



Halder & Associates
Advocates

KEY LEGAL RISKS IN INFRASTRUCTURE SECTOR

By Ajoy Halder

Key Legal Issues

Absence of Dedicated PPP Policy or Regulation at National Level

Multiplicity of Institutions and Overlap in Roles

Lack of Independent Regulator

Underdeveloped Dispute Resolution Mechanism

ABSENCE OF DEDICATED
PPP POLICY OR
REGULATION AT NATIONAL
LEVEL



Purpose of National PPP Policy

To (i) demonstrate political commitment to the PPP program, and (ii) streamline the PPP process, a comprehensive National PPP act/policy should (i) clearly spell out the objectives, (ii) scope, and (iii) the implementing principles of the PPP program in India.

Laws Applicable to PPPs in India

**Public contract and
procurement laws**
(Contract Act, Specific
Relief, Constitution, etc)

**Public financial
management laws** (ECB,
Banking Regulations, etc.)

Sector Specific Laws (Major
Port Trust Act, 1963,
Railway Act, 1989, etc.)

**Other Laws applicable to
business** (Environmental
law, Land Laws, Property
Laws, Tax Rules, Insolvency
Law, FDI, Employment law,
Insurance, etc.)

International Best Practices for Developing PPP Regulation

PPP regulation should include all laws that affects (i) PPP contracts, (ii) decision making processes, and (iii) implementation procedures.

PPP regulation should establish guideline for (i) PPP program, (ii) processes, and (iii) institutional responsibilities.

PPP regulation should aim to ease liquidity constraints in infrastructure projects.

PPP regulation should avoid rigidity and enable the PPP programs to adapt over time.

PPP regulation should avoid conflict with existing laws.

Enactment of PPP Law/Policy

Adopting Existing Laws - Instead of creating a new PPP Law, the Government may amend existing laws to incorporate PPP principles.

Enacting New Laws - If the existing framework of law limits the government's ability to structure and manage PPPs well, then the Government may enact new laws.

Examples of Countries with PPP Law – Brazil, Chile, Colombia, France, Indonesia, Philippines, Mexico, Peru, South Africa, Tanzania



Conclusion

In India, it appears that both enactment of specific policy/ regulations and amendments of existing laws may be necessary to streamline the PPP process.

MULTIPLICITY OF
INSTITUTIONS AND
OVERLAP IN ROLES



Institutions Involved

Governments at all levels are unable to create a steady pipeline of projects due to institutional capacity constraints.

Agencies involved in PPP projects include NITI Aayog, Ministry of Finance, Department of Economic Affairs (DEA), various ministries, statutory entities like NHAI, AAI, and state governments.

Government Responsibilities

Government is responsible to ensure that the public service is provided to the quality and quantity specified in the PPP contract, in a way that achieves value for money.

Government is required to choose the right project and select a competent partner.

Government is required to set and enforce the parameters within which the private parties operates.

Multiplicity of Institutions and Overlap in Roles to be checked.

Means of Achieving Government Responsibilities

Establish PPP Policy (Legislative Responsibility)

- Draft PPP policy, identifying approvals required at various key points, to ensure that all steps are taken for all PPP projects.
- Establishing PPP Institutions.

Managing Public Financial Institution

- Assess the fiscal implications of PPP projects
- Control aggregate exposure to PPPs
- Create budget for fiscal commitments to PPPs
- Regulate/ policies to ease infrastructure financing

Means of Achieving Government Responsibilities

PPP Institutions

- **Implement PPPs** – Identify projects.
- **Review and approve PPPs** – Overseeing the PPP process through review and approvals at key stages, to ensure that the project represents a good investment decision.
- **Develop and implement PPP** – Structuring the PPP, bidding out the transaction, and managing the contract.
- **Oversight** – Reviewing and overseeing the management of PPP projects.

PPP Institutions

- **Policy guidance and capacity building** – Defining PPP policies and processes, and building the capacity of implementing agencies to follow those processes.
- **PPP promotion** – Within and beyond government. Encouraging sector/departments to consider using PPPs.
- **Technical support** – Handhold ministries/departments or be directly responsible for PPP implementation.

LACK OF INDEPENDENT
REGULATOR



Need for Independent Regulator

Due to (i) the long-term nature of PPP contracts, (ii) uncertain market conditions, (iii) lack of capacity at both government and private player levels, etc. disputes are bound to arise during the life cycle of PPP projects.

Absence of regulator or multiplicity of regulators results in many of these issues being unresolved, leading to litigation.

Primary Role of Regulator

Protect Consumers against Monopoly – PPPs often supply essential services in monopoly/ near-monopoly conditions (water, electricity, gas, telecommunications, airports or highways sectors) and may result in abuse.

Protect Investors – The investor needs to know (i) what price they will be able to charge for their service, (ii) the service standards they will be required to meet, (iii) how long they can operate, and (iv) whether exclusive right to operate.

Monitor Performance – Government needs to retain sufficient capacity to monitor and enforce the operator's obligations.

Protect Other Interests – Environment, service standards, consumer services.

Methods of Regulation

Regulation by PPP Contract

- The PPP contract itself can define tariffs, tariff adjustments, and service standards as an alternative to establishing a regulatory regime.

PPP alongside Sector Regulation

- Sector specific regulations.

Key Functions of Regulator

Setting of tariff and structures

Setting entry and exit requirements for the sector (lock-in, FDI)

Setting of quality standards and monitoring/ enforcing performance

Environment, health and safety regulations monitoring/ enforcement

Gather information and data, establish rules, monitor & implement rules.

Issues to Consider

Regulator to be Independent

- Investors will trust a regulatory system which has certainty and independence.
- Overruling power of Government should be limited.

Recourse against Regulator's Decisions

- Investors & customers will like recourse against the decision of the Regulator.
- Will recourse be through the courts, or through arbitration?

Discretionary Power of Regulator

- Level of discretion that a Regulator has in carrying out its functions is important for investor confidence.
- Checks and balances to be built in.

UNDERDEVELOPED
DISPUTE RESOLUTION
MECHANISM

Issues

Dispute resolution mechanisms are slow and not very well developed, often derailing project timelines and freezing funds.

Alternative dispute resolution like amicable settlement, conciliation, mediation, arbitration, expert adjudication, etc. are generally provided in the concession contracts.

However, these methods are proving ineffective for timely resolution of conflicts and issues.

Mitigations Measures

Early identification of disagreement to facilitate dialogue before the dispute matures.

Encourage out-of-court settlements or alternative dispute resolution methods.

Set up the Infrastructure Project Review Committee and Infrastructure PPP Adjudication Tribunal to resolve PPP disputes in a streamlined manner.

Government to maintain a balanced approach towards the interests of the government as well as those of the private sector.

Mitigations Measures

Potential disputes
can be avoided:

- If there is clarity in the determination of tariff,
- Bid evaluation criteria are simple and objective.

Dispute resolution
mechanism should
not hamper the
operations of the
project. This will:

- Prevent delay in the completion,
- Reduce financial loss,
- Safeguard public interest.

Enactment of
Security of
Payment
Regulation: This
will

- Ensure timely payment of contractor and sub-contractor,
- Prevent delay in completion.

EXAMPLES OF LEGAL
ISSUES FACED BY
INDUSTRY

Port Sector

Regulatory Issue:

TAMP (Tariff Authority of Major Ports) was initially set-up to prevent monopolistic behavior of the port operators; however, TAMP guidelines has been hindering the growth of major ports which now faces competition from minor ports that has the liberty to fix their own tariff.

Underdeveloped Dispute Resolution Mechanism & No Independent Regulatory Body Issue:

Almost every port project is in litigation/arbitration with the Government. Terminal operators fighting over (i) rate setting, (ii) lack of dredging on time, (iii) delayed environment and security clearance, (iv) insufficient yard space, (v) projects have also collapsed due to non-compliance of contractual obligations by the port trusts.

Government Measures:

- A review board has been proposed to replace TAMP.
- Ministry of Shipping has filed a bill for replacing the “Major Port Trust Act, 1963

Airport Sector

Multiplicity of Institution Issue:

For Airports projects, obtaining approvals is a source of delay. Multiple approval agencies are involved for statutory approvals.

Underdeveloped Dispute Resolution Mechanism & Independent Regulator Issue:

Airports Economic Regulatory Authority's (AERA) delay in passing regulatory orders and pending decisions on tariff disputes result in significant volatility and uncertainty in tariffs.

Multiplicity of Institutions & Overlap in Roles Issue:

There have been multiple instances of AERA's decisions being overturned by Government, thereby raising concerns over its autonomy (Hyderabad Airport Tariff Determination).

Absence of Dedicated National PPP Policy Issue:

Clear economic regulatory framework required which provides clarity and certainty to investors on the commercial potential of airport operation.

Rail Sector

Independent Regulator Issue:

Passenger and freight tariffs on Indian Railways are often influenced by political decisions. Due to cross-subsidization of passenger fares, Indian Railways has lost its share of freight traffic to other modes of transport.

Independent Regulator Issue & Absence of National PPP Policy Issue:

A Construction Project Review Board (CPRB) was required to review monthly progress and financial reports of the projects in order to monitor progress and prescribe corrective measures if necessary. The audit committee (CAG) did not find the requisite reviews made by the CPRB.

Government Measures:

The Rail Development Authority (RDA) was to be set up to perform functions such as pricing of services, enhancement of Non Fare Revenue, protection of consumer interests, creation of positive environment of investment, benchmarking of service standards etc. In essence, the Railways Board would function as a regulator.



Halder & Associates
Advocates

THANK YOU

Ajoy Halder

Partner

ajoy.halder@halderassociates.com

T: +91 11 6654 4977, M: +91 95992 52989

Level-5, Caddie Commercial Tower

Hospitality District Aerocity, IGI Airport

New Delhi – 110037, India