Dispute resolution mechanism on infrastructure projects

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Census data 2011 reveals that about 31 percent (377 million) of Indian population lives in urban areas and contributes 63 percent of the GDP. Going forward, the intensity of India's urbanisation will only be increasing. With the strides in the urbanisation that is being witnessed, it is projected that by 2030 urban areas will house 40 percent of the Indian population and contribute 75 percent of India's GDP. The number of large cities which were only 5 in 1951 grew to 53 in 2011 and is expected to go to 68 in 2030.

The above data reinstates the fact that India is rapidly urbanizing and to cope with this increasing number, it is critical that due consideration is given to the infrastructure sector which is the backbone to our economy. The infrastructure sector in India has evolved from solely government funded projects. The present scenario of infrastructure sector is vulnerable, with the sector being hit by demonetization causing slowdown in the economy and problems being faced by various infrastructure developers. The way forward, the sector is expected to bounce back with new opportunities.

What ails the infrastructure sector?

In order to maintain the growth momentum in India, it is necessary to strengthen the infrastructure facilities such as transportation, energy, communication, land acquisition, strengthening the laws and procedure. However, in India, the progress of infrastructure development has not been smooth due to significant shortfalls in planned investments. This problem is compounded by the fact that many of the announced projects are yet to be completed with large time and cost overruns.

Other areas which pose as a challenge for the infrastructure sector are as follows:-

(a) Lack of sufficient availability of bankable projects since the concept of public-private partnerships is slowly emerging in India;

(b) Land acquisition and environmental clearance;

(c) Structuring of the projects, particularly of demarcation of risks and rewards between Government and private sector;

(d) Debt burden of infrastructure developers, as a consequence of execution delays and irrational bidding;

(e) A weak dispute resolution mechanism.

The Proposed Public Utility (Resolution of Disputes) Bill to streamline resolution of disputes in the sector

The Public Utility (Resolution of Disputes) Bill proposed by Finance Minister aims to streamline institutional arrangements for resolution of disputes in infrastructure related construction contracts, PPP and public utility contracts. This Bill contains a number of clauses to ensure contractual disputes between private partners and government agencies get resolved in a time bound and institutional manner.

Few important ingredients of Bill, 2015 are as follows:-

1. **Formation and Composition of the Tribunal:** Section 4 of the Bill specifies that a Tribunal would be established by the government for disputes in relation to public contracts and the same shall be composed by a bench which will be constituted with a Chairperson, Vice-Chairpersons and Members as the government may deem fit. The mandatory qualification for the appointed Chairperson and the Member of the Tribunal shall be the retired or serving Judge of the Supreme Court or the Chief Justice of the any High Court.
2. **Powers and Functions of the Chairperson and Vice-Chairperson:** The Chairperson of the Tribunal shall be having general power of superintendence and control over the Tribunal.
3. **Jurisdiction of Tribunal:** Any dispute arising from a public contract including disputes relating to execution for the contract, specific performance of terms of the contract, termination, cancellation, repudiation, and

claims for damages for breach of contract shall be covered under the ambit of the Tribunal. The pecuniary jurisdiction of the Tribunal shall be extended to disputes wherein the claim is of five crores or more.

4. **Arbitral Proceedings:** The Bill provides that the Tribunal may refer a dispute to an Arbitral Tribunal regardless to whether the public contract which is giving rise to the dispute contains an arbitration agreement. In case, any party fails to nominate the arbitrator within 21 days from the date of making reference to an arbitral tribunal, such arbitrator shall be nominated by the Tribunal. The Bill also enumerates that the Tribunal shall regulate a separate panel of arbitrators which will be consisting of persons from judicial or legal background and other persons with knowledge and experience of public administration and public contracts. The Bill provides day to day hearings for adjudication of the dispute and to pass an arbitral award within 120 days of time limit. In the event if arbitral tribunal fails to abide by the timelines, the Tribunal may grant an extension not exceeding thirty days at a time, but the same shall be subject to a total limit of ninety days.
5. **Appeal:** Any award passed by the arbitral tribunal shall be submitted to the Tribunal. In case any parties files objections to the arbitral award, the Tribunal shall hear the matter accordingly and then shall pass such order. Further, any person aggrieved by any final decision or order of Tribunal can file an appeal directly to the Supreme Court within Sixty days of time frame.

Other government initiatives to help streamline the challenges that the sector faces

Few key and crucial initiatives taken by government to streamline the problems and challenges in infrastructure sector are as follows:-

1. **Engineering Procurement and Construction Business:** To boost the EPC industry, few measures were taken by the Government in recent years such as restructuring the tariff framework for ports and seeking international cooperation from other countries for technical support in renewable energy to meet power generation targets. Further, the government has also allowed 100 percent private sector stake in the development of 17 airports in 11 states.
2. **FDI:** Government in previous years has allowed FDI up to 100 percent under the automatic route in developing townships, housing, built-up infrastructure and construction development projects. Moreover, FDI was also advanced in the certain railway sectors such as high speed train projects, suburban corridor projects through PPP model.
3. **PPP Model:** A Public–private partnership (PPP or 3P) is a commercial legal relationship defined by the Government of India in 2011 as “an arrangement between a government/ statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity.

The Kelkar Committee was constituted for review and revitalization of PPP model. In 2015, the Committee suggested the setting up of independent regulators namely, Infrastructure PPP Project Review Committee (IPRC) and the Infrastructure PPP Adjudication Tribunal (IPAT), for PPP projects in various sectors, to strengthen the dispute resolution mechanism in PPP projects, and thus, to avoid cost and time overruns.

Conclusion

According to the World Bank Report, India has the largest market for PPP contracts. Thus, in order to crystallise the benefit, there is urgent need of revamping of PPP model. The implementation of the Kelkar Committee and passing of the Public Utility Bill 2015, clearly shows that India endeavours to step up the list in the infrastructure sector.

The Bill, once enforced, would provide a legal model for speedier resolution of disputes in PPP projects. The Bill triggers initiative step towards establishing an efficient and effective dispute resolution mechanism which will prevent slowdown of PPP projects and curb huge financial losses. These measures will help in increasing investments and accelerating economic growth in India. We do believe that the initiative of setting up a Tribunal for the dispute resolution mechanism as suggested by the Finance Ministry will certainly help in mitigating the increasing risks related to execution of PPP projects, and resolving the disputes in public contracts and also to overcome the deadlocks in the construction work. EPC World

2 Section 5 of The Public Contracts (Resolution of Disputes) Bill, 2015.
3 Section 25(2) of The Public Contracts (Resolution of Disputes) Bill, 2015.
4 Section 26 of of The Public Contracts (Resolution of Disputes) Bill, 2015.