ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

CONCESSION AGREEMENTS IN INDIA

THE BALANCING ACT

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Preface

Private ownership of public assets is a sensitive issue for most governments. However, particularly in the context of developing countries, PPPs emerged as an innovative policy tool for remedying the lack of enthusiasm in traditional public service delivery.

Today, India is one of the most mature PPP markets. As on June 30, 2017 (as per the information available on the government's infrastructure website), 1572 PPP projects with costs over INR 50,000,000 or approximately USD 785,000 are currently being implemented across various infrastructure sectors in India.

Concessions are an especially feasible way of carrying out PPP projects when state or local authorities need to mobilise private capital and know-how to supplement scarce public resources. Under a concession arrangement, the ownership of the project asset remains with the authority, while constructive possession of the assets is passed on to the concessionaire together with certain rights and obligations in relation to the project. On expiry or termination of the Concession Agreement, all the project assets (including assets purchased by the concessionaire for the purpose of the project) revert to the authority.

In India several models have evolved through the years for grant of concessions in various sectors, including roads, airports, ports, metro, railway station redevelopment, and healthcare as well as information technology. As PPPs evolved across the world, government agencies developed standardised documents setting out the terms and conditions on which licenses were granted to private entities to enable them to deliver public goods and services for public benefit. Similarly, in India, the Planning Commission introduced Model Concession Agreements (MCAs), with the intent to standardise documents and processes for the PPP framework across various projects.

The Infrastructure practice at ELP, now 15 years strong, has been privileged to have advised various clients across various sectors including, amongst others the transportation sector (ports, roads, airports, railways and metros). Having worked extensively with our clients on concession agreements, our infrastructure team at ELP looked at these agreements from a 360 degree view and identified the pressing issues which occur or which could possibly occur during the lifecycle of the agreement.

The 'Concessions Agreements in India' guide is our endeavour to give our readers an in-depth view of ELP's collective cross – practice experience on concession contracts. We do hope this makes for some interesting reading. We enjoy every reader's opinion and welcome your feedback.

ELP Infrastructure Team

Concession Agreements in India – An Introduction and History

Private Participation in Infrastructure and PPPs

For many years the development of infrastructure has served as one of the cornerstones of Indian economic policy. Vast outlays are provided year on year in the Union Budget[1] for the infrastructure sector. However, needless to add, there is also a massive expectation that the private sector will support infrastructure development.

Private sector participation in India dates back to the 1800's…..

Private participation in infrastructure has a long history in India. Early examples include private investments in the railroads in the late 1800s and private enterprises producing electricity in Kolkata and Mumbai in the early 1900s. Internationally as well, governments relied on support from the private sector for infrastructure development. The role and scope of the private sector differed through the years - where earlier private sector entities worked merely as suppliers of materials and equipment, their role gradually expanded to that of service providers and contractors to the Government.

PPPs….

In India, since the past thirty years or so, public private partnerships (PPPs) have emerged as a model for private participation with the private sector participating in greater risks under long term contracts. In India, the 90s saw PPPs taking root and the first concession agreements being executed for road and port projects.

Private Finance Initiatives

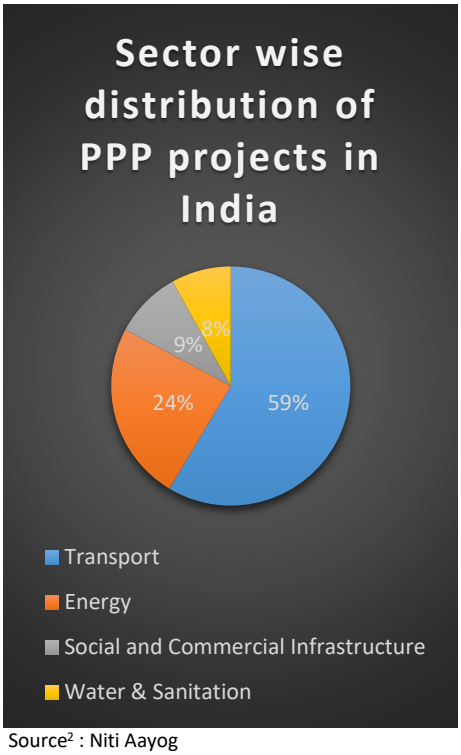
A new form of collaboration wherein certain public goods and services were provide by a private party instead of public authorities developed in the United Kingdom in the early 1990s in the form of Private Finance Initiatives (PFIs). PFIs saw, for the first time, a system where the benefits of private sector management and financing were brought to public projects, especially in the social sector. Following on, similar modes of delivery were embraced by several countries, including Australia.

Serious efforts have been made by the GoI to mainstream PPP in infrastructure after some early successes. In 2006, the GoI established a 'Public Private Partnership' Cell for facilitating PPPs and related capacity building. Various grants are also made available for significant and capital-intensive PPP projects in the form of loans, equity and development funds. A central PPP appraisal committee has been formed to streamline approval and appraisal of projects.

Additionally, a PPP toolkit has been created with the assistance of the World Bank as a guide to government officials to implement PPP schemes.

[1] The Union Budget for the financial year 2017-2018 envisions an allocation of INR 3,961,350,000,000 or approximately USD 62,522,828,300.

Today, India is one of the most mature PPP markets and several models have evolved through the years for grant of concessions in various sectors. Concessions are granted in numerous sectors from roads, airports, ports, metro, railway station redevelopment, and healthcare as well as information technology.



Source[2] : Niti Aayog

PPPs Defined

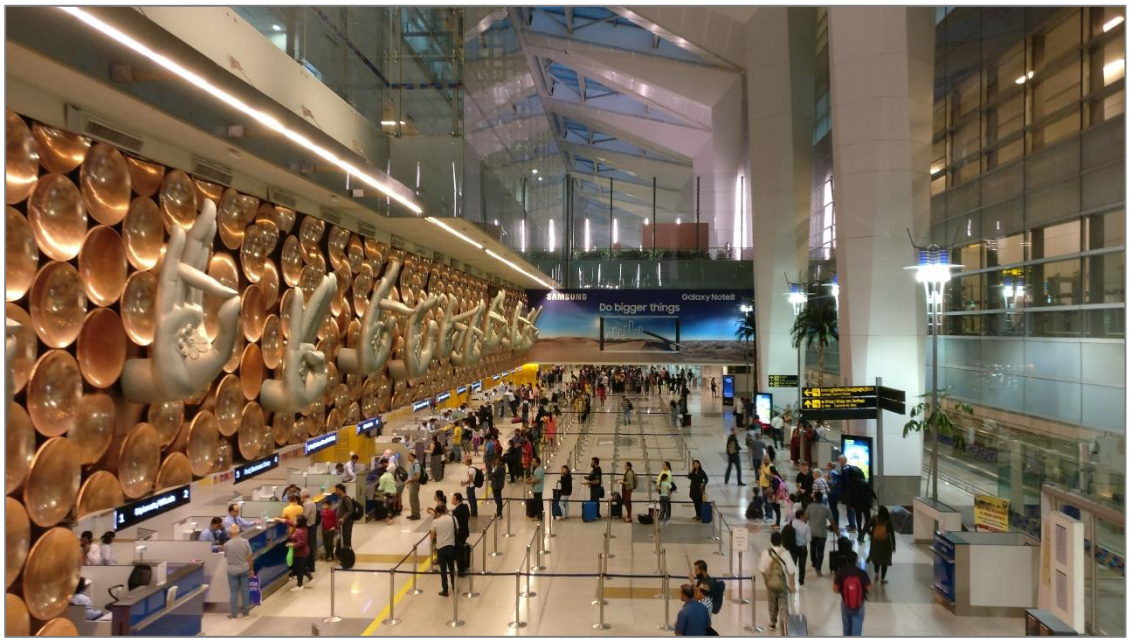
The Department of Economic Affairs, Ministry of Finance, Government of India (***DEA***) has defined the term PPP as:

> "A PPP means an arrangement between Government or statutory entity or Government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or related services for public benefit, through investments being made by and/or management undertaken by the private sector entity for a specified period of time, where there is a substantial risk sharing with the private sector and the private sector receives performance linked payments that conform (or are benchmarked) to specified, pre-determined and measurable performance standard."[3]

This definition makes it clear that PPPs envision the provision of public goods or services for public benefits with substantial risk sharing with the private sector in consideration for performance linked payments. Although the definition is not limited to infrastructure projects, in the Indian context, PPP is primarily used for the delivery of infrastructure to the public.

[2] http://niti.gov.in/writereaddata/files/document_publication/REBOOTING%20PPP%20IN%20INDIA_blog.pdf

[3] PPP Guide for Practitioners issued by the DEA in April 2016 (PPP Guide 2016)



Delhi's IGI airport project was undertaken jointly by the Airports Authority of India (AAI) and infrastructure company GMR group in a PPP (Public-Private Partnership) model.

Concession Agreements

The complex arrangements that comprise a PPP project are usually enshrined in agreements commonly known as concession agreements (Concession Agreement), the concession being a grant to a private sector entity permitting it to undertake actions for the provision of public good or service, which would save for such grant be provided by a public-sector entity.

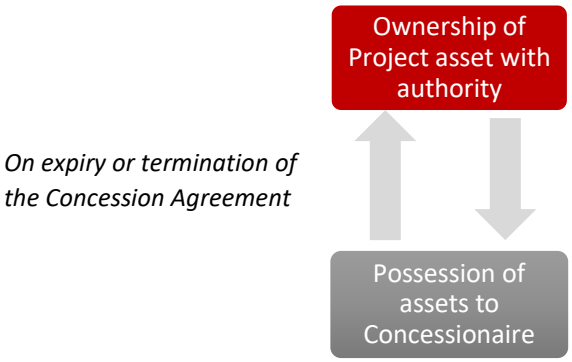
The Concession Agreement is, therefore, the agreement wherein the public-sector entity grants the private sector entity the right to implement an infrastructure project.

The purpose of a Concession Agreement is to:

- Vest the concessionaire with all the rights necessary to implement the project and obtain the agreed returns in accordance with the terms of the concession agreement
- Achieve an appropriate allocation of risks

A concession is in essence a license granted by the relevant public authority to a private party to undertake the delivery of a public service and in some cases, appropriate the user charges, the authority for which lies exclusively with the public authority under law. Along with the grant of such right, a public authority seeks to pass on certain risks to the private party.

Under a concession arrangement, the ownership of the project asset remains with the authority, while constructive possession of the assets is passed on to the concessionaire. On expiry or termination of the Concession Agreement, all the project assets (including assets purchased by the concessionaire for the purpose of the project) revert to the authority.



The commercial viability of the project determines whether the payment is to be made by the private party to the public authority (in the form of a revenue share/ concession payment) or vice versa (in the form of grant or annuity payment).

The foundation of a PPP project is the allocation of risk to parties that are most capable of bearing such risks. Excessive and inappropriate risks taken by either the public or private entity would result in difficulties and in some cases failures of the projects. This is well known. Additionally, even where risks are appropriately allocated, the manner of addressing such risks also is a decisive factor in whether a PPP project will be successful. This can be clearly seen in the evolution of Concession Agreements as the PPP market and players in India matured.

Larsen and Toubro Limited was awarded the Hyderabad Metro Rail Project by the then Government of Andhra Pradesh. The Company signed the Concession Agreement with the then Government on 4th September, 2010.

LT Foods, a leading exporter of basmati rice with a strong distribution network, won the 30-year concession with the Govt. of Punjab to build and operate modern, temperature-controlled steel grain silos with a capacity of 50,000 metric tons.

Development of Model Concession Agreements

In the early stages of PPP projects, various state governments and authorities developed their own versions of concession agreements for individual projects. Difficulties in implementation led to the need for creation of a standard framework for PPP projects in India. The Planning Commission, through Mr. Gajendra Haldea, published in 2000 a model concession agreement (MCA) for the highways sector. Almost simultaneously, the National Highways Authority of India (NHAI) developed its own draft concession agreements that had significant commonalities with the Planning Commission's MCA. The NHAI completely adopted the MCA developed by the Planning Commission in totality from 2008 onwards.

MCAs were then developed for sectors other than roads. Currently, there are MCAs for highways, metros, airports, railway stations, ports and food storage. *Even for sectors not covered under the MCAs or concession agreements issued by various States, language and concepts from the MCA are heavily borrowed.* However, some authorities continue to use their own standard concession agreements that predate the publication of the MCA (e.g. the port concession agreement for non-major ports as used by the Gujarat Maritime Board).The development of MCAs in the highways and the port sectors is touched upon in more detail in chapters 3 and 4 below.

MCAs brought a standardisation to the entire bidding process, the advantages of which are consistency in approach and efficiency in the bidding and transaction process. However, there are several criticisms to the indiscriminate use of MCAs in the PPP process.

Model Concession Agreements

As PPPs evolved across the world, government agencies developed standardized documents setting out the terms and conditions on which licenses were granted to private entities to enable them to deliver public goods and services for public benefit. As discussed in **Chapter 1** above, in India too, standardised Concession Agreements known as Model Concession Agreements (***MCAs***) were developed and used for PPP transactions across sectors. The MCAs are publicly available on websites of various arms of the GoI or the relevant State Governments, in a bid to provide transparency and emphasising consistency in approach.

Rationale for MCAs

Proponents for MCAs put forth the view that MCAs are preferable than a more individualistic approach as they believe that use of such standardised documents results in reduced transaction time and cost, simplifies bidding, develops the confidence of the bidders and financiers in the contracts.

Given that these agreements have been formulated by relevant governmental agencies after taking into account technical, financial and legal advice, by using standardised documentation, the administrative times for the relevant agencies is greatly reduced. Further, the MCAs are used as templates by smaller local government agencies that may not have access to the same level of expertise as the agencies responsible for drafting the MCAs.

The DEA itself has recommended that the for sectors where the relevant Ministries have not issued an MCA, usually the MCA for the development of National Highways may be used as a template and guidance material for the preparation of the concession agreement[4].

Implementation and Criticism

However, the actual implementation has left much to be desired as MCAs are used as templates without sufficient regard being paid to characteristics of each project. There is also a sense that the allocation of risks in the MCAs is not entirely appropriate or otherwise the risk mitigation mechanisms are not workable or equitable. Further, the MCAs are rigid. Being long term and often complex contracts, it is probably impossible to account for all the risks or other developments that may arise during the course of the construction and operation of an infrastructure project. The MCAs are not responsive to such changes and their lack of flexibility can be a deterrent to private developers or financiers.

Concession Agreements differ from other agreements for provision of commercial goods and services in several ways, such as:

[4] PPP Guide for Practitioners issued by the DEA in April 2016 (PPP Guide 2016)

Accordingly, it is natural for there to be a lot of complexity in such agreements that need to be suitably addressed and for which a straight-jacketed approach may not be appropriate.

This has led to limit reliefs available through the MCA, in case of events outside the control of the concessionaire. It has been noted that this creates a perception of risk transfer but the likely (and actual) outcome is disputes which are settled in an unstructured way, thereby undercutting the certainty and consistency of approach mooted as the rationale for the concession agreements.

Further, the MCA does not permit the amendment of the Concession Agreement. The need for setting out an appropriate framework for renegotiation has been proposed time and again by various stakeholders. Certain flexibility in relation to tariff related issues is sometimes built into the MCA. However, similar flexibility in relation to other issues such as major changes in scope, operating conditions or market conditions is missing.

The scope of negotiating MCAs is also quite limited, and this has resulted in a one-size-fits-all approach. Hence, project-specific risks remain unaddressed. It has been noted that such an approach has resulted in multiple obligations not being met and the project purpose being compromised.

Given that Concession Agreements are long term contracts, the inflexibility in the MCAs do not take into account difficulties in forecasting and providing for technological, commercial, financial, economic and legal developments. This has led to litigation as well as underperformance of the MCA.[5]

[5] Report of the Committee on Revisiting and Revitalizing Public Private Partnership Model of Infrastructure headed by Mr. Vijay Kelkar, November, 2015 issued by the DEA (Kelkar Report)

International Approach and Way Forward

Australia…

It is interesting to note that Australia has moved away from the usage of standardised documents. Instead, Infrastructure Australia provides a set of commercial principles that are applied to each project using suitably qualified and experienced commercial advisors and internal staff in public agencies. This is backed up by advisory teams from the state treasuries.

And South Africa…

At the other end of the spectrum, South Africa has moved towards a completely standardised approach, not permitting any deviation from the prescribed contract forms. However, these drafts were developed after an extensive review of global best practices and consultations with numerous public and private sector actors by some of the best international advisors available.

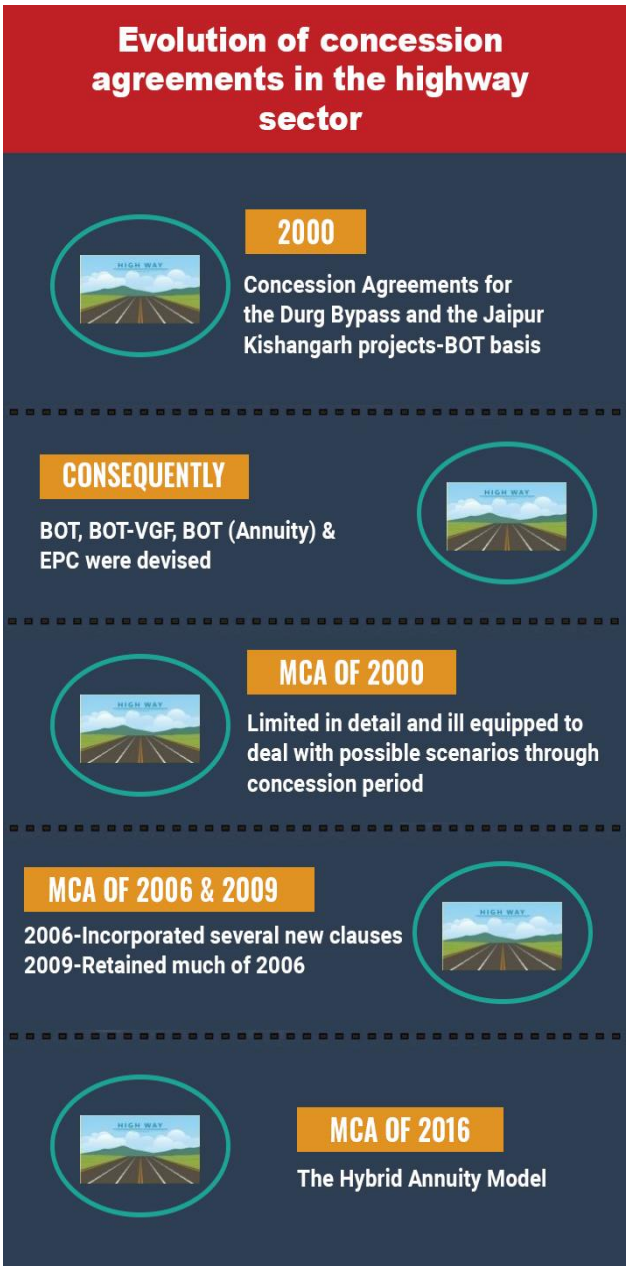
There is definitely great value in using model agreements as they do result in transaction costs and consistent approaches. However, there are valid criticisms of the use of standardized documentation. A periodic overhaul of MCAs together with inbuilt mechanisms for recalibration of the terms could be an approach to make them less rigid. Further, institutional mechanisms for renegotiation of contracts should also be put into place.

Concession Agreements in the Highways Sector

Development of Concession Agreements for National Highways

Following the economic liberalisation in 1991, changes were made across the board to policy and the laws to implement and enable such policy changes.

The highway sector was one of the first sectors opened up to private participation for development of infrastructure. The reasons why this overhaul would benefit the economy were:



- Inefficient usage of State funds in undertaking development and construction could be avoided by opening up the sector to competitive bidding for concession rights;
- Possible stricter timelines dictated by penalties and more stringent standards for development of infrastructure could be contractually dictated upon the concessionaire; and
- Generation of private wealth and increased employment in the infrastructure sector.

The National Highways Act, 1956 was amended in 1995 to add Section 8-A which gave the Central Government powers to enter into agreements with private parties to develop and maintain national highways. The new provision also gave the concessionaire the power to collect and retain fees for the services and benefits rendered by that party, on the rates and magnitude upto which the State would allow through its periodic notifications in this regard.

Among the first highway concession agreements developed were for the Durg Bypass project and the Jaipur Kishangarh around the year 2000. Both projects were awarded for development on a Build-Operate-Transfer (BOT) basis.

The Durg Bypass Project

Jaipur Kishangarh

Following this, several projects were opened up for private participation with different types of development models on offer decided by the State on the basis of anticipated interest and the search for the most efficient model in pursuit of maximum efficiency and minimum stress on the State exchequer.

Consequently, several models viz. BOT, Build-Operate-Transfer-Viability-Gap-Funding (BOT-VGF), BOT (Annuity), and Engineering Procurement` Construction (EPC) were devised. These were introduced and used for bidding in projects at different points. To illustrate, the BOT (Annuity) model was used as early as 2001 in the Panagarh-Palsit project.

Panagarh-Palsit project

Eventually, policy makers sought for a model to be standardised. Until recently, standardised models were extended only to BOT-VGF projects. The Planning Commission came out with MCAs in the years 2000, 2006 and 2009. Although an MCA continued to exist through the 2000s, on the basis of project requirements, anticipated interest, and post-bid Authority-concessionaire negotiations, there continued to be extensive deviation from the MCAs. During this period, in applicable projects competitive bidding was carried out on the basis of lowest quoted VGF or payment of a premium to the Authority. In many cases, over-competitive bidding, unanticipated cost-overruns, inability to procure permits, inability to achieve financial closure and lower-than-expected toll revenues pushed an increasing number of projects into failure and unresolvable limbo. Meanwhile, this increased the number of NPAs in the accounts of banks and affected their ability to fund more such inherently risky and uncertain long-term projects.

Some of the major issues faced by concessionaires during this period were:

- Over aggressive bidding causing drops in IRR, exposing them to increased possibility of failure due to factors such as cost overruns and drop in revenues;
- Already overleveraged balance sheets causing inability to pump in promoter capital or obtain refinancing to fund cost overruns;
- Delays and uncertainty in the procedure for obtaining permits from various points of governmental departments, causing delays in financial closure, penalties and interest;
- Delays and inability in acquisition of land required for the project;
- Unavailability of sufficient assets with the Concessionaire leading to higher provisioning and capital adequacy norms, as ownership of land and project assets existed with the Authority;
- Inability to divest from the ownership and control of projects due to restrictions incorporated in the CAs;
- Lower than expected traffic flowing through the highways causing drops in revenue;
- Force majeure events or changes in law causing cost overruns, disruption in revenues, and unmanageable repayment obligations;
- Refusal of the Authority to engage in re-negotiation of terms of concession agreement.

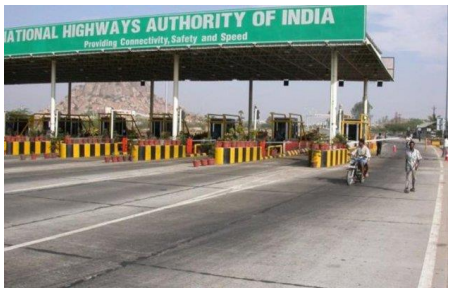
The MCA of 2000 was limited in detail and ill-equipped to deal with possible scenarios that could arise through the concession period. The MCA of 2006 incorporated several new clauses. The MCA of 2009 retained much of the contents in the 2006 MCA, with a few limited changes.

Delays in acquisition of land

Everyday Disruptions

Floods

A Unique method in India : Candies for Change



Lower than expected traffic

Construction delays

The B.K. Chaturvedi Report

The B. K. Chaturvedi report proposed several changes to the MCA. The major recommendations that were sanctioned to be implemented by the Ministry of Road Transport and Highways are as follows:

The BK Chaturvedi Report

1 REMOVAL OF TERMINATION

In the existing MCA, the Authority could terminate the agreement, if the average daily traffic of passenger cars exceeded the designated capacity for four consecutive accounting years. The Committee recommended for removal of this clause to include the incentive of extension of the concession term if the concessionaire augmented the facility.

2 HOLD 51% EQUITY: 2 YEARS AFTER COD

The promoters had to hold 51% equity for a period until two years after the commercial operations date (COD), after which they could divest their entire share, resulting in faster rotation of capital. Now companies could undertake projects only for the limited period till COD plus two years to exercise their expertise in development and opt for an exit.

3 IMPLEMENTATION OF 3 MODES OF DELIVERY

The promoters had to hold 51% equity for a period until two years after the commercial operations date (COD), after which they could divest their entire share, resulting in faster rotation of capital. Now companies could undertake projects only for the limited period till COD plus two years to exercise their expertise in development and opt for an exit.

4 PERMITTING CHARGE ON ESCROW

Permitting charge on the escrow account to senior lenders to bring credibility to the debt and facilitate finance.

However, two major causes for concerns for the concessionaires have always been:

1. Inability to limit the amount of promoter capital to be committed and debt to the undertaken; and
2. Inability to accurately predict traffic resulting in lower than necessary toll-generated revenue to manage amortization obligations.

The next set of major changes in the evolution of MCAs was through the MCA of 2016 and the hybrid annuity model. This however does not mean that these are the models to stay and be used for every project inviting bids. It may so happen that, BOT RFP for a specific project fails to attract, then the same project is invited for bids through a hybrid annuity RFP, and then NHAI settles for the EPC model to generate interest. *This has been the trend in the last two years with the majority of projects being taken up on the EPC mode.*

Comparative Look at MCAs

To illustrate the changes to the NHAI MCAs in light of the evolving PPP landscape as well as the requirements to address the risks realized after implementation, we have set below a table comparing certain key terms in the 2009 MCA, the 2016 MCA, the 2001 BOT (Annuity) model and the 2016 HAM.

		Toll		Annuity	
Sl. No.	**Particulars**	**2009 MCA**	**2016 MCA**	**2001 MCA**	**2016 MCA - HAM**
1.	**Mode of returns/ payments to concessionaire**	Toll	Toll	Annuity	Annuity
2.	**Concession model (as provided under the concession agreement)**	DBFOT – Design, Build, Finance, Operate, and Transfer	DBFOT – Design, Build, Finance, Operate, and Transfer	BOT – Build, Operate and Transfer	DBOT – Design, Build, Operate, and Transfer
3.	**Concession period**	For a period of 20 (twenty) years commencing from the Appointed Date. *[Appointed Date shall be the date on which the project enters into commercial service/ commercial operations on completion/ waiver of all of the conditions precedent as under the concession agreement.]*	For a period of 20 (twenty) years from the Appointed Date. *[Appointed Date shall be the date on which financial close as under the concession agreement is achieved, or an earlier date that the parties may decide by mutual consent.]*	For a period of 17 years and 6 months (seventeen years and six months) from the Commencement Date. *[Commencement Date shall be the date 7 (seven) months from the date of the concession agreement]*	For a period of 15 (fifteen) years commencing from COD. *[COD shall be the date on which the completion certificate or the provisional certificate as under the concession agreement is issued.]*

Sl. No.	Particulars	2009 MCA	2016 MCA	2001 MCA	2016 MCA - HAM
4.	**Land procurement obligation**	▪ NHAI to provide vacant access and right of way to the Concessionaire with 80% being handed over on Appointed Date.	▪ NHAI to provide vacant access and right of way to the Concessionaire with 80% being handed over on Appointed Date.	To be acquired by NHAI.	▪ NHAI to provide vacant access and right of way to the Concessionaire with 80% being handed over on Appointed Date.
		▪ NHAI may require Concessionaire to procure additional land for Change of Scope or for toll plazas etc.	▪ NHAI to procure land for Change of Scope		▪ NHAI to procure land for Change of Scope
5.	**Permits procurement obligation**	NHAI to procure, • right of way; • approval of the railway authorities in the form of a general arrangement drawing that would enable the concessionaire to construct road overbridges/ underbridges at level crossings on the project highway in accordance with the specifications and standards and subject to the terms and conditions specified in such approval;	NHAI to procure, • right of way; • approval of the railway authorities in the form of a general arrangement drawing that would enable the concessionaire to construct road overbridges/ underbridges at level crossings on the project highway in accordance with the specifications and standards and subject to the terms and conditions specified in such approval;	To be procured by the concessionaire.	NHAI to procure, • right of way; • all applicable permits relating to environmental protection, and conservation in respect land forming part of the right of way; • forest clearance for and in respect land forming part of the right of way; • approval of the general arrangement drawings for the road over bridges/under bridges at level crossings on the project.
		• All applicable permits relating to environmental protection and conservation of the Site.	• All applicable permits relating to environmental protection and conservation of the site.		The above permits will be procured by NHAI, provided they are not for the area falling within the 20% length of road to be acquired by the concessionaire.

Sl. No.	Particulars	2009 MCA	2016 MCA	2001 MCA	2016 MCA - HAM
		If environmental protection and conservation of site permits pertain to only small portion of site, it will be included in the remaining 20% land to be obtained by the concessionaire. Further, NHAI may postpone the period within which it needs to acquire the above permits, up to an aggregate period of 6 months, beyond which it will be considered to fall within the 20% area of land to be acquired by the concessionaire, and an additional period of 12 months will be provided to construct the overhead bridges. The concessionaire shall obtain all remaining permits.	If environmental protection and conservation of site permits pertain to only small portion of site, it will be included in the remaining 20% length of road to be obtained by the concessionaire. Further, NHAI may postpone the period within which it needs to acquire the above permits, up to an aggregate period of 6 months, beyond which it will be considered to fall within the 20% area of land to be acquired by the concessionaire, and an additional period of 12 months will be provided to construct the overhead bridges. The concessionaire shall obtain all remaining permits.		Further, NHAI will be entitled to a penalty free period of 90 days additional to the period provided for this purpose. The concessionaire shall obtain all remaining permits.
6.	**Maintenance obligations prior to appointed date**	During the development period, NHAI shall, • Maintain the project highway at its own cost and expense; • Undertake routine maintenance during the development period; and • In the event of any material deterioration	During the development period, NHAI shall, • Maintain the project highway at its own cost and expense; • Undertake routine maintenance during the development period; and • In the event of any material deterioration	Prior to commencement of any construction activity, the concessionaire shall finalise, in consultation with the independent engineer, an operations and maintenance plan for the project during the implementation period.	During the development period, the concessionaire shall, • Maintain the existing project road; • In the event of any material deterioration or

		or damage other than normal wear and tear, undertake repair thereof, or pay the concessionaire the cost and expense as determined by the independent engineer for undertaking such repair after the appointed date.	or damage other than normal wear and tear, undertake repair thereof, or pay the Concessionaire the cost and expense as determined by the independent engineer for undertaking such repair after the appointed date.		damage other than normal wear and tear, undertake repair thereof; • In the event of excessive deterioration or damage caused due to unforeseen events such as floods or torrential rain, NHAI shall undertake special repairs at its own cost and expense.
7.	**Financial closure**	▪ The concessionaire is to achieve financial close within 180 (one hundred and eighty) days from the date of the concession agreement. Period may be extended to 320 (three hundred and twenty) days on payment of damages, provided that no damages shall be payable if such delay is attributable to default or delay by NHAI or due to force majeure.	▪ The concessionaire is to achieve financial close within 180 (one hundred and eighty) days from the date of the concession agreement. Period may be extended to 120 (three hundred and twenty) days on payment of damages, provided that no damages shall be payable if such delay is attributable to default or delay by NHAI or due to force majeure.	To be achieved on or before the Commencement Date.	▪ The concessionaire is to achieve financial close within 150 (one hundred and fifty) days from the date of the concession agreement. Period may be extended to 215 (two hundred and fifteen) days on payment of damages, provided that no damages shall be payable if such delay is due to force majeure.
8.	**Deemed termination**	If financial close is not achieved within the prescribed periods, the concession agreement would be deemed to have been terminated by mutual consent of the parties.	If financial close is not achieved within the prescribed periods, the concession agreement would be deemed to have been terminated by mutual consent of the parties.	Not provided for.	If financial close is not achieved within the prescribed periods, the concession agreement would be deemed to have been terminated by mutual consent of the parties.

<table>
<tr>
<td>9.</td>
<td>Variation of costs arising from change in law</td>
<td><u>Increase in costs:</u>

If as a result of change in law, the concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate of which exceeds the higher of INR 1,00,00,000 (Rupees One Crore) and 0.5% (zero point five percent) of the realisable fee in any accounting year, the concessionaire may so notify NHAI and propose amendments to the concession agreement so as to place the concessionaire in the same financial position as it would have been in, had there been no such change in law causing the cost increase.</td>
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<td><u>Increase in costs:</u>

If as a direct consequence of a change in law, the concessionaire is obliged to incur additional cost in any accounting year, such additional cost shall be allocated and shared between the concessionaire and NHAI as follows:
<table>
<tr><th>Increase in capital expendit-ure</th><th>NHAI's share</th></tr>
<tr><td>From INR 0 to 6 crores</td><td>0%</td></tr>
<tr><td>Above INR 6 crores</td><td>100% of the capital expenditu-re in excess of INR 6 crores</td></tr>
<tr><th>Increase in Costs/ Taxes</th><th>NHAIsh are</th></tr>
<tr><td>From INR 0 to 1 crore</td><td>0%</td></tr>
<tr><td>Above INR 1 crore</td><td>100% of the amount in excess of INR 1 crore</td></tr>
</table></td>
<td><u>Increase in costs:</u>

If as a result of change in law, the concessionaire suffers an increase in costs or reduction in net after-tax return or other financial burden, the aggregate of which exceeds the higher of INR 1,00,00,000 (Rupees One Crore) and 2% (two percent) of the total annuity payments in any accounting year, the concessionaire may so notify NHAI and propose amendments to the concession agreement so as to place the concessionaire in the same financial position as it would have been in, had there been no such change in law causing the cost increase.</td>
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<td><u>Decrease in costs:</u>

If as a result of change in law, the concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate of which exceeds the higher of INR 1,00,00,000 (Rupees One Crore) and 0.5% (zero point five percent) of the realisable fee in any accounting</td>
<td><u>Decrease in costs:</u>

If as a result of change in law, the concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate of which exceeds the higher of INR 1,00,00,000 (Rupees One Crore) and 0.5% (zero point five percent) of the realisable fee in any accounting</td>
<td><u>Decrease in costs:</u>

Not provided for.</td>
<td><u>Decrease in costs:</u>

If as a result of change in law, the concessionaire benefits from a reduction in costs or increase in net after-tax return or other financial gains, the aggregate of which exceeds the higher of INR 1,00,00,000 (Rupees One Crore) and 2% (two percent) of the total annuity payments in any accounting year, NHAI may so notify the concessionaire and propose amendments to the concession agreement so as to</td>
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		year, NHAI may so notify the concessionaire and propose amendments to the concession agreement so as to place the Concessionaire in the same financial position as it would have been in, had there been no such change in law causing the cost decrease.	year, NHAI may so notify the concessionaire and propose amendments to the concession agreement so as to place the Concessionaire in the same financial position as it would have been in, had there been no such change in law causing the cost decrease.		place the concessionaire in the same financial position as it would have been in, had there been no such change in law causing the cost decrease.
10.	**Change of scope**	Expenses arising out of a change in scope order aggregating over 0.25% (zero point two five per cent) of the total project cost shall be reimbursed by NHAI.	Expenses arising out of a change in scope order aggregating over 0.25% (zero point two five per cent) of the total project cost shall be reimbursed by NHAI.	NHAI may require a change in the scope of the project, provided that such change does not involve additional capital expenditure exceeding INR 17,50,00,000 (Rupees Seventeen Crores and Fifty Lakhs).	Expenses borne by the concessionaire from carrying out works required by NHAI through a change of scope order shall be reimbursed to it by NHAI.
11.	**Commercial operations date**	COD shall be the date on which all conditions precedent as under the concession agreement have been satisfied or waived. Provided that, the period for achievement of COD shall be within 180 (one hundred and eighty) days of the date of the concession agreement. An additional period of 120 (one hundred and twenty) days shall be provided to the concessionaire subject to payment of damages for the achievement of COD.	COD shall be the date of Financial Close or Appointed Date, whichever is later. Provided that, the period for achievement of COD shall be within 180 (one hundred and eighty) days of the date of the concession agreement. An additional period of 120 (one hundred and twenty) days shall be provided to the concessionaire subject to payment of damages for the achievement of COD.	COD shall be the date on which the independent engineer has issued the provisional certificate or the completion certificate. Provided that, COD shall be on or before the scheduled project completion date as defined under the concession agreement, such date being 2.5 (two point five) years from the commencement date.	COD shall be the date on which the completion certificate or the provisional certificate as under the concession agreement is issued. Provided that, COD shall occur prior to the 90th (ninetieth) day after the scheduled completion date as defined under the concession agreement, failing which, the concessionaire shall pay damages to NHAI in a sum calculated at the rate of 0.2% (zero point two per cent) of the amount of performance security for delay of each day until COD is achieved. *[The 550th (five hundred and fiftieth) day from the Appointed Date shall be the Scheduled Completion Date of the Project.]*

		Exclusions to payment of damages for the period of delay in achievement of COD: • due to delay in achievement of COD solely attributable to default or delay by the NHAI in satisfying its conditions precedent under the concession agreement; or due to force majeure.	Exclusions to payment of damages for the period of delay in achievement of COD: • due to delay in achievement of COD solely attributable to default or delay by the NHAI in satisfying its conditions precedent under the concession agreement; or due to force majeure.		
12.	**Change in ownership**	▪ The concessionaire shall not undertake or permit any change in ownership as defined under the concession agreement, except with the prior approval of NHAI.	▪ The concessionaire shall not undertake or permit any change in ownership as defined under the concession agreement, except with the prior approval of NHAI.	▪ In the event that any of the representations or warranties made/ given by a party ceases to be true or stands changed, the party who had made such representation or given such warranty shall promptly notify the other party of the same.	▪ The concessionaire shall not undertake or permit any change in ownership as defined under the concession agreement, except with the prior written approval of NHAI.
		Promoters/ consortium to hold at least 51% (fifty one per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.	Promoters/ consortium to hold at least 51% (fifty one per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.	Promoters/ consortium to hold at least 51% (fifty one per cent) of the shareholding in the concessionaire until 3 (three) years from the commercial operations date.	Promoters/ consortium to hold at least 51% (fifty one per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.
		Each member of the consortium whose financial or technical capacity was evaluated for the purposes of pre-qualification and short-listing in	Each member of the consortium whose financial or technical capacity was evaluated for the purposes of pre-qualification and short-listing in	After a period of 3 (three) years from the commercial operations date, promoters/ consortium to hold at least 26% (twenty six per cent) of the shareholding in the concessionaire for the term of the concession.	Each member of the consortium whose financial or technical capacity was evaluated for the purposes of pre-qualification and short-listing in response to the request for qualification shall hold at least 26%

		response to the request for qualification shall hold at least 26% (twenty six per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.	response to the request for qualification shall hold at least 26% (twenty six per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.		(twenty six per cent) of the shareholding in the concessionaire until 2 (two) years from the commercial operations date.
13.	**Levy and collection of fee**	On and from the COD till the date of transfer of the project to NHAI, the concessionaire shall have the sole and exclusive right to demand, collect and appropriate fee from the users subject to and in accordance with the concession agreement and the applicable laws.	On and from the COD till the date of transfer of the project to NHAI, the concessionaire shall have the sole and exclusive right to demand, collect and appropriate fee from the users subject to and in accordance with the concession agreement and the applicable laws.	▪ The concessionaire shall not levy, demand or collect from or in respect of any vehicle or person, any sum whatsoever in the nature of a toll or fee. ▪ NHAI shall have the authority to levy toll or fee on the vehicles using the project facilities and demand, collect, retain and appropriate the fee in accordance with the applicable laws. NHAI may do so by itself or authorise any person for this purpose.	Not provided for.
14.	**Charge on escrow account in favour of senior lenders**	Not permitted.	A charge on the escrow account arising or created in the ordinary course of business and a charge on receivables of the concessionaire as security only for indebtedness to the senior lenders under the finance agreements and/ or for working capital arrangements for the project is permitted.	Not permitted.	A lien on the escrow account, subject to and without prejudice to the rights of NHAI under the concession agreement is permitted.
15.	**Annuity payments**	Not applicable.	Not applicable.	Biannual instalments as provided for the specific project under Schedule J of the relevant concession agreement.	Biannual instalments over a period of 15 (fifteen) years commencing from COD.

Sl. No.	Particulars	2009 MCA	2016 MCA	2001 MCA	2016 MCA - HAM
16.	**Capacity augmentation**	NHAI may issue a notice to the concessionaire to undertake augmentation as determined by NHAI. On refusal, non-acceptance, or failure by the concessionaire to undertake such augmentation, an indirect political event shall be deemed to have occurred and NHAI may in its discretion terminate the concession agreement by issuing a termination notice and making the termination payment as under the concession agreement.	NHAI may issue a notice to the concessionaire to undertake augmentation as determined by NHAI. On refusal, non-acceptance, or failure by the Concessionaire to undertake such augmentation, an indirect political event shall be deemed to have occurred and NHAI may in its discretion terminate the concession agreement by issuing a termination notice and making the termination payment as under the concession agreement.	NHAI may invite bids from eligible persons for capacity augmentation. On failure of the concessionaire, after participating in the bidding process to give the lowest bid, the concessionaire shall be given the right of first refusal to match the preferred bid. On refusal or failure of the concessionaire to take up such option to undertake works for capacity augmentation, NHAI shall be entitled to accept the preferred bid and terminate the concession agreement with the concessionaire and pay to the concessionaire an amount equal to the termination payment as provided under the respective concession agreement.	Not provided for.
17.	**Refinancing**	No specific provision. However, the definition of "Financing Agreements" includes refinancing.	▪ Refinancing permitted in accordance for the purpose of the project and with the consent of NHAI. ▪ Refinanced debt to be repaid within 1 year prior to expiry of concession period.	No specific provision. However, the definition of "Lenders" includes financial institutions, banks, funds or trusts who refinance debt.	Refinancing permitted in accordance for the purpose of the project and with the consent of NHAI.

Concession Agreements in the Ports Sector

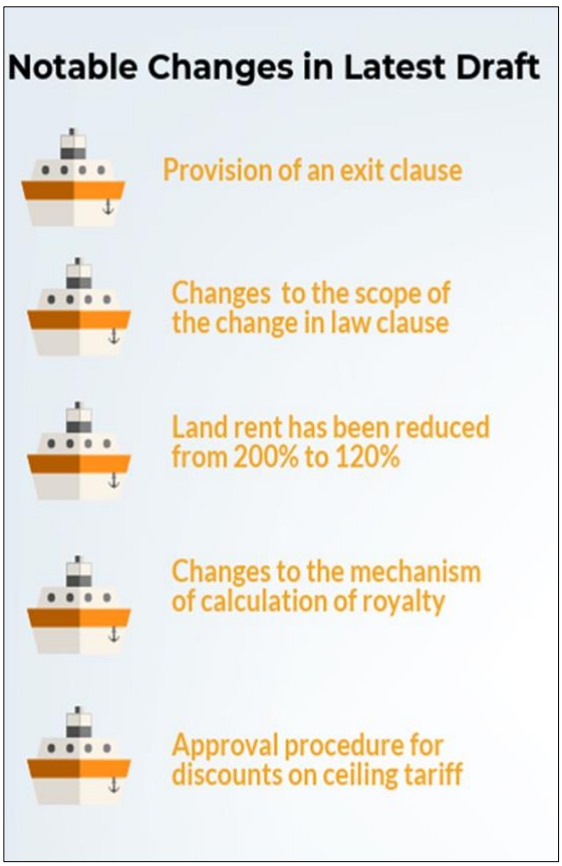
Development of Concession Agreements

The port sector has seen significant investments through the PPP model. The preferred model is DBFOT and both major and non-major ports and terminals therein are bid out and awarded to private players.

A model concession agreement for ports was introduced in the year 2001 by IDFC. An MCA was also developed by the Ministry of Shipping, and projects under both these regimes continue till this day. Separate concession agreements for State ports i.e. non-major ports was also issued.

Separately, several States have adopted their own concession agreements for non-major ports that are different from the MCAs drafted by the Central authorities. For instance, the MCAs developed by the GMB, which predate the MCAs issued by the Planning Commission's draft, expressly recognize grant of sub-concessions while the MCA do not directly recognize this.

Several issues continue to concern the stakeholders in the industry, and the Ministry of Shipping has attempted to address this through periodically issuing model concession agreements taking into account the views of such stakeholders, and the requirements of the evolving industry. The latest of which was issued by the Ministry of Shipping in early January this year. The notable changes brought into the latest draft as follows:



- **Provision of an exit clause.** The new agreement provides an option to the promoters to divest their shareholding in the project concessionaire special purpose vehicle. At any time, after expiry of a period of 5 years from the date of commercial operations of the project, the lead member under the respective concession agreement can approach Authority for approval proposing a new entity/ consortium.

- **Changes to the scope of the change in law clause.** The new definition of change in law includes:

- **Imposition of standards and conditions** arising out of the guidelines/orders issued by the Tariff Authority for Major Ports, environmental laws, and labour laws; and
- **Increase and imposition of new taxes, duties,** etc. for compensating the concessionaire. Since the viability of the project was affected, concessionaire will now be compensated for the increase and imposition of new taxes, duties etc. except in respect of imposition/increase of a direct tax, both by the Central and State Governments.

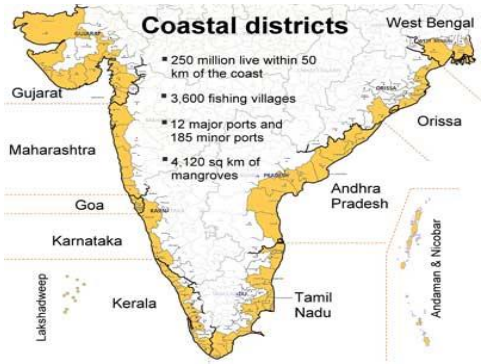
- Under the clause relating to provision of additional land to the concessionaire, land rent has been reduced from 200% to 120% of the applicable scale of rates for the proposed additional land.

- Changes to the mechanism of calculation of royalty payable to the relevant authority.

- Approval procedure for discounts on ceiling tariff and revenue share to be paid on the approved discounted tariff.

Many issues continue to remain unaddressed. Some of these are common to most concessions i.e. delays in land acquisitions and approvals. Other port specific issues such as the lack of connectivity to ports (which often is an obligation of the port authorities), requirements for minimum throughput which may not track realistic levels and providing for a revenue share instead of a profit share (which results in a skewed sharing of returns) also still remain.

Kamrajar port signed a Concession Agreement with IOCL



Ministry of Shipping's Sagarmala Project

Oil spills at ports

Jal Vikas Marg project

Comparative Look at MCAs

A comparison of the key terms in the 1999 model concession agreement issued by the GMB for minor ports, the 2008 model concession agreement issued by the Ministry of Shipping for major ports, the 2016 model concession agreement issued by the Ministry of Shipping for major ports, and the 2018 MCA issued by the Ministry of Shipping for major ports is provided below to trace the evolution of Concession Agreements in the port sector.

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
1.	**Concession model (as provided under the concession agreement)**	Build, Own, Operate, and Transfer (BOOT)	BOT – Build, Operate and Transfer	BOT – Build, Operate and Transfer	BOT – Build, Operate and Transfer
2.	**Concession period**	Unless otherwise provided under the concession agreement, the concession period shall be for a period of 30 years from the date of signing of the concession agreement.	As determined on a project-to-project basis. However, the model concession agreement states that the maximum concession period shall be 30 years.	As determined on a project-to-project basis. However, the model concession agreement states that the maximum concession period shall be 30 years.	As determined on a project-to-project basis. However, the model concession agreement states that the maximum concession period shall be 30 years.
		Provided that, the concession period may be extended by a maximum of 2 years or the period taken for the institution of transport linkages required for the operation of the port as provided in the approved detailed project reports.	Notwithstanding which, the same can be extended by the Authority, or terminated by either party in accordance with the terms of the concession agreement.	Notwithstanding which, on the basis of the actual target traffic achieved in terms of the concession agreement, the concession period can be extended by a maximum period of 10 years or reduced by a maximum period of 3 years in accordance with the terms of the concession agreement.	Notwithstanding which, the same can be extended by the Authority, or terminated by either party in accordance with the terms of the concession agreement.
3.	**Land procurement obligation**	The Authority shall acquire the land for subsequent phases of the project, as identified in the approved detailed project report within 18 months of the date of the agreement.	The ownership of the land shall remain with the Authority and the concessionaire may use such assets for the purposes of the project.	The ownership of the land shall remain with the Authority and the concessionaire may use such assets for the purposes of the project.	The ownership of the land shall remain with the Authority and the concessionaire may use such assets for the purposes of the project.

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
		Ownership of leased land, reclaimed land and waterfront land shall remain with the Authority.	The concession agreement does expressly not lay down obligations relating to land acquisition.	The concession agreement does expressly not lay down obligations relating to land acquisition.	The concession agreement does expressly not lay down obligations relating to land acquisition.
4.	**Additional land**	The Authority shall acquire and keep in reserve additional land from the boundary of the leased premises as identified in the Approved detailed project report for future expansions of the port.	Not provided for.	On deemed insufficiency of land by the concessionaire for the purpose of providing services under the concession agreement, the concessionaire may approach the Authority in this regard. The Authority, on consideration of the issue, and subject to availability, provide such additional land.	On deemed insufficiency of land by the concessionaire for the purpose of providing services under the concession agreement, the concessionaire may approach the Authority in this regard. The Authority, on consideration of the issue, and subject to availability, provide such additional land. The concession agreement additionally states that, in case of non-facilitation of such additional land by the authority, the concessionaire would not be entitled, on these grounds, to any relaxation on the performance of its obligations under the concession agreement.
5.	**Permits procurement obligation**	The Authority agrees to make reasonable efforts to assist the concessionaire in obtaining clearances.	Specific permits to be procured by either the concessionaire, or the Authority as determined during the execution of the project specific concession agreement. Provided that the permits to be obtained by the	Specific permits to be procured by either the concessionaire, or the Authority as determined during the execution of the project specific concession agreement. Provided that the permits to be obtained by the	Specific permits to be procured by either the concessionaire, or the Authority as determined during the execution of the project specific concession agreement. Provided that the permits to be obtained by the

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
			Authority shall be clearances relating to the project site, including clearances from the Ministry of Environment and Forests, and any in-principle clearances, as the case may be. Such permits to be obtained by the Authority may also include consents to establish.	Authority shall be clearances relating to the project site, including clearances from the Ministry of Environment and Forests, and any in-principle clearances, as the case may be. Such permits to be obtained by the Authority may also include consents to establish.	Authority shall be clearances relating to the project site, including clearances from the Ministry of Environment and Forests, and any in-principle clearances, as the case may be. Such permits to be obtained by the Authority may also include consents to establish.
6.	**Financial closure**	Financial close shall occur upon the fulfilment of all conditions precedent to the initial availability of funds under the financing documents, and on receipt of commitments for the equity required for the first phase of the project.	Financial close shall occur upon: ▪ the conditions precedent under the concession agreement being fulfilled by both the concessionaire and the Authority; and ▪ Completion of all actions relating to financial assistance as provided under the respective concession agreement, including the concessionaire obtaining access to financial assistance.	Financial close shall occur upon: ▪ the conditions precedent under the concession agreement being fulfilled by both the concessionaire and the Authority; and ▪ Completion of all actions relating to financial assistance as provided under the respective concession agreement, including the concessionaire obtaining access to financial assistance.	Financial close shall occur upon: ▪ the conditions precedent under the concession agreement being fulfilled by both the concessionaire and the Authority; and ▪ Completion of all actions relating to financial assistance as provided under the respective concession agreement, including the concessionaire obtaining access to financial assistance.
7.	**Termination due to failure to achieve financial close**	On failure of achievement of 'zero day' within a period of 18 months from the date of signing of the concession agreement, the concession agreement would stand terminated. Under the concession agreement, 'zero day' shall be deemed to have been occurred upon: ▪ achievement of financial closing;	Conditions precedent provided under the concession agreement shall be fulfilled within a period of 90 days from the date of execution of the concession agreement. Conditions precedent to be fulfilled by one party may be partially or fully waived by the other party. The Authority may provide additional	Conditions precedent provided under the concession agreement shall be fulfilled within a period of 180 days from the date of execution of the concession agreement. Conditions precedent to be fulfilled by one party may be partially or fully waived by the other party. The Authority may provide additional	Conditions precedent provided under the concession agreement shall be fulfilled within a period of 180 days from the date of execution of the concession agreement. Conditions precedent to be fulfilled by one party may be partially or fully waived by the other party. The Authority may provide additional

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
		▪ obtaining of environmental clearance from the Ministry of Surface Transportation/ Ministry of Environment and Forests; and ▪ completion of milestones necessary for construction as provided in the approved detailed project report under the respective concession agreement.	time to the concessionaire for the fulfilment of its conditions precedent. On delay in this regard, the concessionaire shall be liable to pay certain amounts to the Authority for every day of delay until a certain period, upon expiry of which, the non-defaulting party shall have the right to terminate the concession agreement.	time to the concessionaire for the fulfilment of its conditions precedent. On delay in this regard, the concessionaire shall be liable to pay certain amounts to the Authority for every day of delay until a certain period, upon expiry of which, the non-defaulting party shall have the right to terminate the concession agreement.	time to the concessionaire for the fulfilment of its conditions precedent. On delay in this regard, the concessionaire shall be liable to pay certain amounts to the Authority for every day of delay until a certain period, upon expiry of which, the non-defaulting party shall have the right to terminate the concession agreement.
8.	**Variation of costs arising from change in law**	In the event that a change in law renders exercise by the concessionaire of any of its material rights or performance of its obligations impossible, the concessionaire may serve a termination notice to the Authority. However, the parties to the concession agreement shall engage in consultations, failing which, the matter may be referred for dispute resolution.	The Authority and the concessionaire may discuss and make modifications to the terms of the concession agreement so as to mitigate the effect of the change in law. After taking such measures, if as a direct consequence of the change in law, the concessionaire is to incur additional costs, the concessionaire would have to bear such costs upto an amount, as may be	The Authority and the concessionaire may discuss and make modifications to the terms of the concession agreement so as to mitigate the effect of the change in law. After taking such measures, if as a direct consequence of the change in law, the concessionaire is to incur additional costs, the concessionaire would have to bear such costs upto an amount, as may be	The Authority and the concessionaire may discuss and make modifications to the terms of the concession agreement so as to mitigate the effect of the change in law. After taking such measures, if as a direct consequence of the change in law, the concessionaire is to incur additional costs, the concessionaire would have to bear such costs upto an amount, as may be

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
			decided on a case to case basis, and as provided under the relevant concession agreement. Additional costs incurred by a concessionaire above a certain threshold as decided between the parties, would be borne by the Authority.	decided on a case to case basis, and provided under the relevant concession agreement. Additional costs incurred by a concessionaire above a certain threshold as decided between the parties, would be borne by the Authority.	decided on a case to case basis, and provided under the relevant concession agreement. Additional costs incurred by a concessionaire above a certain threshold as decided between the parties, would be borne by the Authority.
9.	**Change of scope**	Any expansions outside the scope of the approved development plan shall be subject to the prior approval of the Licensor. Any expansion, including any expansion envisaged in the and /or approved detailed project report, entailing capital investment in excess of 25% of the 'Capital Cost for Contracted Assets for Phase 1' shall be considered a Major Expansion.	The Authority may require the concessionaire to carry out works other than what has been agreed to, through a change in scope order, provided that, the cost of implementing a single change of scope order shall not exceed 5% of the estimated project cost and the cumulative cost of such change in scope orders issued during the concession period shall not exceed 20% of the estimated project cost. The Authority shall make payments for the increased costs arising from the change of scope order. The Authority may also seek competitive bids for carrying out of works in relation to a change of scope. The concessionaire shall have an option to match the preferred bid in order to carry out works under a change of scope order, in the terms of the agreement.	The Authority may require the concessionaire to carry out works other than what has been agreed to, through a change in scope order, provided that, the cost of implementing a single change of scope order shall not exceed 5% of the estimated project cost and the cumulative cost of such change in scope orders issued during the concession period shall not exceed 20% of the estimated project cost. The Authority shall make payments for the increased costs arising from the change of scope order. The Authority may also seek competitive bids for carrying out of works in relation to a change of scope. The concessionaire shall have an option to match the preferred bid in order to carry out works under a change of scope order, in the terms of the agreement.	The Authority may require the concessionaire to carry out works other than what has been agreed to, through a change in scope order, provided that, the cost of implementing a single change of scope order shall not exceed 5% of the estimated project cost and the cumulative cost of such change in scope orders issued during the concession period shall not exceed 20% of the estimated project cost. The Authority shall make payments for the increased costs arising from the change of scope order. The Authority may also seek competitive bids for carrying out of works in relation to a change of scope. The concessionaire shall have an option to match the preferred bid in order to carry out works under a change of scope order, in the terms of the agreement.

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
10.	**Commercial operations date**	Before the date of signing of the concession agreement, the Authority and the concessionaire shall decide terms relating to the start of commercial operations.	The Date of Commercial Operations shall be the date on which the independent engineer has issued the provisional certificate or the completion certificate.	The Date of Commercial Operations shall be the date on which the independent engineer has issued the provisional certificate or the completion certificate.	The Date of Commercial Operations shall be the date on which the independent engineer has issued the provisional certificate or the completion certificate.
11.	**Change in ownership**	The Lead Promoter shall maintain a minimum interest of 26% in the shareholding of the concessionaire till the completion of a period of 7 years from the date of the concession agreement. The combined shareholding of key promoters in the concessionaire shall not be less than 51% for a period of 7 years from the date of the concession agreement. A reduction in shareholding below 51% can be undertaken with the prior permission of the Authority. During the term of the concession agreement, an acquisition of more than 10% direct or indirect interest in the shareholding of the concessionaire by any person (either alone or together with its associates) shall require and shall be subject to the prior approval of the Licensor. Any change in shareholding, other than those which require the approval of the Authority, shall be intimated to	Management control shall be retained in the concessionaire at least until the expiry of the exclusivity period. *[Management control shall mean the power to elect or appoint more than 50% of the directors, managers, partners or other individuals exercising similar authority with respect to the concessionaire.]* *[Exclusivity period shall be (i) the period of 5 years from the scheduled project completion date of the project, as provided under the* respective *concession agreement, or (ii) until when the average annual turnover of cargo handled reaches a level of at least 75% of the project capacity for two consecutive years. In cases where an exclusivity period is not provided for, such period shall be till the expiry of 3 years from the date of commercial operations.]*	Management control shall be retained in the concessionaire at least until the expiry of the exclusivity period. *[Management control shall mean the power to elect or appoint more than 50% of the directors, managers, partners or other individuals exercising similar authority with respect to the concessionaire.]* *[Exclusivity period shall be (i) the period of 5 years from the scheduled project completion date of the project, as provided under the* respective *concession agreement, or (ii) until when the average annual turnover of cargo handled reaches a level of at least 70% of the project capacity for two consecutive years. In cases where an exclusivity period is not provided for, such period shall be till the expiry of 3 years from the date of commercial operations.]*	Management control shall be retained in the concessionaire at least until the expiry of 2 years after the date of commercial operations. *[Management control shall mean the power to elect or appoint more than 50% of the directors, managers, partners or other individuals exercising similar authority with respect to the concessionaire.]* At any time, after expiry of a period of 5 years from the date of commercial operations, the lead member under the respective concession agreement, can approach Authority for approval proposing a new entity/ consortium.

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
		the Authority by the concessionaire.			
			Further, the (i) applicant, or the members of the consortium shall hold not less than 51% of the paid up equity capital in the concessionaire until a period of 3 years from the date of commercial operations and not less than 26% of its paid up equity capital during the balance concession period; and (ii) lead member, as provided under the respective concession agreement, shall hold at any time not less than 50% of the consortium's holding in the paid up equity capital of the concessionaire.	Further, (i) the applicant, or the members of the consortium shall hold not less than 51% of the paid up equity capital in the concessionaire until a period of 3 years from the date of commercial operations and not less than 26% of its paid up equity capital for another three years, provided that the concessionaire shall be entitled to waive the equity holding requirement of 26% during the period of three years after the date of commercial operations; and (ii) the lead member, as provided under the respective concession agreement, shall hold at any time not less than 50% of the consortium's holding in the paid up equity capital of the concessionaire.	Further, (i) the applicant, or the members of the consortium shall hold not less than 51% of the paid up equity capital in the concessionaire until a period of 3 years from the date of commercial operations and not less than 26% of its paid up equity capital for another 2 years; and (ii) the lead member, as provided under the respective concession agreement, shall hold at any time not less than 50% of the consortium's holding in the paid up equity capital of the concessionaire. At any time, after expiry of a period of 5 years from the date of commercial operations, the lead member under the respective concession agreement, can approach Authority for approval proposing a new entity/ consortium.
			Any transfer of shareholding in the concessionaire, and/ or direct or indirect change in the management control of the concessionaire shall only be with the prior written approval of the Authority.	Any transfer of shareholding in the concessionaire, and/ or direct or indirect change in the management control of the concessionaire shall only be with the prior written approval of the Authority.	Any transfer of shareholding in the concessionaire, and/ or direct or indirect change in the management control of the concessionaire shall only be with the prior written approval of the Authority.

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
12.	**Levy and collection of fee/ tariff**	The concessionaire shall comply with the provisions of the Indian Ports Act, 1908 relating to tariff.	The concessionaire may charge fees for the project facilities and services tendered in accordance with the specific tariff notification provided under the respective concession agreement published by the Tariff Authority for Major Ports.	The concessionaire may charge fees for the project facilities and services provided in accordance with the specific tariff notification provided under the respective concession agreement published by the Tariff Authority for Major Ports or any such other competent authority under the applicable law.	The concessionaire may charge fees for the project facilities and services provided in accordance with the specific tariff notification provided under the respective concession agreement published by the Tariff Authority for Major Ports or any such other competent authority under the applicable law.
		A comprehensive tariff schedule and the time period from which such tariff shall be in effect, shall be notified to the public by the concessionaire. Any user shall be entitled to avail the port's services at the notified tariffs. A revision in the notified tariff shall be intimated to the Authority and notified as provided under the concession agreement.	The tariff caps shall be revised every year based on a variation in the wholesale price index. Such revision shall be based on indexation against 60% of the variation in the wholesale price index for a relevant year beginning 1st January and ending 31st December.	The aforesaid Tariff caps shall be revised every year based on a variation in the wholesale price index. Such revision shall be based on indexation against 60% of the variation in the wholesale price index for a relevant year beginning 1st January and ending 31st December.	The aforesaid Tariff caps shall be revised every year based on a variation in the wholesale price index. Such revision shall be based on indexation against 60% of the variation in the wholesale price index for a relevant year beginning 1st January and ending 31st December.
			The Concessionaire shall collect all cesses and charges including infrastructure cess, if any, levied on the users as may be requested by the Authority.	The Concessionaire shall collect all cesses and charges including infrastructure cess, if any, levied on the users as may be requested by the Authority.	The Concessionaire shall collect all cesses and charges including infrastructure cess, if any, levied on the users as may be requested by the Authority.
13.	**Charge on escrow account in favour of senior lenders**	Not provided for.	Not provided for.	Permitted.	Permitted.
14.	**Dispute resolution**	Disputes are to be resolved through arbitration by an expert committee to be set up by the Authority and the	Failing amicable settlement with the assistance of the 'expert' appointed by the Authority and the concessionaire	Failing amicable settlement with the assistance of the 'expert' appointed by the Authority and the concessionaire	Failing amicable settlement, the dispute shall be referred to the 'Society for Affordable Redressal

Sl. No.	Particulars	1999 MCA – GMB – Minor Ports	2008 MCA – MoS – Major Ports	2016 MCA – MoS – Major Ports	2018 MCA – MoS – Major Ports
		concessionaire. The Authority and the concessionaire, on failure to agree on one person, each shall each nominate a person, who will then, nominate a third member.	by mutual consent, the dispute shall be settled through arbitration following the procedure agreed to, by the parties. Unless mutually agreed otherwise, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, New Delhi shall apply to the arbitration. The arbitral panel shall consist of one member nominated by each party, and a third member appointed by the two arbitrators	by mutual consent, the dispute shall be settled through arbitration following the procedure agreed to, by the parties. Unless mutually agreed otherwise, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, New Delhi shall apply to the arbitration. The arbitral panel shall consist of one member nominated by each party, and a third member appointed by the two arbitrators.	of Disputes – Ports' for resolution.
15.	**Refinancing**	Not provided for.	Permitted.	Permitted.	Permitted.

Balancing of Risks

Although the Government has launched and continues to work with great enthusiasm, many projects end up languishing or distressed. The forms of distress may vary but factors generally include the following:

- Lower than expected revenue;
- Higher than expected costs;
- Delays;
- Variations in contractual specifications;
- Disagreements between parties in relation to the cause and effect of their actions/inactions.

Improper allocation of risks is identified as one of the key factors that leads to distress in projects, although not all risks can fit within the 4 corners of a concession agreement.

One of the raisons d'etre of a concession agreement is that it provides for allocation of risks to the party who is most capable of bearing such risks. However, the general view is that Indian concession agreements have a very aggressive risk profile and private parties are not capable of bearing all the risks that are transferred to them.

It may also be noted that risk positions set out in contracts are only as good as the management thereof by the two parties but in particular the contracting authority.

Comparison with International Projects

The DEA has compared risk allocation under Indian concession agreements as against several foreign projects to examine the differences.[5] What was discovered is that apart from allocation of risks to different parties, the manner in which foreign concessions dealt with risks was also quite different. Further, Indian concession agreements also did not account for certain risks that were addressed in these foreign concession agreements.

A table setting out the manner in which some of the risks are addressed in Indian NHAI MCAs as compared to foreign concessions based on the studies carried out by the DEA is set out in the following section.

[5] 'Developing a Framework for Renegotiation of Contracts' issued by the DEA on December 5, 2014 (**DEA Report 2014**). The examples used were (1) Gautrain rapid rail system covering 80 km between Johannesburg and Pretoria, South Africa, (2) Chapman's Peak Drive, a high-risk road in Cape Town, South Africa, (3) Lane Cove Tunnel in Australia, (4) Sydney Harbour Tunnel in Australia, and (5) Melbourne Southern Cross Rail Station.

Issue 1 Site not available	Issue 2 Regulatory Approvals Delayed	Issue 3 Failure to Reach Financial Close
INTERNATIONAL		
		
How Dealt With Land made available pre-financial close or Compensation Event	**How Dealt With** Compensation Event/ Renegotiation	**How Dealt With** Termination – mitigated by requiring underwritten
Project Lane Cove Tunnel and Gautrain	**Project** Chapman's Peak Drive/ Lane Cove Tunnel	**Project** All projects require firm financial underwriting
Contractual Form Compensation Event	**Contractual Form** Compensation Event	**Contractual Form** Terminate and retender
INDIA		
		
Obligation to provide site within 150 days of agreement or penalty payable	Applicable Permits is a Condition Precedent to the MCA	Damages payable by the concessionaire to the NHAI after

Issue 4 Refinancing	Issue 5 Traffic Demand above Forecast	Issue 6 Traffic Demand below Forecast
INTERNATIONAL		
		
How Dealt With Refinancing gain share regulated. Prohibition on additional debt. Approval rights for public sector **Project** Lane Cove Tunnel **Contractual Form** Amendments	**How Dealt With** No trigger unless results in Return of Equity above base case then sharing **Project** Chapman's Peak Drive **Contractual Form** Private party risk – no change	**How Dealt With** No trigger unless loan covenants breached then lender step-in/ liquidation/ termination **Project** Sydney Harbour Tunnel and Lane Cove Tunnel **Contractual Form** Lender step In and substitution **How Dealt With** Loan to private company to make good shortfall, repaid once debt service complete **Project** Chapman's Peak Drive **Contractual Form** Renegotiation
INDIA		
		
Permitted with the consent of the NHAI	For every 1% increase in traffic a 0.75% decrease in concession period with a cap of 10%	If actual traffic falls below target traffic, for every 1% shortfall, the concession period, on payment of requisite concession fees will be increased by 1.5% subject to a cap of not more than 20% increase of concession period.

Issue 7 Uninsurable events	Issue 8 Changes in WPI pre-completion	Issue 9 Changes in WPI post-completion
INTERNATIONAL		
		
How Dealt With Compensation by public party on no-better-no worse basis measured against base case financial model. This base case financial model is required to be provided by the concessionaire, audited and signed off by its lenders and reviewed by the public authority.	**How Dealt With** Standby equity used or Government Capital Grant increased by WPI	**How Dealt With** No trigger as revenue WPI indexed
Project Melbourne Southern Cross Station	**Project** Gautrain	**Project** All
Contractual Form Compensation Event	**Contractual Form** Private party risk – no change	**Contractual Form** Private party risk – no change
INDIA		
		
Not Covered	Not Covered	Not Covered

Issue 10 Accurate Reporting	Issue 11 Delay to Completion
INTERNATIONAL	
	
How Dealt With Audited accounts, inspections and audits, financial statements on 6 months' and year's performance; daily, monthly annual reports on traffic volumes and toll revenues **Project** Sydney Harbour Tunnel and Lane Cove Tunnel and Chapman's Peak Drive **Contractual Form** Amendments	1. **How Dealt With** If public party then compensation for delay to place private party in no-better-no-worse position **Project** Lane Cove Tunnel **Contractual Form** Compensation Event 2. **How Dealt With** Loan to private company to make good shortfall, repaid once debt service complete **Project** Lane Cove Tunnel **Contractual Form** Relief Event 3. **How Dealt With** If private party fault then relief on completion granted relief and liquidated damages payable **Project** Lane Cove Tunnel **Contractual Form** Private party risk – no change

Issue 10 Accurate Reporting	Issue 11 Delay to Completion
INDIA	
	
Status reports in the form as provided under the MCA to be sent to the NHAI and the relevant independent engineer on a monthly basis. Reports of unusual occurrences to be sent to the NHAI and the relevant independent engineer on a daily, weekly and monthly basis. In BOT Toll projects, the concessionaire must additionally send monthly fee statements to the NHAI and the relevant independent engineer, install electronic/ computerised traffic counters and conduct traffic surveys and samplings as the NHAI may require.	1. If fault attributable to the NHAI, the concessionaire will not be obligated to pay damages. Completion date will be modified accordingly. 2. If fault attributable to a force majeure event, the concessionaire will not be obligated to pay damages. Completion date will be modified accordingly. 3. If concessionaire fails to achieve a project milestone within 90 days of the contractually specified date, damages at a rate of 0.1% of the amount of Performance Security per day will be payable to NHAI until such milestone is achieved.

As is apparent, there are several risks that are addressed differently internationally. Further, there are also many risks that are unaccounted for in Indian concession agreements.

(MSRDC) terminated concession agreement with IRB Infrastructure Developers for Mumbai Pune Phase II project.

The Delhi Metro Rail Corporation (DMRC) on Tuesday agreed to take over the liability of Rs 1,617 crore debt owed to banks by Reliance Infrastructure subsidiary DAMEPL, which pulled out of the Airport Express Line leading to a dispute.

Improper Addressing of Risks

Even where it appears that an issue is addressed in an MCA, it may not actually be true, given that the commercial reality flowing from the language of the contract differ from the intention of the persons drafting or because the actual practice on ground does not conform to the requirements of the contract. The DEA itself has acknowledged the issue and provided certain relevant examples of this:

- The NHAI MCA provides for an increase in the concession period in order to address variations in traffic volumes as a manner to address demand risk. However, this solution fails to take into account that reduced traffic volumes result in reduced revenues that create an immediate cashflow problem for the concessionaire. Adding a period at the end of the original concession term may have a positive impact on the return on equity but would not ease the stress on the cashflows.

- Even where the risk of land acquisition is placed on the authority, the obligation is expressed in percentage terms i.e. a certain percentage of the extent of the land is required to be provided by a certain date. However, the materiality of the portion of land is not taken into account. This could result in a situation that a critical piece of land required for the development of the project is not provided by the authority; however, the obligations relating to construction imposed on the concessionaire would commence.

It is evident that the issues around risk allocation need to be addressed to ensure that the private developer is not distressed, leading to the project being stalled. Even from the perspective of the concessioning authority, if excessive risks are allocated to the private developer, such risks are usually either priced into the bid, thereby affecting its competitiveness, or such risks are not provided for by the developer as the developer may have presented an aggressive bid, thus jeopardising the project.

It may be noted that issues around 'obsolescing bargains remain unaddressed. A developer who invests money during the construction period often loses bargaining power related to tariffs and other matters in case there are abrupt changes in the economic or policy environment, which are beyond his control. In such situations the developer is left to the mercy of the relevant government authority, with often very little recourse.

Changes required

Various stakeholders have espoused their concerns to the DEA and the concessioning authorities. Common themes emerge as to certain changes that could be considered as desirable to the Concession Agreements themselves, as well as the framework for their implementation.

Some changes that may be considered are:

- Change in Law provisions and specifically exclude changes in tax and environmental laws. Considering that tax and environmental laws have a great deal of impact on project cost and schedule, such a specific exclusion leads to such risks not being addressed or rather leaving the developer to deal with such risks.

- Change in Scope provisions only provide for a Change in Scope of 5% of the total project cost. However, for complex projects where the construction period can be quite long drawn out, greater Changes in Scope may be required. A better mechanism for consultation and agreement on Changes in Scope and compensation therefor would be necessary.

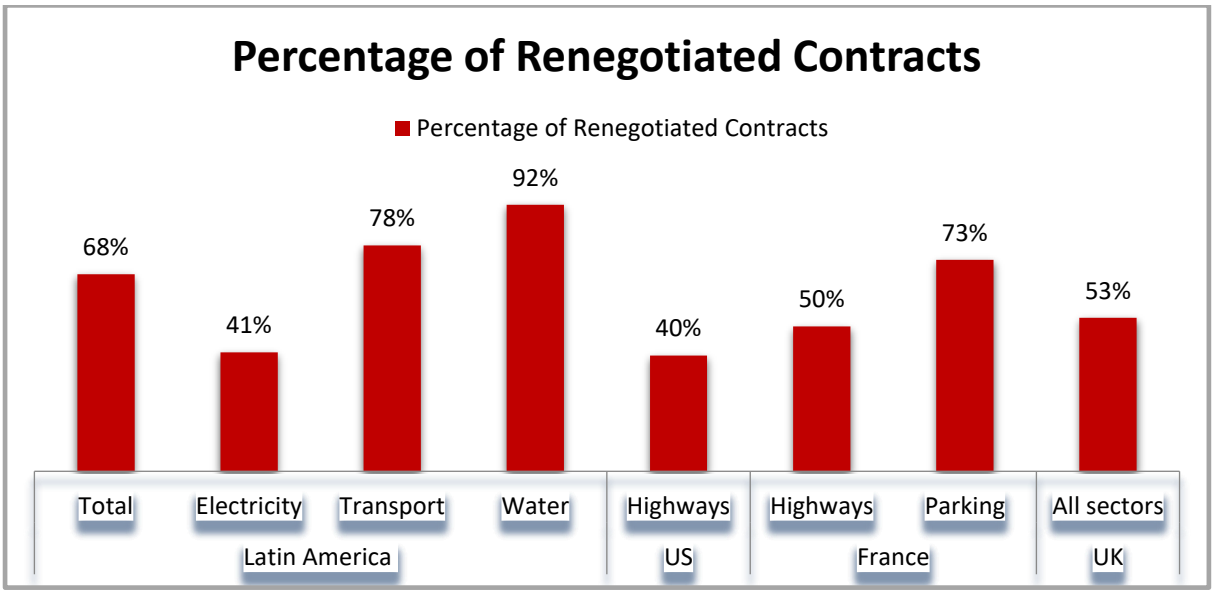
- Contract Management and Review needs to be institutionalised and written into concession agreements. Currently, there is an inadequate mechanism established for contract management where reliance is placed on independent engineers appointed through a Government bid process. More focussed public contracting agencies with the necessary expertise should be involved.

- Renegotiation of Contracts is seen across mature PPP markets around the world. However, in India, any deviations from executed Concession Agreements are not permitted even though circumstances drastically evolve through the years in ways not foreseen by either the concessionaire or the authority. Both the DEA Report 2014 and the Kelkar Report suggest that a mechanism for review and renegotiation for contracts be included. However, the Kelkar Report also cautions of moral hazards involved in such a process. This leads to the question as to whether the inclusion of such a mechanism would even be useful if there is a reluctance to renegotiate.

Renegotiation of Concession Agreements

Renegotiation of PPP contracts is a common feature across mature PPP markets. However, Indian authorities have been resistant towards permitting such renegotiations despite numerous demands from the private sector as well as recommendations by the DEA and other advisors.

There are several instances of renegotiation in relation to PPP contracts across the world. A snapshot of the instances of renegotiation of PPP contracts across certain Western jurisdictions has been provided below as extracted from report issued by a report issued by the OECD in 2014 written by J. Guasch and Others[6] (**Guasch Report**):



Note : In South Korea, as of 2012, 168 projects were renegotiated.

Although the DEA has published reports recommending adoption of renegotiation within pre-determined frameworks, presently there is no mechanism in India that would allow for such renegotiation. This despite the changing risk profile of a Concession Agreement through the passage of time and the life cycle of a project as well as their management. In the implementation of a Concession Agreement, the risk profile is only as good as the management thereof by both the authority as well as the concessionaire. However, a heavier burden towards such management should necessarily flow towards the authority. Where improper management puts the project at a disadvantage, a potential mechanism to salvage the same could be through contract renegotiations.

Whilst currently there is no framework, the Kelkar Report mentions that the model clauses based on established thresholds for renegotiation were in the process of being drafted. However, the latest MCAs do not contain any such clauses permitting renegotiation.

[6] Guasch, J. *et al.* (2014), "The Renegotiation of PPP Contracts: An Overview of its Recent Evolution in Latin America", *International Transport Forum Discussion Papers*, 2014/18, OECD Publishing, Paris.

What is Renegotiation

Where there is any change in the contractual terms and conditions of an agreement other than revisions in payments in accordance with a mechanism specified in the agreement, a renegotiation is said to have taken place.

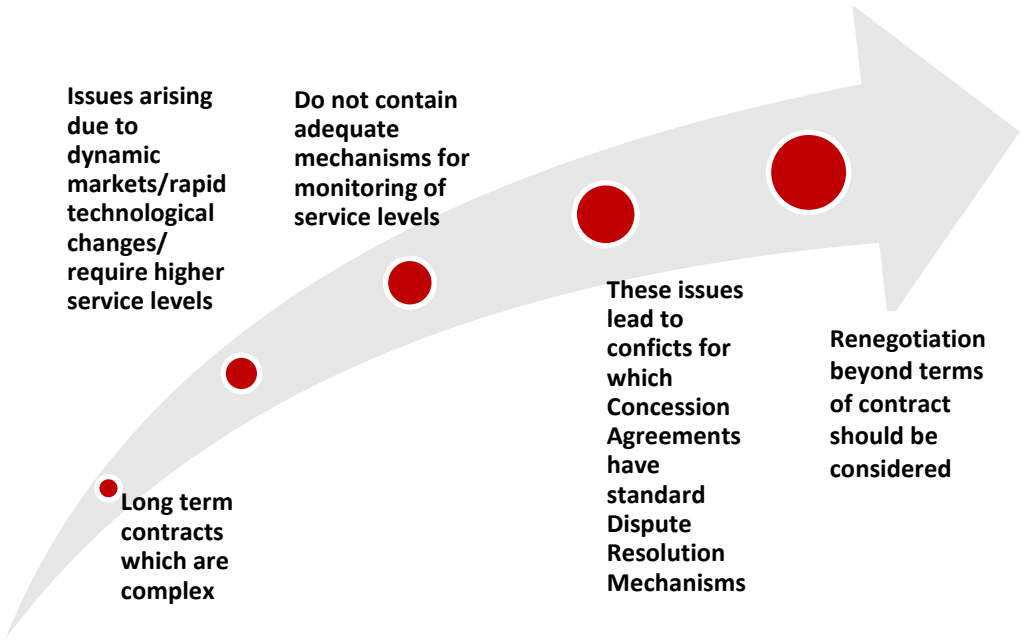
As per the Guasch Report a distinction would need to be made between changes that could be considered as renegotiation (that would require careful consideration) and those that would not as being in consonance with and pursuant to the contractual framework. A tabular summary of this is provided below:

Sr. No.	Renegotiation	Examples
1.	A change in the risk matrix assignment and / or in the conditions of the contract	▪ Reduce the level of services (airports, from IATA A to B) ▪ Defer or advance investments for several years ▪ Extension of the contract term ▪ Reduction guarantees (financial bonds) ▪ Increase the guarantee of the government (to pay lenders) ▪ Delays in the reduction of tariffs (tolls) ▪ Reduce the thresholds of the economic equilibrium of the contract, etc.
2.	A change in the risk matrix assignment and / or in the conditions of the contract	▪ Government requests new investments ▪ Reduction of fees for the government ▪ Avoid bankruptcy of the operator ▪ Changes on the contract scope, etc.

However, the following actions would not be considered as renegotiation:

- Tariffs are adjusted with a formula set it in the contractor indexed by inflation or other index.
- Triggers are activated and eventual investments become mandatory.
- Payments to operator if they are regulated in the contract, etc.
- Corrections of errors in the contract, which do not create obligations, commitments or contingencies (typos, contradictions that affect the implementation for the PPP contract, etc.).

Need for Renegotiation



Typically, Concession Agreements tend to be long-term contracts with terms spanning 15-30 years. Further, Concession Agreements tend to be fairly complex and detailed. However, not all post-award scenarios are envisioned at the time of their execution. Often Concession Agreements do not contain adequate mechanisms for monitoring of service levels. The probability of issues arising due to the dynamic markets due to increases in demand/traffic, rapid technological changes or requirements for higher service levels is certainly high. These issues lead to conflicts for which Concession Agreements contain standard dispute resolution mechanisms such as mediation and arbitration. However, renegotiation beyond terms of the contracts is also an avenue that should be considered. This is to ensure that the benefits of the project continue to be made available to the public as well as reduce the burden on dispute resolution apparatus.

Although the DEA in its reports has recommended renegotiation of contracts under a stringent framework, currently there is no such renegotiation in process. However, even then, it is well recognized that there could be a moral hazard in allowing for such renegotiation. The DEA Report 2015 contains an observation that typically such calls arise from the private party and often such requests are premised towards maintaining a required return on investment or preventing a default under financing agreements undertaken by the private party or avoiding certain risks and therefore renegotiations may not be in the best interest of the public.

Potential Perils and Disadvantages

Even where renegotiations are prevalent (such as Latin America), there is a sentiment that the process is fraught with moral hazards and opportunism and hence should be discouraged. This could partially be through better contract management and monitoring by the authority, careful vetting of bids (as contracts pursuant to aggressive bids are most likely to be submitted to renegotiation) and better contract conceptualisation and risk allocation at inception.

Some of the concerns relating to renegotiations are:

• Often such requests are opportunistic and geared towards ensuring certain financial outcomes for the private party.
• Renegotiations could eliminate the competitive effect of the bid process including transparency, especially where they occur in a short time after bidding. This could result in questioning of the credibility of the model/program.
• There could be asymmetric information and lack of negotiation skills of public sector and lack of competitive pressures to renegotiate the contract.
• Renegotiations could result in the distortion in public tender, in that the most likely winner is not the most efficient operator but the most expert/qualified in renegotiations.
• Renegotiations could decrease the benefits/advantages of PPP and the welfare of users.
• There would most likely be a fiscal impact by increasing liabilities to the Government.

There are certain competition law issues relating to this, that are set out in Chapter 8 below.

Proposed Framework

The DEA in the DEA Report 2014 has suggested a certain framework for renegotiation of Concession Agreements. Further, the Kelkar Report also contains certain guidelines for adopting such a mechanism. It is important to consider these recommendations as they would likely inform the policy of the Government in this regard. Certain key suggestions from both the reports are set out below:

- **Authority Approval.** Given that the concessioning authority would be interested in the outcomes of a Concession Agreement renegotiation, it would not be suitable for the same authority to decide on the necessity for renegotiation or to oversee its negotiations or oversee the outcome. Therefore, an independent authority would be better suited to undertake the process.

- **Fiscal Oversight.** As renegotiation can have significant financial outcomes, fiscal oversight commensurate to that involved in the original contract award would be necessary.

- **Technical Panel.** Independent panels for each sector comprising technical sector experts empowered to hear disputes relating to amendments to the Concession Agreements may be set up similar to existing regulatory bodies such as the Telecom Regulatory Authority of India (TRAI) and the Central and State Electricity Regulatory Commissions (CERCs and SERCs).

- **Standardised Benchmarks**. There should be standardized benchmarks to determine whether a case is worthy of renegotiation to promote consistency. These benchmarks should include:

    - Evidence that the project distress is material and likely to result in default under the Concession Agreement at some future point should the default continue;

- The project distress was not caused by the private party and likely to cause adverse outcomes for the government and/or users of the project;
- Evidence that it is likely that the direct cost implications for the government are less than the financial outcomes of doing nothing if the Concession Agreement being renegotiated;
- The renegotiation is likely to have social benefits or avoided costs that provides better long-term outcomes; and
- The renegotiation does not involve materially different terms of risk allocation to the Government.

- **Disallowed Grounds**. There would be no renegotiation of contracts on the basis of the following grounds:
  - Any event of distress that was foreseeable at the time of financial close;
  - Any event that would affect the Concessionaire as any other company in its ordinary course of business (for example general changes in law)[6]
  - Any impact arising from assumptions made or risks taken any the Concessionaire in preparing its bid;
  - Any impact arising directly or indirectly from any act or omission of the Concessionaire; and
  - Any failure of any associated party to the Concessionaire to perform or provide finance to the Concessionaire.

- **Programme Perspective**. The DEA in the DEA Report 2014 recommends that a programme-wide approach towards renegotiations of Concession Agreements be adopted to enable the Government to monitor and manage renegotiations across all sectors. Further, if certain issues appear to be widespread, the risk allocation in new Concession Agreements may be altered from the beginning so as to obviate the necessity for renegotiation subsequently. Therefore, for each sector, the Government may monitor:
  - Number of projects in distress (so that if above a certain percentage, a programme-wide approach rather than a project-by-project approach can be taken);
  - Causes of distress (so that systemic factors can be identified);
  - Adequacy of contractual mechanisms to deal with such distress; and
  - Adequacy of contract management systems to deal with or avoid such distress.

[6] Although this is mentioned in the DEA Report 2014, typically Concession Agreements in India do have detailed provisions relating to the effects of change in law and the sharing of such risk.

Issues beyond Concession Agreements

As has been discussed in the previous chapters, Concession Agreements suffer from several issues by reason of their inflexibility and improper risk allocations. *However, it has become increasingly clear that beyond the risks inherent in the Concession Agreements and lacunae therein, there exist systemic issues that have led to implementation hurdles and stagnation of infrastructure projects.* It is evident that changes at an institutional level would be required apart from changes to the Concession Agreements.

Some such changes are:

- **Legal Framework**. It is often felt that the lack of an overarching legal framework for PPPs leads to institutional issues as currently PPPs function under a patchwork of Central and State laws that do not always work cohesively. Very few States have specific laws that address PPPs. Although several policies have been put into place, the ability of a private party to actually enforce such policy is quite limited. It may therefore be useful for a clear legal framework to be crafted for PPPs. However, it should be borne in mind that the legislative process is long drawn out and far from certain, therefore any such law could end up bringing inflexibility to the PPP process, if not carefully framed.

- **Project Preparation**. A common complaint is that the projects are not well conceptualised from their inception. There is often no clarity on issues around land availability and permissions or feasibility. Even when the Government employs resources to line this up, given the lead time between bidding and actually awarding the contract, ground conditions may change and developer's risk assessment may be skewed. The World Bank has made available a PPP toolkit to help government officials devise PPP projects. The DEA has also issued a 'PPP Guide for Practitioners' in April 2016 recognizes the issue and states "*Practitioners of PPPs within the Government at its different tiers across the country lack the competence and skill set to conceptualize, structure and implement projects.*" It aims to serve as a manual for practitioners to develop projects through appropriate PPP frameworks. However, each project should be viewed individually and authorities should let go of their ivory tower approach at the inception stage of the project.

- **Capacity Building**. Connected with the above, capacity creation in both the public and private sector for implementation of projects through a PPP scheme is lacking. The Kelkar Committee specifically recommends that the Government undertake capacity building measures including by preparation of knowledge modules for different stakeholders.

- **Knowledge Building**. The Kelkar Committee recommends that a mechanism for collation of data to help with decision making be developed. Currently, there is no accessible database of projects, issues therein and the manner in which they are/were addressed. Such a data would definitely help in identifying systemic issues, making available solutions that worked in earlier projects and gradually introduce consistency in approach.

- **Unrealistic Bidding**. Aggressive bidding by bidders has led to a lot of stagnancy in the sector. Projects often undergo cost overruns with the developers ending up borrowing greatly from banks and financial institutions, tying up money due to inadequate risk assessment by the developer.

Demands for renegotiations also arise from such projects. Although, in some cases renegotiations may be justified, in such cases such asks should be discouraged.

- **Dispute Resolution**. Long drawn out dispute resolution processes. Although a Public Utility (Resolution of Disputes) Bill was mooted, it has yet not been introduced in the Parliament. Usually concession agreements provide for dispute resolution through arbitration. Although arbitration is mooted as a method to avoid a lengthy court dispute, due to jurisprudence developed in India, many awards end up being challenged and unfortunately, arbitration ends up often as a step prior to litigation rather than finally resolving a dispute. Interestingly, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 provides that disputes relating to infrastructure contracts would be considered as a commercial dispute. Further, a welcome change has been incorporated in the Arbitration and Conciliation (Amendment) Act, 2015 which mandated that the arbitrator has to be independent and impartial. This would bring a lot of confidence in private developers considering that it was not uncommon for the concessioning authority to mandate that its own employees or officers would act as arbitrators in the case of disputes.

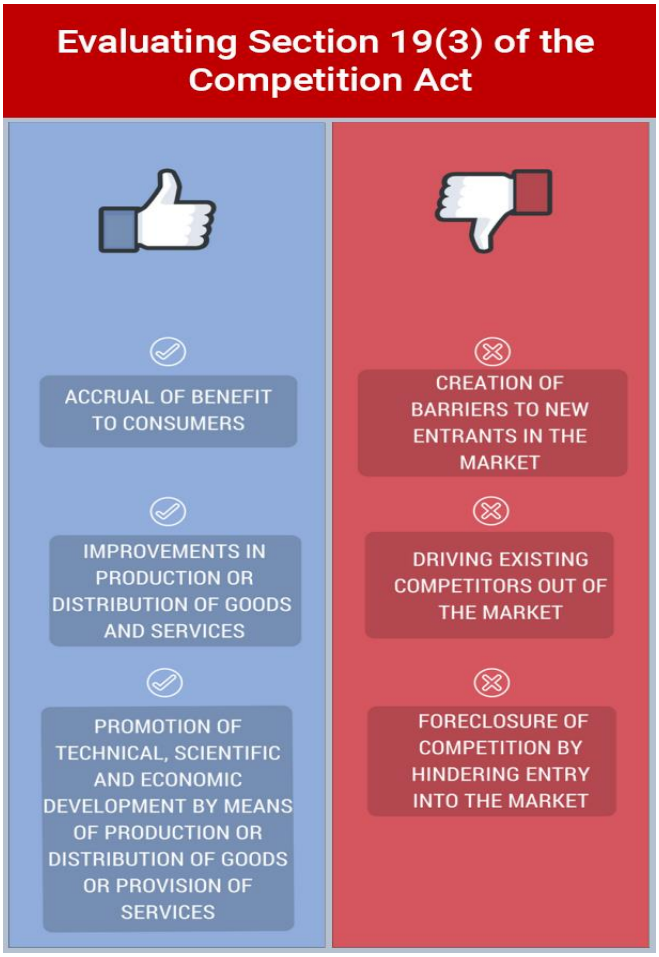
Competition Law Issues in Concession Agreements

A Brief Overview of Competition Law in India

Competition in markets in India is regulated by the provisions of the Competition Act, 2002 (**Competition Act**), which is enforced by the Competition Commission of India (**CCI**). The Competition Act seeks to ensure fair competition in the markets within India and deals with competition concerns broadly arising out of :

- Anti-competitive Agreements under Section 3 of the Competition Act;
- Abuse of dominance under Section 4 of the Competition Act;
- Combinations under Section 5 and Section 6 of the Competition Act.

Like other agreements, Concession Agreements and conduct arising out of the process of grant of concession as well as the conduct of the parties thereafter do have the potential to raise concerns under the provisions of the Competition Act.



Section 3 – Anti Competitive Agreements

Sections 3 of the Act generally prohibits certain horizontal and vertical agreements which cause or are likely to cause an appreciable adverse effect on competition (**AAEC**) in India. Any such agreement is considered void under Section 3 of the Competition Act.

The Competition Act does not define the term 'AAEC' to provide definite parameters for the CCI. However, the Competition Act provides for guidelines in the form of certain identified factors under Section 19(3) of the Competition Act, that the CCI is required to consider while analyzing whether an agreement causes or is likely to cause an AAEC in India. These factors under Section 19(3) of the Competition Act can be categorized into positive and negative factors as listed in the adjoining figure.

Categorisation of Agreements

Agreements under Section 3 of the Competition Act can broadly be categorized as:

- **Horizontal agreements under Section 3(3) of the Act:** Section 3(3) of the Competition Act deals with agreements amongst competitors i.e., agreements between two or more enterprises that are at the same stage of the production chain and in the same market. Such agreements tend to enable sharing of information which concern fixing of prices, limiting of controlling quantities, market sharing or rigging bids.

  The following kinds of horizontal agreements are *presumed* to have an appreciable adverse effect on competition in India by the CCI. This presumption however can be rebutted by the parties with evidence.[7]

  (a) Fixing prices: directly or indirectly determining purchase or sales prices (Agreements regarding prices);

  (b) Production: limit or control production, supply, markets, technical development, investment or the provision of services (Agreements regarding quantities);

  (c) Market Allocation: allocating geographic markets or customers (Agreements regarding market sharing); and

  (d) Collusive Bidding: directly or indirectly result in bid-rigging or collusive bidding (collusive tendering and bid rigging).

- **Vertical Agreements under Section 3(4) of the Act** - Section 3(4) of the Act deals for vertical agreements and provides for an illustrative list of vertical agreements, which if proven to cause AAEC in India, are prohibited, i.e., any vertical agreement in respect of *inter alia* provision of services, including:

  (a) tie–in arrangements;

  (b) exclusive supply agreements;

  (c) exclusive distribution agreements;

  (d) refusal to deal; and

  (e) resale price maintenance

[7] *FICCI Multiplex Association of India v. United Producers*, 2011 CompLR 79 (CCI).

Section 4 - Abuse of Dominance

Section 4 of the Competition Act deals with and prohibits abuse of dominant position by an enterprise. Section 4 of the Competition Act defines dominance as, position of strength, enjoyed by an enterprise, the relevant market in India, which allows it to – (a) operate independently of the competitive forces prevailing in the market; or (b) affect its competitors or consumers or the relevant market in its favour.

As per Section 4 of the Competition Act, there shall be an abuse of dominant position be it an enterprise or a group, if it falls within the following categories:

(a) Directly or indirectly imposing unfair or discriminatory conditions:

  (i) in purchase or sale of goods or services;

  (ii) price in purchase or sale of goods or service

(b) Limits or restricts

  (i) Production of goods or provision of services or market;

  (ii) Technical or scientific development relating to goods or services to the prejudice of consumers

(c) Indulges in practice or practices resulting in the denial of market access;

(d) Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts;

(e) Uses its dominant position in one relevant market to enter into or protect other relevant market

In order to determine the abuse of dominance by an enterprise or a group, it is necessary to first determine the relevant market under which the enterprise/group is operating in for the purpose of assessing the dominance. The term 'relevant market' has been defined under Section 19(5) of the Competition Act as an amalgam of the relevant product market and the relevant geographical market.

After determination of the relevant market, the CCI takes into consideration factors listed under Section 19(4) of the Competition Act to determine dominance of the enterprise in the relevant market. Once dominance of an enterprise/group is established in an identified relevant market, the CCI scrutinizes whether the conduct of such an enterprise/ group is abusive within the purview of Section 4 of the Competition Act, which sets out a number of practices that are considered to be abusive. Such conduct could be either exclusionary, i.e. having the effect of excluding other players in the relevant market or exploitative, i.e. practices which tend to exploit the dominant entity's position by imposing unfair or discriminatory restrictions on other players and consumers in the market.

Section 5 and Section 6 of the Competition Act – Combinations

The merger control provisions of the Competition Act are enshrined under Sections 5 and 6 of the Competition Act with the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. According to this no person or enterprise shall enter into a combination which causes or is likely to cause an AAEC within the relevant market in India and such combinations are treated as void.

The jurisdictional thresholds in India adopt the 'size of parties or the size of group' test and transactions, which meet any one of the following thresholds must be notified to the CCI[8]:

TABLE 1

Companies party to M&A or Acquisition			Groups (2 or more enterprises) party to M&A or Acquisition		
In India			***In India***		
Assets	**OR**	**Turnover**	**Assets**	**OR**	**Turnover**
> INR 20 Billion *(INR 2000 Crores)*		> INR 60 Billion *(INR 6000 Crores)*	> INR 80 Billion *(INR 8000 Crores)*		> INR 240 Billion *(INR 24,000 Crores)*
In India & Outside India (aggregate)			***In India & Outside India (aggregate)***		
> 1 Billion *(Including minimum INR 1000 Crores in India)*	**OR**	> 3 Billion *(Including minimum INR 3000 Crores in India)*	> 4 Billion *(Including minimum INR 1000 Crores in India)*	**OR**	> 12 illion *(Including minimum INR 3000 Crores in India)*

Powers of the CCI

It would be necessary to understand the powers of the CCI when presented with complaints and offences under the Competition Act.

- **Initiate an inquiry**: Section 19 of the Competition Act empowers the CCI to initiate an inquiry into the agreements and abuse of dominance for alleged contravention of the Competition Act either on its own or an information filed by any person or on the basis of a reference made to it by the Central Government or a State Government or a statutory authority.

- **Imposition of penalty and other powers under Section 27 of the Act:** After conducting the inquiry, if the CCI finds violation of the provisions of the Competition Act, it can pass the following orders:

[8] Section 20(3) of the Competition Act provides for revision of the threshold limits every two years by the Government of India, in consultation with the CCI, through notification, based on the changes in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies. Accordingly, the Ministry of Corporate Affairs, Government of India, by way of a notification dated 4 March 2016, have increased the jurisdictional thresholds provided under the Act, 100% (effectively doubling the thresholds).

(a) That the anti-competitive agreement in question be discontinued and not to be re-entered into;

(b) That the abuse of dominant position be discontinued;

(c) Impose penalty as it may deem fit, which shall not be more than 10 percent of the average of the turnover of the last three preceding financial years upon each of the concerned parties to the anti-competitive agreement or abuse of dominance. Further, in case of a cartel, the CCI may impose penalty up to the higher of - three time of the profits for each year of the continuance of such agreement **or** 10 percent of its turnover for each year of continuance of the agreement, on each of the parties to such agreement;

(d) Direct the agreements to be modified to the extent and in the manner as may be specified by the CCI;

(e) Pass such other orders as the CCI may deem fit; or

(f) Additionally, the CCI may also pass orders against the group entities, if they are found to have contributed to the violation.

- **Contravention by companies under Section 48 of the Act:** In case where the violation by a company is established, Section 48 of the Competition Act empowers the CCI to also proceed against individuals, who at the time of the violation were in charge and was responsible to the company for the conduct of the company, if the contravention was committed without the knowledge or the individual exercised all due diligence to prevent the contravention. Further, the CCI may also penalize directors, managers, secretary or other officer, where the contravention took place with the consent, connivance, or is attributable to the neglect on part of such directors, managers, secretary or other officer.

Essential Facilities Doctrine

One of the important principles that is relevant in relation to competition concerns arising out of Concession Agreements is the doctrine of Essential Facilities (**Doctrine**). ***The Doctrine, prevalent in jurisdictions such as the US, EU and Australia, states that a dominant firm cannot refuse to grant access to an essential facility which it controls, to other firms.***

In the US, the doctrine was conceptualised for the first time by the Seventh Circuit Court's opinion in *MCI Commc'ns Corp*. v. *AT&T*[9] The court listed conditions that held that for the Doctrine to be applied in a case, it must be shown that:

- a monopolist controls an essential facility;
- the facility cannot be reasonably duplicated;
- the monopolist has denied access; and
- it was feasible for the monopolist to share the facility

[9] MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983)

Similarly, in the case of *Verizon Communications* v *Curtis Trinko LLP*,[10],the US Supreme Court stated that even if the doctrine were valid, it would be applicable only when there was no means of access and that in the case on hand, the Telecom Act already mandated access or in other words the doctrine was not applicable in a regulated industry.

In India, the Doctrine has not been specifically recognised as such, however, the CCI in certain cases has made references to the Doctrine.

On a similar front, the Supreme Court of India has acknowledged the Doctrine when it comes to Concession Agreements, however not in context of competition law – more so apropos the duty of private bodies performing public functions.

Case Studies

In the case of *VST Industries Limited* v. *VST Industries Workers' Union and Anr*,[11] it was held that private bodies that possess dominant position in the market, are under an implied duty to act in the public interest. The Supreme Court also observed that any private company in India that is controlling infrastructure facility through Concession Agreement as awarded by the government will be considered as performing a public function and thus is expected to act in public interest. If the company refuses to deal with any competitor, then it would be under judicial scrutiny for performing an arbitrary action of a body discharging public functions. This, as per the Supreme Court, would make it difficult for a concessionaire to attempt such unilateral actions.

The CCI observed in *Arshiya Rail Infrastructure*[12] that the Doctrine could only be invoked in certain circumstances, such as existence of a technical feasibility to provide access, replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms.

Scope of Competition issues under the Concession Agreements

The CCI may have an important role to play in concessions. The provisions of the Competition Act could likely stand attracted to Concession Agreements depending upon the nature of the agreement and stage of grant of a concession. The grant of Concession Agreements involves various stages depending upon the method followed by the entity involved in granting the concession. Concessions by their nature provide for certain incentives to the concessionaire such as tax holidays, exclusive supply, exclusive distribution and exclusive rights of building, operating and generating revenue in a particular geographical location.

Depending upon the nature of the agreement and stage of the concession process, Concession Agreements may broadly raise the several concerns (discussed below) under the provisions of Competition Act. In this regard, it is important to note that any enterprise, including a government entity that is involved in a commercial activity will be covered within the purview of the Competition Act. The term 'enterprise' has been broadly defined under Section 2(h) of the Competition Act, to include department of the government but excludes any activity of the government relatable to the sovereign functions of the government, including all activities carried out by the departments of the central government dealing with atomic energy, currency, defence and space. As such, any conduct,

[10] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004)
[11] VST Industries Limited v. VST Industries Workers' Union and Anr (2001) 1 SCC 298.
[12] Arshiya Rail Infrastructure Limited v. Ministry of Railways & Ors., Case No. 64/2010 & 12/2011

that in the CCI's view is ant-competitive, can be investigated, including conduct emanating from commercial activities of government agencies or departments which are responsible for issuing tenders.

Scope of Competition Issues

Exclusivity : If the grant of exclusive rights is done in an unfair manner and terms that has led to exclusion of others from competing on merits, it may potentially raise concerns generally under Section 3 or under Section 3(4) of the Competition Act.

Collusive Behaviour: Section 3(3) of the Competition Act specifically prohibits collusive behaviour in the nature of bid-rigging or collusive bidding and any arrangement of this nature is presumed to have an appreciable adverse effect on competition and is thus void.

Abuse of Dominant Position: While mere dominance is not considered to be objectionable, any abuse of such dominance is prohibited under Section 4 of the Competition Act.

Renegotiations of the Concession Agreements: Re-negotiations may raise competition concerns where the terms of the Concession Agreement are restructured in a manner that they are more favourable to parties that were involved in initial phase of the bidding process.

Combinations, joint ventures and vertical integration: An acquisition or a merger between two competing bidders or their respective parent entities may also raise concerns under the provisions of the Competition Act.

- **Exclusivity**: A concession is intended to grant exclusive rights over a certain real estate or supply/distribution channel for a long term. Although, the CCI has not particularly dealt with cases that have raised exclusivity in relation to the concession agreements, it is important to bear in mind that the grant of exclusive rights is not anti-competitive *per se*. However, if the grant of exclusive rights is done in an unfair manner and terms that has led to exclusion of others from competing on merits, it may potentially raise concerns generally under Section 3 or under Section 3(4) of the Competition Act as having an appreciable adverse effect on competition.

- **Collusive behaviour**: One of the most common method of granting a concession is by way of a competitive bidding process. As discussed above, Section 3(3) of the Competition Act specifically prohibits collusive behaviour in the nature of bid-rigging or collusive bidding and any arrangement/conduct/agreement of this nature is presumed to have an appreciable adverse effect on competition and is thus void. It is pertinent to note that the term 'agreement' has been broadly defined under Section 2(b) of the Competition Act and interpreted by the competition authorities in India.[13]

- **Abuse of dominant position**: By their very nature, Concession Agreements tend to create a monopoly in favour of the concessionaire by granting it sole ownership or access to a certain market for a significantly long period of time. While mere dominance is not considered to be objectionable, any abuse of such dominance is prohibited under Section 4 of the Competition Act. In the context of Concession Agreements, once granted, the concessionaire is the only player in that concerned relevant market, establishing its monopoly in that market. Competition law casts a special responsibility upon dominant enterprises to

[13] *Builders' Association v. Cement Manufacturers' Association & Ors*., Case No. 29 of 2010

ensure that their conduct does not impede the process of competition in the market and as such, any conduct on the part of a concessionaire, being the monopolist, which dilutes or impedes the overall competitive fabric of the market in which such a concessionaire operates, may raise concerns under Section 4 of the Competition Act, if it:

(a) Directly or indirectly imposes unfair and discriminatory conditions on other participants in the market that are utilizing the concession project facility. These conditions could include price and non-price conditions. For instance, if the concession grant is done through the competitive bidding method, the terms of the tender documents may also be examined by the CCI. If the terms of the tender are unfair and discriminatory without any reasonable justifications, then it may be questioned under Section 4 of the Competition Act.

(b) Limits or restricts production of goods or provision of services or limits or restricts scientific development to the prejudice of consumers.

(c) Denies access to the market to market participants. For instance, where the concessionaire being a dominant entity conducts does not allow to deal or imposing conditions that make it impossible for the other player to enter into the market.

(d) Makes conclusion of contracts subject to acceptance of unfair conditions on other participants in the market.

(e) Uses its dominant position in one relevant market to enter into or protect another relevant market. For instance, in case a new concession is being granted and the concessionaire uses its dominant position to influence the market to win the concession for the new project at the cost of exclusion of other competitors.

Further, concessions may also raise the issue of the concessionaire being in control of an essential facility. As discussed above, the Doctrine is applicable in cases where the project facility/infrastructure involved fulfils the criteria of being an essential facility and the concessionaire unjustly refuses to share access to such facility with other market participants. A case raising this issue would be covered under Section 4 of the Competition Act. However, the doctrine of essential facilities has not yet been applied by the CCI as a basis in arriving at a decision under Section 4 of the Competition Act, but references to it has been made in certain cases.

- **Renegotiations of the Concession Agreements**: Re-negotiations may raise competition concerns where the terms of the Concession Agreement are restructured in a manner that they are more favourable to parties that were involved in initial phase of the bidding process. This may not offer a level playing field to other participants who are willing to compete with either the incumbent or earlier bidders. Other competitors may argue that such conditions are anti-competitive under Section 3 and/or Section 4 of Competition the Act.

  Renegotiations to refurbish revise clauses may also have an impact on the competition in the market, depending upon the clauses being renegotiated in view of change in circumstances, cost structures, currency fluctuations, etc. *For instance, extension of the term of the concession or change in the exclusivity offered under the Concession Agreement may potentially raise concerns under Section 3 and Section 4 of the Competition Act. However, at present, no such concerns have been presented to the CCI.*

- **Combinations, joint ventures and vertical integration**: An acquisition or a merger between two competing bidders or their respective parent entities may also raise concerns under the provisions of the Competition Act. Such mergers or acquisitions can potentially raise some of the following concerns:

  (a) Elimination/reduction of competition in the market, which is against the spirit of the Competition Act that seeks to *inter alia* promote competition in the market;

  (b) Chances of collusion among the newly acquired or merged entities that were originally competitors, thereby raising concerns under Section 3(3) of the Competition Act;

  (c) A merger or acquisition between entities that are vertically related in the supply/distribution chain, and which can be said to command dominance in their respective markets, may give rise to an entity that may control market at two levels. In such case, if the vertically integrated entity engages in a conduct that is prohibited under Section 4 of the Competition Act, the CCI may proceed against such an enterprise.

  (d) Joint ventures between two competitors or entities that are vertically related may also raise similar concerns under the Section 3 and Section 4 of the Competition Act. However, joint ventures between competitors in appropriate cases may be defended and justified on efficiency grounds as provided in the proviso to Section 3(3) of the Competition Act.

  (e) Mergers and acquisitions between two entities, where the prescribed thresholds under Section 5 of the Competition Act are breached will be governed by provisions dealing with combinations. In such a case, the proposed transaction will have to be notified to the CCI for its prior mandatory approval, without which the proposed transaction cannot be consummated. The CCI has the power to pass appropriate orders under Section 31 of the Competition Act.

Concession Contracts: Implications of GST

With effect from 1st July, 2017, the indirect tax landscape of the country was completely overhauled, with multifarious indirect taxes such as Central Excise, Service tax, Value Added Tax ("VAT"), Central Sales Tax ("CST"), Countervailing Duty ("CVD") and several cesses, being replaced and subsumed into a singular levy in the form of the Goods and Services Tax ("GST").

India follows a dual structure of the GST, with both the Centre and the State empowered to levy GST, on equal measure, in every transaction of a 'supply'. To effectuate GST in the country, the Central Goods and Services Act, 2017 ("CGST Act"), the State Goods and Services Act, 2017 ("SGST Act"), the Union Territory Goods and Services Tax Act, 2017 ("UTGST Act") and the Integrated Goods and Services Act, 2017 ("IGST Act") have been enacted, and the resultant rules and notifications notified.

Some issues and aspects specific to concession contracts are listed below:

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- By way of specific exemption, service by way of access to a road or a bridge on payment of toll charges as well as service by way of access to a road or a bridge on payment of annuity, are both exempt from the levy of GST.
- If roads fall in more than one State, then the toll charges will be apportioned to each State on proportionate basis i.e. on the basis of ratio of length of roads in each State.
- The service of transportation of passengers, with or without accompanied belongings, by metro continues to be exempt under GST (like it was under the Service tax regime).
- However, the issue that remains is whether the activities of construction, operation and maintenance of roads/ metro lines is carried out under BOT/DBFOT basis when carried out against toll collection rights, will be liable to GST. It remains to be seen whether such activities are seen to be are carried out for self and thus outside the purview of GST.
- Where the infrastructure is handed over back to awarding entity (e.g. NHAI for roads or MMRDA for metro lines) as a going concern, upon the completion of the concession period, it is noteworthy is that services by way of transfer of a going concern, as a whole or an independent part thereof are exempt from the levy of GST.
- Another issue is whether GST becomes payable on grants received from the awarding entity (e.g. NHAI) to bridge the viability gap of the project. "Consideration"14 as defined to not include any grant received from the Central Government or a State Government. However, it requires consideration whether NHAI can be understood as Central Government/ State Government, especially when NHAI merely acts as a conduit to facilitate such a grant from the Central Government.

[14] under Section 2(31) of the CGST Act

- Owing to the specific restriction of credits[15] , credit of the goods or services received for repairs of an immovable property (other than plant or machinery), to the extent of capitalization, to the said immovable property shall not be available.

- Any consideration payable by one party to a registered person on account of termination of contract would be deemed to be supply of service and attract GST, as it would amount to consideration for tolerating an act. However, if such person is supplier (in the ordinary course in respect of an arrangement with the registered person) of goods and/or services, the amount payable on the account of delay in the delivery maybe treated as price adjustment and in such case the supplier is required to issue credit note. In case, there is a dispute as to the entitlement of compensation to be paid on account of termination of the contract unless, the dispute is settled by way of acceptance of an arbitration award(s)/order(s) by both the parties, the amount payable as compensation will not enter into the realm of consideration till the dispute attains finality.

[15] under Section 17(5)(d) of the CGST Act

Due Diligence for Concession Contracts

An acquirer of or investor in a concessionaire usually carries out a detailed due diligence, from a legal, financial and technical perspective. The documents and information that a legal due diligence entails largely overlaps with legal due diligences of entities engaged in other businesses. However, it is advisable that the following documents and information are reviewed as a part of such diligence as they often have a direct bearing on the evaluation of the concessionaire or the transaction itself:

- Tender documents for the grant of the concession
- Concession agreement
- Construction contracts
- Operation and maintenance contracts
- Any related consultancy contracts
- Correspondence between the concessionaire and the concessioning authority, if any
- Any documentation in relation to the right of way over land required for the project or lease or other right
- Environmental approvals
- Construction related approvals
- Documentation relation to any claims made by and against contractors

Notes

Glossary

Concession Agreement	An agreement wherein the public sector entity grants the **private sector entity the right to implement an infrastructure project**
DEA	Department of Economic Affairs, Ministry of Finance, Government of India
MCA	Model Concession Agreement
NHAI	The National Highways Authority of India
PPP	Public Private Partnerships

ECONOMIC LAWS PRACTICE
ADVOCATES & SOLICITORS

Mumbai

109 A, 1st Floor, Dalamal Towers
Free Press Journal Road, Nariman Point
Mumbai 400 021
T: +91 22 6636 7000, F: +91 22 6636 7172

Delhi

801 A, 8th Floor, Konnectus Tower
BhavbhutiMarg, Opp. Ajmeri Gate Railway
Station, Nr. Minto Bridge New Delhi 110 001
T: +91 11 4152 8400, F: +91 11 4152 8404

Ahmedabad

801, 8th Floor, Abhijeet III
Mithakali Six Road, Ellisbridge
Ahmedabad 380 006
T: +91 79 6605 4480/1, F: +91 79 6605 4482

Pune

202, 2nd Floor, Vascon Eco Tower
BanerPashan Road, Pune 411 045
T: +91 20 49127400

Bengaluru

6th Floor, Rockline Centre, 54, Richmond
Road, Bangalore 560 025
T: +91 80 4168 5530/1

Chennai

No. 6, 4th Lane, Nungambakkam High Road
Chennai 600 034
T: +91 44 4210 4863

elplaw@elp-in.com

elplaw.in **/elplaw.in** **/ELPIndia** **/company/economic-law-practice**