in India. There remains pressing concerns over the growing disconnect between intent and implementation in terms of policies. While the legislative framework intends to balance between viability and affordability, implementation is found lacking thereby affecting cash flow and delaying resolution.

Take arbitration awards, for example. Experience shows when an award is not in favour of the Government/authority, such authority inevitably challenges the same, often on untenable and baseless grounds. The Government has directed that, pending the outcome of any challenge, 75% of the award amount must be paid out to the contractor/concessionaire subject to the contractor/concessionaire furnishing a bank guarantee for this amount. This bank guarantee is ordinarily being provided by banks margin-free. However, in practice, Governments/authorities are demanding bank guarantee for the interest portion, which banks are unwilling to provide.

The constitution designation of special courts to deal with infrastructure contracts under the Amendment Act, and the constitution of commercial courts under the Commercial Courts Act offer another example where intent and practice may not coincide – regardless of how well-intentioned and thought out this move may be, it will not be fully realised unless courts are staffed with sufficient and suitably experienced judges. Otherwise, the reform will fall by the wayside, as it would merely end up burdening an already harried judiciary.

The teething troubles faced in effectiveness in implementation of the IBC are instructive. In two years, serious issues like the imbalance of power amongst creditors, gaming in bid processes, delays and vacancies have reached worrisome levels. The failure to adhere to timelines has put the credibility of time-bound resolution at risk – with over 10,000 pending cases, the National Company Law Tribunal only has 28 members against a sanctioned capacity of 62. Over 48% of corporate insolvency cases have breached the 180 day timeline (and 29% the extended 270 day timeline). ■

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Reforming Contract Enforcement and Dispute Resolution is Key to Unshackling India

If India is to become the third largest economy in the world by 2028, a mere decade from today, dispute resolution and contract enforcement would need very radical improvement. In the World Bank's Ease of Doing Business index, India has shown great improvement to rank 77 in 2018 from 142 in 2014. However, contract enforcement was India's worst parameter in both 2014 and 2018.

India's 2018 contract enforcement rank is 163 out of 190 countries, the lowest among G-20 countries. While India has introduced a time limit of 12 months on arbitration, appeals against arbitral awards in High Courts and Supreme Court take years, if not decades, to finally get concluded. Lack of contract enforcement and dispute resolution is hurting both, the Government and businesses in India, especially MSMEs.

Government officials often overlook the sanctity of contract, and seldom make payments as per contract, especially for claims and disputes, until a long-winding court battle is settled. Similarly, the private sector's cost of doing business increases since contract non-enforcement costs are factored in upfront. Further, in public procurement, gaming the system by unscrupulous bidders is widespread - bid to win, then renegotiate without fear of penalty. This makes it difficult for ethical companies to compete, and produces undesirable outcomes. Indeed, the much-lamented corruption in India is a direct consequence of lack of contract enforcement.

In Government procurement, there are numerous instances where contracts see lack of performance from the counterparties. In most G-20 countries, Government authorities would invoke damages for non-performance and go for a fresh procurement process. This seldom happens in India, for the real risk of getting stuck – the counterparty would take the dispute to court, the matter would remain in suspended animation and procurement would not happen. Instead, the authority pragmatically prefers to somehow work with the underperforming counter party, hoping for acceptable outcomes.

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Delhi's poor air quality is in part due to lack of contract enforcement. Under a Supreme Court-monitored process, the Kundli-Manesar-Palwal expressway was awarded in 2006 and construction started. However, when work ground to a halt, it took over six years for the Government authority to terminate the contract and award the project to another bidder. The project was finally inaugurated in November 2018, and will divert trucks going through Delhi city, improving air quality. But every Delhi resident suffered air pollution for a decade because contract enforcement was delayed.

The Mumbai Trans-Harbour Link bridge would connect the island city to the mainland, leading to many positive outcomes. However, when the project was bid out in 2005, one consortium went to court against being disqualified, while another consortium submitted their bid that was opened and disclosed. After a long process, the disqualified consortium was allowed to submit its bid, an extremely aggressive number. Instead of enforcing contract conditions, the Government authority preferred to cancel the entire bid process. At long last, the project has now been awarded.

In Chennai, a third desalination plant was bid out, but a bidding party went to the High Court, which stayed the bidder prequalification process for three years. After the court cleared prequalification in 2018, another bidder went to court seeking disqualification of a competitor. There will be undue delay in good water availability for Chennai residents.

National Highways Authority of India (NHAI) enters into a contract called concession agreement (CA) with a private partner called concessionaire, to develop a highway. If there is a termination of contract, NHAI is required under the CA to pay the debt due to bankers within a specified time period. However, this termination payment is almost never seen in practice. NHAI takes the termination dispute into arbitration, and the bank loan proceeds, in stately fashion, towards being classified as NPA.

The Chennai-Tada Tollways Ltd (CTTL) project was awarded in November 2007 after a competitive bid by L&T IDPL. The CA was signed in June 2008 between NHAI and the SPV, CTTL. Loans for CTTL were tied up with IDBI Bank as the lead in a four-bank consortium. Construction started in April 2009, and work completed on all available right of way (land) within the specified 30 months. However, even after six years, 30% of land was not made available by NHAI. This was a condition precedent in the CA, and should have happened by July 2009. Hence the project was terminated in June 2015 and handed over by CTTL to NHAI. After termination, toll is being collected by NHAI and being deposited with IDBI Bank.

However, since NHAI did not abide by the contract condition for making termination payment, IDBI Bank tagged CTTL as a defaulter, for no fault of the concessionaire. Further, the SPV and its holding company suffer reputational loss, as also potential consequences of debarment for acquiring fresh assets under various provisions. Arbitration in this instance is ongoing, and an award may come by May 2019, for a project terminated in June 2015. However, this would almost certainly be appealed against in the High Court, and further in the Supreme Court – a dispute that may not be finally resolved even till 2028.

Indian Government and businesses, especially its legal ecosystem, need to urgently transform contract enforcement and dispute resolution processes, so that all commercial disputes may be resolved within one year at most, including hearing of appeals and final disposal. There are many global best practices, and several professionals who could be roped in to make this happen, if India is serious about its aspirations of becoming the third largest economy by 2028. ■

Key CII Recommendations for Liquidity Crisis and Dispute Resolution in the Infrastructure Sector

Issue	CII Recommendations	Expected outcome post Government intervention
Infrastructure Financing		
Enhancing long term financing sources: India faces a deficit of atleast USD 70 billion per annum (2015 prices) in infrastructure financing.	• Allow infrastructure companies, public and private, to issue tradable zero coupon, long-term, tax-free infrastructure bonds based on strict credit rating criteria by bringing an amendment to Section 10, clause 15 (iv) (h) of IT Act. • Create a dedicated window for infrastructure (say 10%) within the overall ceiling for Foreign Portfolio Investors in corporate bonds. • Develop 'India Infrastructure' – a Rs 500 billion Credit Guarantee and Low Interest Long Tenure Government Loan Scheme by leveraging Government's budgetary resources.	The measures will enable channelization of domestic and household savings towards infrastructure and incentivize long-term capital i.e. pension funds, sovereign wealth funds and insurance companies to invest in infrastructure. They will also enhance funding for viable infrastructure projects by credit enhancement, takeout finance and other alternative financing mechanisms.
Financing urban infrastructure: Indian cities have large infrastructure deficit and rank low on global lists. Urbanization is expected to continue increasing the demand for urban infrastructure such as roads, metros, waste management facilities and water supply.	• Enact legislation for implementing City Tax for Infrastructure Enhancement (CITIE). • Link availability of central funds for urban projects under Smart City, AMRUT, etc. to raising ULB own resources. • Implement the Value Capture Financing Policy that has already been approved. • Require all ULBs in cities with more than 1 million population to enhance credit rating and issue municipal bonds.	The proposed measures will make it possible to raise Rs 100 billion per annum through such a city tax based on property ownership. They will also incentivize ULBs to raise own resources through rationalization of property taxes and other service fees, and enhance investor confidence through rating and institutional discipline in collecting due revenues.
Alternate framework for stressed assets: A host of projects are under stress due to reasons beyond their control. Most remain economically viable though they face temporary cash flow issues. Scrapping or liquidation is economically and socially sub-optimal given gross infrastructure deficit across the country.	• Create sector specific asset reconstruction companies as done in Sweden. • Realign legacy contracts with current policy and regulatory framework. • Revisit tenure and terms (interest rates etc.) for all infrastructure loans. • Government support through infusion of equity (on selective basis) and other mechanisms such as extending the tenure of contracts or counter guarantees. • Provide debt servicing moratorium and workout period of 18 months to resolve problems.	These measures will: • Retain economic value and minimize damage to investors. • Maintain operation and maintenance of key services with no or few alternatives • Address issues in contracts emanating from policy and regulatory issues. • Protect early investors and projects against losses to ensure continued interest. • Reduce losses for banks and further increase in NPAs.

Issue	CII Recommendations	Expected outcome post Government intervention
Enhancing liquidity: Lack of liquidity due to PCA framework of RBI and lack of timely payments by Government agencies are major reasons for cash flow constraints.	• Enhance opportunities for refinancing, takeout finance and credit enhancement by expanding capital base and operations of IIFCL and NIIF. • Government should provide a mechanism for automatic and fast settlement of payments by entities such as ULBs, DISCOMs etc. • A legislation may be enacted for automatic payment of interest on pending invoices beyond a specified period (say 30 days). • Resolution of stressed assets in the light of the Revised Framework issued by RBI vide Circular dated 12/02/2018 should be encouraged to overcome the liquidity crunch being faced by the infrastructure industry. Keeping this in mind, DFS and the Finance Ministry have asked the Indian Banks Association (IBA) to come out with a workable solution. The Inter-creditor Agreement has been signed by the stakeholders under project 'Shashakt'. Under this proposed scheme, 66% of creditors are required to approve the RP, similar to IBC. This should be implemented smoothly. • Adoption of ICC Uniform Rules for Demand Guarantees (URDG) 758 for Demand Guarantees. URDG 758 was officially endorsed by the UN Commission. Implementation of URDG 758 for issuance of Bank Guarantees will require intervention of DFS. Bankers are keen and ready to introduce URDG 758 and the respective bank boards have also approved implementation. A circular from DFS in this regard will bring India on par with international practice. This will restrict illogical and unfair encashment of the BGs by its cash starved beneficiaries having malafide attention.	• This intervention will help enable working capital for projects to continue operations while the restructuring plan is being prepared and negotiated since delayed payments create financial distress for the concessionaires and directly hit their profitability. • It will incentivize timely payment and reduce creation of new stressed assets and enhance transparency.
Alternative financing: There is huge dependency on commercial banks for PPP financing in India. These banks reach their corresponding exposure limits for the sector and run with high levels of NPAs. Also, loans from financial institutions are usually on higher debt servicing costs during the initial phases of project. Authorities such as RBI and SEBI could consider creating better structure for enabling long-term project financing across the asset life.	• Alternative sources of financing need to be recognized and considered for easing pressure on banks and financial institutions. This can be achieved by deepening the capital markets by issue of different types and structure of bonds – for instance zero coupon bonds. • Authorities may also intervene through various measures such as: credit enhancement measures; further liberating ECB policies in terms of land use; allowing participation of NBFCs in funding projects and allowing creation of securities in respect of the same; and infrastructure and debt funds.	Bonds (especially zero coupon bonds) can be a useful source of long-term capital particularly during the construction phase when the project has not yet started generating any cash flows. Once the project is operational, the bonds can be retired and the concessionaire can avail new debt at lower costs. Loans of senior lenders can also be restructured to be repaid prior to the maturity of the bonds.

Issue	CII Recommendations	Expected outcome post Government intervention
Group tax relief: Currently, every project under an infrastructure company (mostly registered as an SPV) is treated as a separate entity and the performance of one such operation is independent from that of the other. There are taxable profits in certain SPVs and losses or unabsorbed depreciation in others, leading to different tax outgo in different subsidiaries.	There should be a provision for infrastructure companies to consolidate profits and losses in all their subsidiaries and pay taxes as a single entity. All infrastructure companies should be allowed to consolidate their SPVs.	The measure will bring much relief to the ailing infrastructure sector and help companies that are struggling to service their existing debt.
Dispute Resolution and Judicial		
Renegotiation of contracts: Current PPP contracts lack provisions for re-negotiating their terms.	• Recognize the need for renegotiation in infrastructure contracts. Given their long-term nature, they are fundamentally incomplete contracts. Incorporate a section on renegotiation in new as well as all ongoing contracts through a standard amendment based on discussion with stakeholders. • Expand institutional capacity by increasing the number of existing benches of various commercial courts and benches of arbitration panels; create subject matter and stage-specific benches wherever possible. • Establish timelines for resolution of cases and institutionalize periodic performance review.	These measures will reduce the time taken to resolve disputes and improve productivity and cash flows. They will also help prioritize management attention on operations and customer service rather than dispute resolution, while facilitating faster resolution and unlocking of stuck capital. Specialized knowledge will enable increasing credibility and better decisions considering the long-term view of the sector. Performance review will incentivize timely resolution of cases.
Sector specific concessions: The terms and conditions of the concession agreements across various sectors / industries are common and in many cases identical to each other as the model concession agreement prescribed by the Government have been applied to the same. Thus, project-specific risks do not get addressed and lead to implementation as well as contractual issues and disputes with the concessionaires. Due to this, prospective bidders are seen to request numerous modifications to the terms to the concession agreement which is often seen by the bidding authority as requests for substantial change.	The draft concession agreements which are usually floated with bid documents should be appropriately modified keeping in mind the industry as well as the factual issues pertaining to the specific project.	The negotiations on the terms of the concession agreements during the bid stage would be minimal and would lead to lesser litigations/ disputes among stakeholders.

Issue	CII Recommendations	Expected outcome post Government intervention
Allocation of risks: The terms of concession and allocation of risk between the authority and the concessionaire / EPC contractor in a concession are usually very onerous and inequitable, with negligible consequences for non-performance on the part of the authority, which leads to disputes. For instance, in the event of delay in performance of the contract or meeting a project milestone by the concessionaire, the contractor is liable for payment of liquidated damages to the authority. On the other hand, the timelines for performance of obligation on the part of the concessionaire are merely extended but no liability for payment of monetary compensation by the authority to the concessionaire are usually prescribed in the event of delay in performance of its obligation by the concession authority.	• The risk allocation in respect of a project should be balanced between the authority and private sector participant/ concessionaire. Such risks can be divided into commercial risks, legal risks and political risks. The entity that is most suited or capable to assume and digest a particular risk may be asked to take the risk. For instance, risks in respect of change in law and other aspects within the control of the Government may be adopted/ assumed by the concession authority while the construction and O&M risks should be borne by the concessionaire. At the same time risks such as force majeure, tariff change, change in market demand, availability of fuel could be shared by the Government and the concessionaire. • Risk probabilities in respect of the project may be assessed by use of available and sophisticated risk assessment techniques and the same may be accordingly reflected by initiating hybrid / more sophisticated and nuanced PPP participation models better suited for a project (rather than the traditional PPP models), which shall also prescribe appropriate framework for renegotiation.	Fair allocation of risks will create a level playing field for all stakeholders involved in a project and stimulate private participation.
Project concessions typically prescribe multiple levels of dispute resolution mechanisms in same contract: Various methods of alternative dispute resolution like amicable settlement, conciliation, mediation, arbitration, expert adjudication, etc. are provided in the same concession agreement. This leads to delays in resolution of the dispute. In certain cases, the concession authority is the authority for determining the dispute in question between the authority and the concessionaire, thereby leading to more litigations.	• The provisions in respect of dispute resolution mechanism may be further simplified by reducing / removing multiple levels of alternate resolution mechanisms in the same contract and introducing one-time amicable settlement mechanism. • Members with required technical and legal expertise could be pre-identified to form arbitration tribunal. Institutional arbitration may be envisaged. • Sector-specific institutional framework may be encouraged for addressing issues of stressed PPP projects.	Expeditious disposal of disputes between the concession authority and the concessionaire would provide more certainty in respect of project implementation and would also help with faster release of essential capital stuck as a subject matter of a dispute and prevent escalation of project cost.

Issue	CII Recommendations	Expected outcome post Government intervention
Requirement of specialized tribunals: To address weaknesses in the PPP framework, the rigidities in contractual arrangements, the need to develop more sophisticated and nuanced models of contracting and to develop quick dispute redressal mechanisms, there is a need to develop regulatory and institutional framework. Recently, an institution called 3P India was envisaged. The Finance Ministry had in its 2014 budget allocated a fund of Rs 500 crore for this. However, for some reason this has not taken off. The specialized tribunal envisaged under the Public Contracts (Resolution of Disputes) Bills, 2015 for settling disputes that plague Government contracts is not in place yet.	Special tribunals/institutions having technical and legal expertise should be established at the earliest with special powers to resolve such issues from a public interest perspective.	Speedy and appropriate disposal of various existing project issues such as disputes in the power sector regarding re-negotiation of tariff for supply of power due to change in cost of procurement of fuel, etc. can be achieved.
Arbitration matters: In the event of any award passed against the Government/ concession authority, the authority invariably ends up challenging the same. Many times, such challenges are found to be untenable and baseless. As a result, huge award amounts are stuck with Government departments and distribution of the same to the private party/ concessionaire is held up leading to a cash crunch/ liquidity issue with the concessionaire. In case of claims, where the PSU/Dept has challenged the Arbitral Award already announced, 75% of the award must be paid out as per CCEA direction, to the Contractor/Concessionaire against BG. This BG is being issued by banks margin-free. However, PSUs are demanding BG for the interest portion (assuming the PSU/Dept wins the appeal in court-usually only 2% chances though, as per statistics available with PSUs). For the interest portion, banks are not willing to provide background or are asking for 100% margin. This is a practical issue.	• Stricter policy / criteria for internal assessment in a time-bound manner should be put in place, which should be satisfied before challenging of such awards by the Government / concession authority. For amounts that are stuck with the Government, a policy for immediate relief through takeout funding, etc. may be envisaged and firmed up to ease the stress on availability of working capital with the concessionaires. • In this regard, Proposed Section 87 in the Arbitration and Conciliation (Amendment) Bill, 2018 must be deleted as it will weaken and defeat the very basis of the Act as a process for swiftly adjudicating disputes that the arbitral award in principle should not be frivolously challenged with the purpose of avoiding responsibility for making payment. On its applicability to arbitral proceedings which commenced on or after the commencement of the Amendment Act of 2015, and to court proceedings arising out of or in relation to such Arbitral proceedings. • Further, Section 29 A of the 2015 Amendment Act stipulates that the award shall be made within a period of 12 months of the arbitral tribunal being constituted, further extendable by parties' agreement by up to 6 months i.e. a total of 18 months. However, the 2018 Amendment Bill has proposed a retrograde amendment to Section 29A. The aforesaid amendment is problematic as it postulates that the timeline of 12 months is reckoned only from the date of completion of pleadings and not from the date of constitution of the arbitral tribunal. This will delay announcement of the arbitral award beyond 18 months. Law Ministry should come out immediately with a Litigation Policy for Government, PSUs/PSBs, etc.	A well-defined policy on challenging of awards and release of award money would be helpful in supporting availability of working capital for re-investment in the project and servicing of financing facilities availed for the purposes of the project.

Issue	CII Recommendations	Expected outcome post Government intervention
No limitation of liability clause/ unlimited liability: Drafting of this clause creates panic among the investor fraternity. No limitation of liability clause results in the contractor's exposure to customer claims exceeding 100% of contract price or to unlimited liability.	Limitation of liability for all damages under the contract to be limited to 100%.	Limitation of liability 'caps' the amount of potential damages to 100% of contract price and reduces the loading of risk on account of unlimited liability in the bid value.
No disclaimer for consequential damages: This, or not mentioning express exclusion from disclaimer, exposes the contractor to customer claim for indirect damages that can exceed the direct damages.	Neither contract party shall be liable to the other party for any indirect or consequential loss or damage, loss of contracts, loss of profit or loss of capital, loss of revenue, loss of business opportunity, loss of business, loss of reputation, loss of credibility, loss of interest, loss of power, interruption of operations or loss of use, cost of purchased or replacement power, loss of information and data, damages based on the customer's third party contracts, loss of production or facilities downtime, arising at any time from any cause whatsoever.	Inclusion of the disclaimer provides for sufficient protection under the applicable law for such damages and reduces the loading of risk on account of indirect and consequential damages in the bid value.

India's ranking in ease of doing business has significantly improved over the last few years. The present Government's decisions in favour of developing the Indian economy has further boosted investments. For the infrastructure sector, the need is for radical reforms in policies - particularly land acquisition laws, labour regulations, and archaic documentation processes. Also, revision of interest rates, implementation of single-window clearances, acceleration of spending in infrastructure and private investments, investor protection, ensuring enforcement of contracts, fast-tracking completion of projects such as the Green Corridor, Rail Freight corridor etc. will be a welcome move. A holistic focus on improving ports, railways, transmission grid infrastructure, along with financial reforms through National Company Law Tribunal (NCLT), Insolvency Bankruptcy Code (IBC) and GST regime are imperative. The twin-balance sheet problem needs to be resolved, while the IBC must be implemented with the active involvement of all stakeholders including the judiciary. On the back of such positive steps, India certainly has the potential to be amongst the top 50 countries by 2022.

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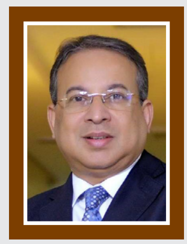
The Indian power sector is going through challenging times, especially the financially stressed thermal power plants which are facing issues like absence of coal supply linkage and of long/medium-term PPAs. These can be resolved only if power plants are able to generate enough demand from the State discoms. However, the State discoms are currently grappling with huge debts and financial losses on account of factors like high AT&C losses, operational inefficiencies and populist tariff schemes, etc. This calls for aggressive distribution reforms. These reforms will then enable the discoms to encourage and drive the investment in generation activities - both from conventional and renewable sources. In other words, for the power sector to be financially sustainable in the long-term, the distribution reforms need to become a reality.



Praveer Sinha
Co-Chairman, CII National Committee on Power and Chief Executive Officer and MD, The Tata Power Co Ltd

In 2018, the impetus on renewables and creation of energy-efficient infrastructure in the country has been commendable. There is renewed consolidation within the industry to address issues and work towards collective growth. Diverse stakeholders have collaborated to resolve issues such as ensuring financial and operational viability of stressed assets and continued growth of the solar sector in light of the new safeguard duty. The Government's move to introduce competitive bidding in the renewable sector has boosted the interest of industry players, both domestic as well as international. While the Government's decision to cap tariffs may be a necessary measure keeping in mind the consumer interests, it would be equally important to ensure that these caps account for the ground realities such as increasing interest rates, higher land acquisition cost, building the evacuation infrastructure and so on. With the tariffs being capped and increasing interest rates, there must be an emphasis on creating alternate avenues to raise funds at lower interest rates so that renewables sector remains sustainable for all the stakeholders in the long run. Long-term policy framework is also bound to play a critical role in creating a more conducive investment climate.

Rajiv Ranjan Mishra
Co-Chairman, CII National Committee on Power and Managing Director, CLP India Pvt Ltd

Infrastructure has defined the inflection points for all major economies and is a critical element in the transition of India. What is needed is a coherent policy and support environment across sectors and Governments to maximise the impact. Talking about the power sector, while power generation has evolved substantially and is now undergoing renewable transformation, transmission and distribution have not kept pace. Lack of reforms and investments in these segments has created a major bottleneck, resulting in significant economic impact. Issues with power supply has costed India in terms of additional costs for diesel generators, UPS/ invertors and voltage stabilisers. Another challenge is access to affordable capital. We need to learn from a few successful economies about how to finance and monetise infrastructure assets. Governments also need to focus on providing socioeconomic growth at a cost instead of providing short-term monetary relief i.e. investments are always better than subsidies.

Ramesh Kymal
Chairman, CII Task Force on Wind Energy and Chairman & Managing Director, Siemens Gamesa Renewable Power Pvt Ltd

The infrastructure sector is one the primary drivers of the country's economy with the sector receiving much-needed impetus from the Government and policy-makers. India is one of the most rapidly developing nations and it is imperative that its infrastructure sector will have to constantly evolve to support the demand. Innovation and modern technology have made it possible for this dynamic sector to continue developing while driving down costs. However, it is not without its set of challenges. Lack of planned investments, delay in execution, cost overruns and funding issues have plagued the sector for years. The most recent liquidity crisis has posed a serious threat on India's economic growth. Improved corporate governance, public - private partnerships, efficient credit risk pricing and improved investor base will be crucial in getting the sector back on its feet.

Ratul Puri
Co-Chairman, CII National Committee on Solar Energy and Chairman, Hindustan Powerprojects Pvt Ltd

With consistent double-digit growth for 50 months, the Indian civil aviation industry is amongst the world's fastest growing. Going forward, continued growth in this sector is expected to come from regional connectivity in tier-II and tier-III cities. In fact, the Government's UDAN scheme attempts to do exactly that - to connect unserved and under-served airports in the country and make flying affordable to the masses. One of the key determinants for the success of UDAN is a well-connected network of low cost airports. A blueprint needs to be established for technology-enabled, high efficiency, low cost airports that cost less than Rs 100 crore and take less than 18 months to develop. To attract private investment, an economic framework to ensure adequate return on investment through a combination of air-side and city-side opportunities should also be enabled.

Palash Roy Chowdhury
Member, CII National Committee on Civil Aviation and MD – India, Pratt & Whitney, UTC India Pvt Ltd

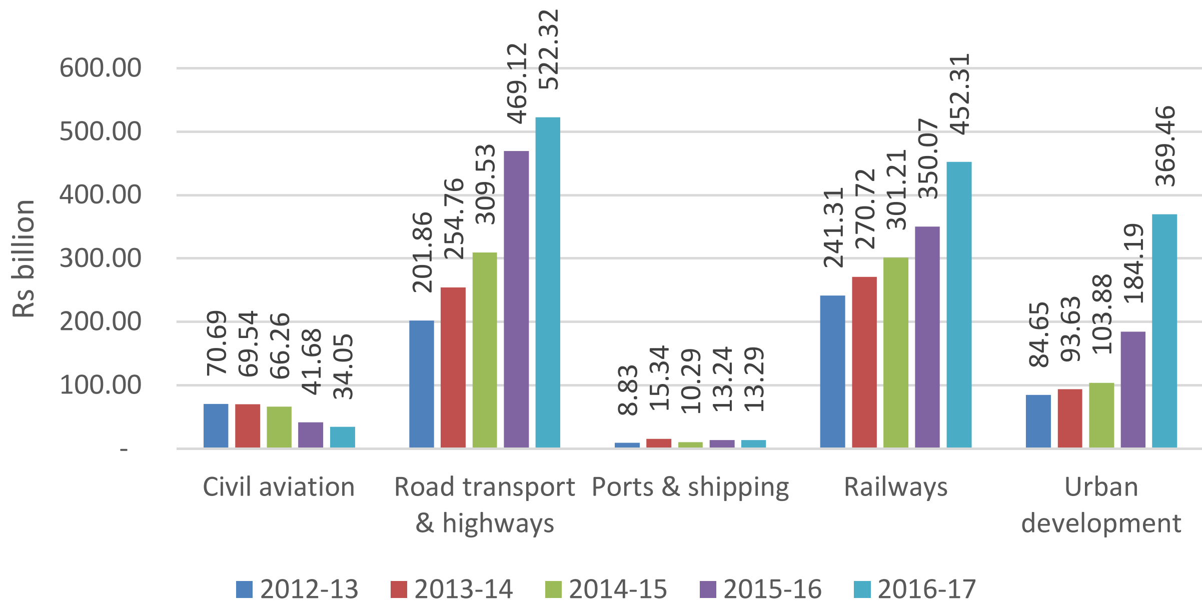
Local Rolling Stock (RS) manufacturers today face an inverted duty structure where the differential between the output GST (5%) and the inputs GST (weighted average approx 12%) is around 7%. This implies that the local RS manufactures have to carry an additional tax burden of 7% in their cost structure which they need to absorb, particularly while competing in international bids. This puts them at a significant disadvantage vis-à-vis importers of RS. Under the current GST formulation, therefore, it is beneficial for OEMs to import RS rather than make in India, and even more so, when they can claim customs duty exemption under Deemed Export Benefit in projects funded by multilateral agencies. This has serious implications not only for the local RS industry but also for the Make in India initiative launched by the current Government. Not only will Indian taxpayers' money get diverted overseas to create manufacturing jobs there, but precious foreign exchange will be lost in financing the import of RS.

Bharat Salhotra
Member, CII National Committee on Railways and Vice President, Sales & Business Development, Asia Pacific Region, Alstom Transport

Today, factors such as extraordinary population growth, rapid urbanization and prosperity in India are driving the need for robust safety and security measures particularly in the critical national infrastructure sectors. In fact, due to the increased threat perception, it is imperative to mitigate the risks to vital infrastructure such as defence establishments, ports, oil refineries, power plants, civil aviation and mass transportation infrastructure. The Indian Government has initiated many essential infrastructure projects including modernization of railway infrastructure and rolling stock, new airports, mega ports and the development of other critical infrastructure across the country, with well-defined plans for their safety and security as they are major drivers for economic growth. It is thus increasingly becoming important to draw up possible action plans for bringing focus on security in sectors such as urban infrastructure, oil and gas, railways, maritime and aviation.

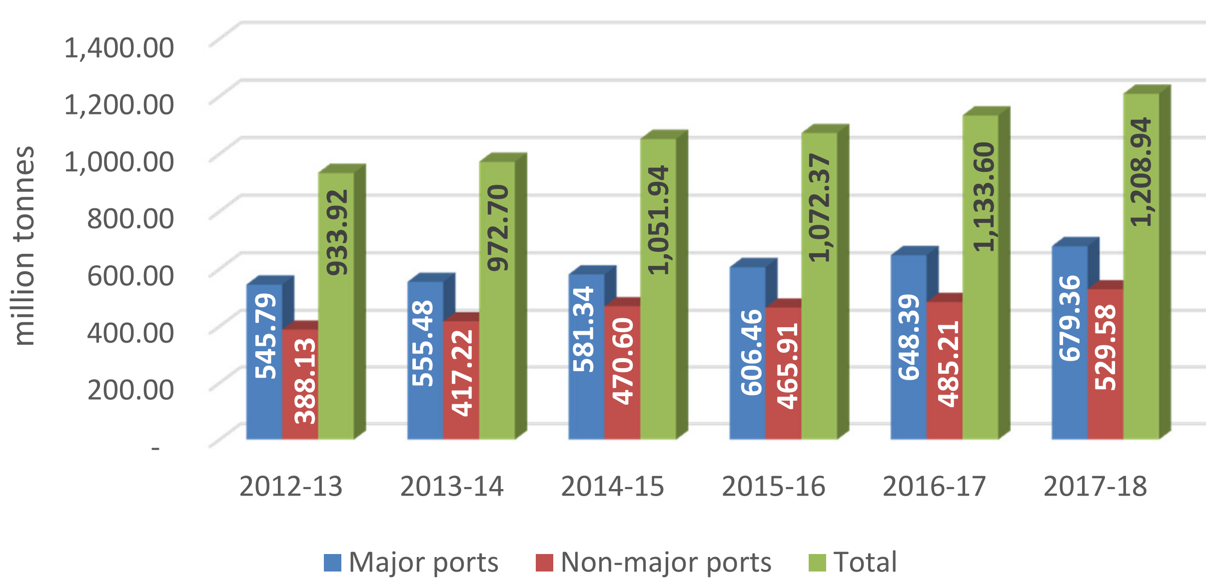
Rituraj Sinha
Member, CII National Committee on Civil Aviation and Group Managing Director, SIS Group Enterprises

Infrastructure spending by Government



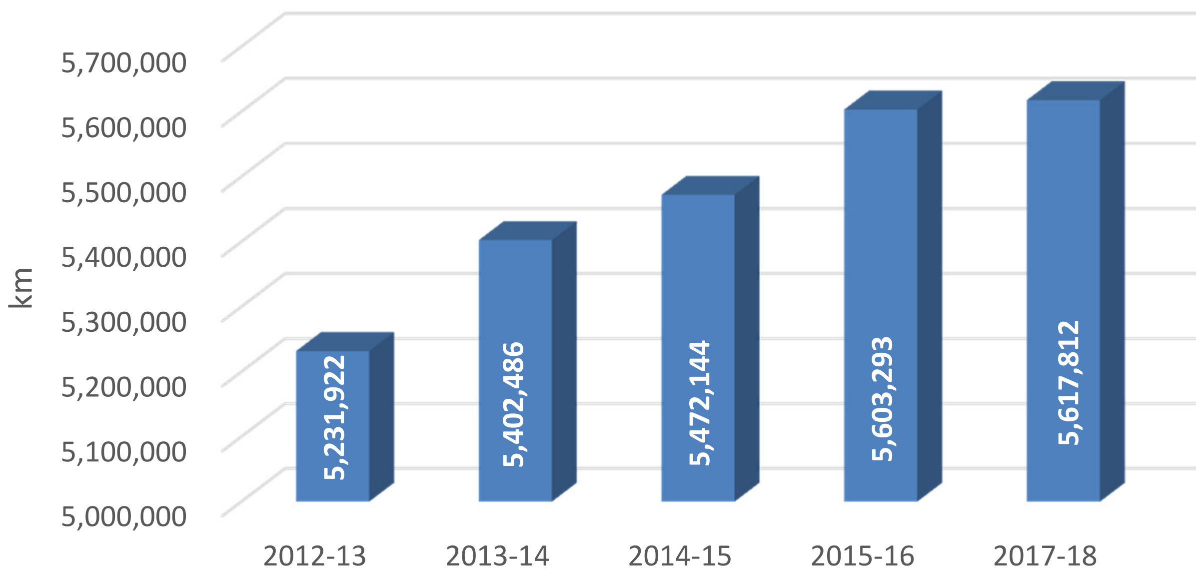
Source: India Budget

Traffic handled by Indian ports (million tonnes)



Source: Indian Ports Association

Road network in India (km)



Source: Ministry of Road Transport & Highways; Economic Survey 2017-18

Rail traffic in India

	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
Freight (million tonnes)	1,009.89	1,053.56	1,097.58	1,104.17	1,108.79	1,161.66
Passenger (million)	8,489.79	8,425.60	8,229.67	8,151.22	8,219.51	8,286.95

Source: Ministry of Railways

Air traffic at all Indian airports

Details	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
Aircraft movement ('000)	1,478.81	1,536.62	1,603.02	1,793.61	2,049.08	2,324.55
Passengers (million)	159.40	168.92	190.13	223.61	264.97	308.75
Freight ('000 tonnes)	2,190.55	2,279.15	2,527.56	2,704.27	2,978.24	3,357.03

Source: Airports Authority of India

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