Indian Infrastructure

FOR INFORMATION PURPOSES ONLY.

THIS DOCUMENT DOES NOT CONSTITUTE LEGAL ADVICE

AUGUST 2019

Introduction

India is one of the largest, most prominent, and fastest growing economies in the world. Everything about it is big – big opportunities and big challenges. This note discusses an important area of India's economy – "infrastructure" – which will have a profound bearing on the growth and true potential of India as it seeks to take its place at the high table of world economies. This note provides the macro-economic context for this sector, the state of India's infrastructure, the legal framework for private and public investment in this sector, the opportunities, the challenges and policy responses as well as and recent significant and incremental structural and other reforms which make India an attractive proposition for developers and suppliers.

The Opportunity

Over the past decade, India has witnessed significant growth in its infrastructure sector. The World Economic Forum's Global Competitiveness Report 2018 highlights India's "efficient infrastructure system." India's overall competitiveness ranking – out of 140 economies – is 55.

To maintain this momentum, the Government of India (GOI) has proposed public expenditure of approximately USD 1.4 trillion (exchange rate USD 1 = INR 70) towards infrastructure in the Union Budget 2019-20. These funds are for investment in energy (conventional & renewable power); transportation (shipping, ports, aviation with special focus on railways and roadways); affordable housing; rural and urban infrastructure.

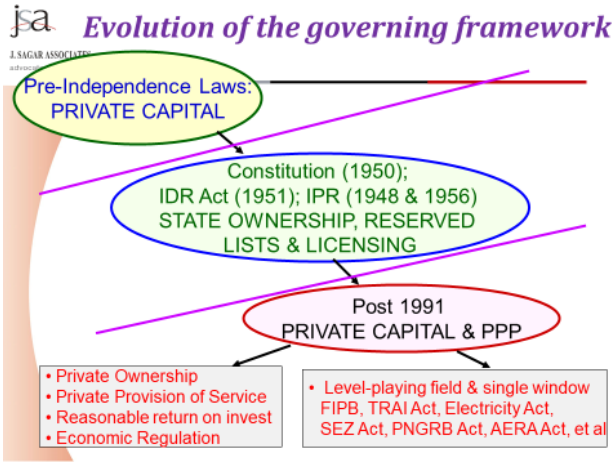
- At USD 2.7 trillion at present (and expected to reach USD 5 trillion by 2025), the Indian economy is:
  - The 7th largest in nominal GDP terms;
  - 3rd largest in Purchasing Power Parity terms.
- 2019-20: India's GDP growth is expected to be 6.9% owing to global slowdown in demand and other international factors.

Changing Role of State in Infrastructure

- Provision of reliable and affordable basic infrastructure facilities to the society including water, electricity, transportation, municipal services is necessary for a healthy life with dignity. It is seen as a responsibility of the "State" owed to citizens.
- India is a union of 28 states with a quasi-federal structure. The Constitution of India sets out the framework for governance of all aspects of the nation, classifying subjects in three groups:
  - ***Central List (List I)***: Union Parliament has sole legislative power to make laws for the nation for the subjects in this list.
  - ***State List (List II):*** State Legislatures have sole legislative power to make laws for the respective states for the subjects in this list.
  - ***Concurrent List (List III):*** Both Union Parliament and State legislature can legislate. In such matters, union law would prevail in cases of irreconcilable conflict.

  When it comes to policy making and implementation, primacy lies in the hands of the States, unless specifically reserved for the Union Government.
- For decades prior to economic liberalization reforms (commencing in 1991), the Union/ State governments had a state monopoly on infrastructure. Post liberalization, with pressing needs for infrastructure and inadequacy of public funds (compounded by inefficiencies and lack of capacity in the public sector), the need for private participation in the infrastructure sub-sectors came to be recognized. This necessarily involved grant of concessions/ license by "State" including access to public facilities/ resources (like spectrum, minerals, etc.), with concomitant issues of pricing and quality of the facilities, balancing of interests of project proponents with "public" and "welfare" aspects.
- To give certainty and a level playing field, the premise for private participation came to be enshrined in legislative and policy frameworks, which provide for establishing and regulating market structures, including the rules of doing business (grant of concessions and licenses, entry, exit and consolidation in that industry) and the governing mechanism pursuing stated economic and social objectives.
- The regulatory architecture of the infrastructure sub-sectors belongs to one of the two basic

frameworks. Regulation of power, petroleum & natural gas, airports, telecom is vested in independent autonomous sector specific statutory expert regulatory agencies and the government has distanced itself from day-to-day regulation. In other sectors such as highways and ports, statutory agencies were established to be grantors of concessions which established a framework for regulation by contract.



- Given that infrastructure is regulated, investment decisions and long-term contractual arrangements (such as supply contracts) must be made in the context of the regulatory framework. Feasibility of investment (type, size, and tenure), the risk appetite and the expectations of return on investments have to be assessed in the regulatory context.

*Harmonised list of Infrastructure Sub-Sectors**	*Domain*
Transport	
Roads and bridges	Union
Ports	Union & State
Inland waterways	Union & State
Airports	Union
Urban public transport	Union & State
Railway track, tunnels, viaducts, bridges, terminal infrastructure (including stations and adjoining commercial infrastructure)	Union
Shipyards	Union & State
Logistics Infrastructure	Union & State
Energy	
Conventional & renewable energy: Generation, transmission, distribution	Union & State
Oil and gas pipelines	Union
Oil, gas & liquefied natural gas: storage	Union
Water, Sanitation & Urban Infrastructure	
Solid-waste Management; Water treatment/ supply; Sewage collection, treatment/ disposal; Irrigation; Storm-water drainage; Slurry pipelines	Union & State

Energy

Electricity

Since the enactment of the Electricity Act, 2003, the electricity industry has transformed into a competitive multi-buyer, multi-seller market from a monolithic State controlled industry. With focus on enhanced competition and private sector participation, there are five segments:

- Generation
- Transmission
- Trading, including power exchanges
- Distribution
- Supply

Electricity is placed in the Concurrent List of the Constitution of India. The Union Government and State Governments determine policies. Regulation is vested in expert sectoral regulators at the Central and State levels. Entry into and exit from the market; safety and standards of performance and tariffs are regulated besides expert panels for resolving disputes. All inter-state aspects are vested with a Central/ Federal Regulator while intra-state elements including consumer tariff is vested with State Regulator.

The legislative and regulatory framework provides for competition in the market, with non-discriminatory open access to the network infrastructure for its movement from the power plants to the load centres/consumers.

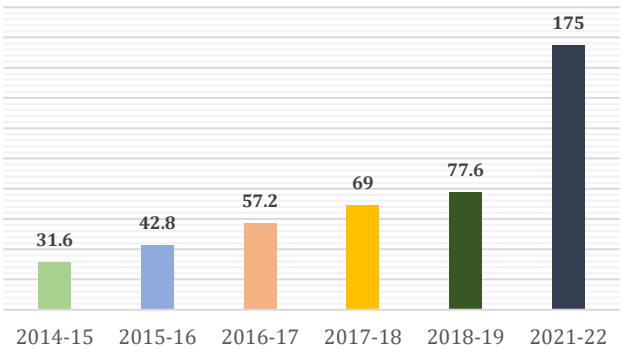
Power may be sold by: (a) the negotiated route, wherein parties enter into a contract for purchase of power such that tariff for such sale is regulated/ determined by the concerned regulator, or (b) the competitive route, when power is procured by way of tariff-based competitive bidding, with such competitively discovered tariff merely being adopted by the concerned regulator.

All decisions of the regulators are subject to a time-bound expert appellate review (180 days) before the Appellate Tribunal for Electricity (APTEL), where each bench comprises of a former judge and an industry expert.

The Union Ministry of Power and the Union Ministry of New and Renewable Energy ("**MNRE**") are executive nodal agencies governing this sector - who work in consultation with various State Governments to evolve and implement policies.

Pursuant to the Paris Agreement, India has opted to achieve ~40% cumulative power installed capacity from non-fossil fuel based energy resources by 2030. In order to achieve these commitments, India intends to promote renewable energy generation, and has announced a target of adding 175 GW of renewable power by 2022, i.e., the solar energy target of 100 GW; wind energy target of 60 GW and biomass target of 10 GW.

Further, India is the second most attractive country (after China) for renewable energy investment, with fiscal and other benefits offered by State Governments via state-level policies. The growth in the installed capacity (GW) is illustrated below:



Initiatives taken by the Union Government to achieve the targeted renewable energy capacity of 175 GW by 2022, include:

(a) better enforcement of renewable purchase obligations;

(b) evolved tariff-based competitive bidding guidelines;

(c) setting-up of exclusive solar parks;

(d) large government complexes/ buildings, smart cities and new construction with higher floor area ratio must mandatorily have rooftop solar projects;

(e) infrastructure status for solar projects;

(f) tax-free solar bonds;

(g) longer loan tenures, etc.

The MNRE has recently issued the National Wind-Solar Hybrid policy, for hybrid wind-solar plants, which aims to ensure the efficacious utilisation of available land and transmission infrastructure, reducing variability in renewable power generation and achieving grid stability. In addition, various State Governments' policy initiatives provide further incentives for the renewable energy sector.

In April, 2018, the Ministry of Power, clarified that the activity of charging of batteries of electrical vehicles is a 'service' and does not constitute transmission, distribution or trading of electricity. Therefore, charging stations are not required to obtain a license under the Electricity Act, 2003.

More recently, guidelines for development of charging infrastructure have been issued by the Ministry of Power, setting out, amongst other things, the minimum technical requirements for public charging infrastructure and the minimum requirements for density/ distance between charging stations.

Oil & Gas

Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products fall within the purview of the Union List of the Constitution of India.

Oil and gas activity in India is broadly divided into three segments:

- Upstream (exploration, development and production);
- Midstream (refining and transportation); and
- Downstream (marketing, distribution and retail).

The Ministry of Petroleum and Natural Gas ("MOPNG") and the Directorate General of Hydrocarbons are the primary administrative bodies that regulate the upstream segment.

The MOPNG announced the Hydrocarbon Exploration and Licensing Policy ("**HELP**") regime in 2016. This ushered in a slew of changes to the exploration and production regime (earlier set out in the New Exploration and Licensing Policy). Key changes include a model revenue sharing contract, unified licences for all types of hydrocarbons, open acreage licensing, and marketing and pricing freedom.

Pursuant to the introduction of the HELP regime and 3 licensing rounds being conducted under the Open Acreage Licensing Policy, the Government on February 28, 2019 passed a resolution providing a series of policy reforms to incentivise production, streamline and expedite approval process, and promote ease of doing business in the sector. In Category I basins where there is established potential, to further give a boost to exploration in these basins, the weightage of minimum work programme has been enhanced and a revenue sharing ceiling has been set at 50%. Further, for Category II and III basins, the blocks are solely to be awarded basis the exploration work programme and

no production and revenue sharing would be applicable for these basins (except in case of windfall gain).

The Petroleum and Natural Gas Regulatory Board, constituted under the Petroleum and Natural Gas Regulatory Board Act, 2006, regulates midstream and downstream activities, including, *inter-alia*, transportation (including laying of pipelines), distribution, marketing, import, export and sale of petroleum and petroleum products (excluding production of crude oil and natural gas).

Appeals from decisions of the Petroleum and Natural Gas Regulatory Board lie before the APTEL. A further appeal against the order/decision of the APTEL lies before the Supreme Court of India.

In the downstream segment, the federal government is largely focusing on developing **City Gas Distribution ("CGD") networks**. Pursuant to the recently concluded 9th and 10th CGD bid rounds, CGD would be available in 228 geographical areas.

Transportation

Aviation

Civil aviation is under the administrative control of the Union Ministry of Civil Aviation. Airport Infrastructure of India Policy, 1997 recognized the need for private sector participation (including foreign entities) in airports to bridge the growing gap in resources and to bring managerial efficiency. The governance structure is as set out below.

- ***Union Ministry of Civil Aviation*** exercises administrative control over airports and civil aviation.
- ***Directorate General of Civil Aviation*** is the safety regulator responsible for promoting safe and efficient air transportation and proactive safety oversight system.
- ***Airports Authority of India*** is responsible for creating, upgrading, maintaining and managing India's civil aviation infrastructure.
- ***Airport Economic Regulatory Authority*** is an expert regulator which enforces performance standards; determines/reviews tariff structure for aeronautical services levied by airports on airlines/passengers; and regulates user fees levied by service providers at airports. A recent amendment has increased the threshold of passenger traffic in airports over which the authority will have jurisdiction.
- ***Airports Economic Regulatory Authority Appellate Tribunal*** is the expert appellate institution which adjudicates dispute between two or more providers of aeronautical services and between a service provider and a group of consumers.

There has been a move towards increased private participation in the development or redevelopment of airports – recently, 6 airports (Ahmedabad, Guwahati, Jaipur, Lucknow, Mangaluru and Thiruvananthapuram) were offered up for brownfield development. Key features of the privatisation structure include: (a) substituting the revenue share model with a per-passenger fee as the bidding criterion, (b) increasing the concession term to 50 years considering the financial viability of increasing the period for financial returns, and (c) non-prescription of mandatory capital works, with only pre-defined performance parameters set out.

Metro Rail Transport

Metro rail transport is governed by the Metro Railways (Construction of Works) Act, 1978 read with the Metro Railway (Operation and Maintenance) Act, 2002. The Metro Railways (Construction of Works) Act, 1978 provides for the constitution of an advisory board to formulate and coordinate plans for developing metro railways and the financing and execution of any metro railway project.

To facilitate greater private participation and investment in construction and operation of metro rail, the GOI is:

(a) formulating a new Metro Rail Policy to establish innovative models of implementation and financing; and

(b) proposing to rationalize the existing laws.

Metro rail projects are underway in various cities, including Kanpur and Varanasi in the state of Uttar Pradesh, Indore in the state of Madhya Pradesh, Patna in the state of Bihar, and Vijayawada and Visakhapatnam in the new state of Andhra Pradesh.

Railways

The Union Ministry of Railways regulates rail transport. The Railways Act, 1989 consolidates the laws relating to the rail transport industry in India, including rail infrastructure and rail operations. The powers and functions of the Ministry of Railways under the Railways Act, 1989 are vested in the

Railway Board, which issues directions and guidelines for the rail sector in India.

Recognizing existing infrastructure gaps and capacity constraints in the rail system, the Union Budget for 2019-20 investment of USD 700 billion is estimated to be required between 2018-2030. In this regard, it is proposed to use PPPs to unleash faster development and completion of tracks, rolling stock manufacturing and delivery of passenger freight services.

Railway operations have been primarily reserved for the public sector. However, private participation is permitted in the construction, operation and maintenance of the following – suburban corridor projects through PPPs; high-speed train projects; dedicated freight lines; rolling stock including train sets, and locomotives or coach manufacturing and maintenance facilities; railway electrification; signalling systems; freight terminals; passenger terminals; infrastructure in industrial parks pertaining to a railway line or sidings including electrified railway lines and connectivity to a main railway line; and mass rapid transport systems.

Additionally, it is understood that Indian Railways is examining various options for private participation in operation of passenger carrying trains.

The **Dedicated Freight Corridor project** is designed to alleviate congestion on the rail routes between the four metropolitan cities of Delhi, Mumbai, Chennai and Howrah (the golden quadrilateral). Its two diagonals (Delhi-Chennai and Mumbai-Howrah), are building long-distance, cargo-only rail lines.

National Highways

The Ministry of Road Transport and Highways, GOI is responsible for all policy matters related to road transport and national highways.

National highways are regulated under the National Highways Act, 1956 by the National Highways Authority of India ("NHAI"), which is responsible for development, maintenance and management of National Highways. NHAI can contract with private persons to develop and maintain national highways.

GOI has launched an ambitious umbrella programme for roads, i.e., **Bharatmala**, to subsume all existing road projects including the National Highways Development Project. The first phase of the programme, set to be implemented over 5 years (2017-22), envisages development of ~34,000 Km of economic corridors, inter corridors, feeder routes, national corridors, border roads, international connectivity roads, coastal roads, port connectivity roads and expressways at an estimated outlay of USD 75 billion.

NHAI has awarded projects on the hybrid annuity model – 40% of the project cost is funded by the Government to the private developer during the construction period while the balance 60% is received as annuity payments over the operations period along with interest on the outstanding amount. The hybrid annuity model has, after initial hesitation, begun to be enthusiastically responded to by the private sector. Case-specific impediments such as aggressive bids, stressed sponsors or lack of construction experience continue to delay financial closure for some of the projects.

Ports

Major ports are owned and managed by the Union Ministry of Shipping and governed under the Indian Ports Act, 1908 read with the Major Port Trust Act, 1963. A Major Port is governed by Board of Trustees appointed by the Central Government, which can enter into an agreement with private entities to perform any services or functions assigned to the Board of Trustees.

The GOI issued guidelines for private sector participation in major ports in 1996 and 1997, which enable major ports to set-up joint ventures with foreign ports, minor ports and private companies. It also issued a Model Concession Agreement and standard bid documents in respect of major ports.

The Union Ministry of Shipping recently launched the **Sagarmala Programme**, which envisages promoting port-led development. 414 projects for port modernization, new port development, port connectivity, port-linked industrialization and coastal community development with investment outlay of over USD 60 bn.

Minor ports are owned and managed at the State level by the department in charge of ports or the State Maritime Board (as seen in Gujarat, Maharashtra and Tamil Nadu). The functions of the State Maritime Boards are similar to those of port trusts, and include the tariff determination. They focus on attracting private investment by awarding concession contracts, providing incentives with exclusivity rights and facilitate land acquisition.

Urban Development – Smart Cities

Nearly 31% of India's population lives in urban areas and contributes 63% of India's GDP. By 2030, urban areas are expected to house 40% of India's population and contribute 75% of India's GDP. This addition of over 120 million citizen requires comprehensive development of physical, institutional, social and economic infrastructure.

This led the Union Government to launch the Smart Cities Mission to build 100 Smart Cities during 2015-16 to 2019-20. A smart city must be equipped with basic infrastructure[1] for a decent life with a clean and sustainable environment premised on smart solutions. Its urban eco-system comprises four pillars – institutional, physical, social and economic element.

Union Government declared financial support to the Smart Cities Mission of USD 7,500 million over a period of 5 years, i.e., on an average of USD 15 million per city per year. A matching amount will be contributed by the respective State Government/ urban local body.

Each city is required to formulate its own concept, vision, mission and plan for mobilisation of resources and intended outcomes in terms of infrastructure up-gradation and smart applications for the Smart City appropriate to its local context, resources and salient features of the proposal.

A special purpose vehicle is to be incorporated to implement each identified Smart City to:

(a) Approve and sanction projects;

(b) Execute the Smart City Proposal with operational freedom;

(c) Appoint project management consultants to design, develop, manage and implement area-based projects, and

(d) Take assistance from any consulting firm empanelled by the union Ministry of Urban Development.

A total of 5,151 projects at an estimated cost of USD 30 billion have been mooted for the smart cities, covering core infrastructure for area-based development, technology-based governance solutions, service-delivery and utilization of infrastructure. Of these, 3,645 projects have been tendered and/or are complete or under implementation.

With a focus on visible and transformative impact in the lives of citizens (and particularly, transportation & urban mobility, waste management and green energy), various projects are under implementation, including Smart toilets (Delhi, Kakinada, Solapur), solar rooftop (Guwahati, Delhi, Kakinada, Solapur), smart parking (Surat, Indore, Delhi, Bhubaneswar), smart cycles (Bhopal, Jabalpur) and smart cards (Ahmedabad, Surat, Indore, Bhubaneswar).

[1] Comprising water supply; electricity supply; sustainable sanitation and solid waste management; efficient urban mobility; affordable housing; and robust IT connectivity with e-governance.

Telecommunications

Under the Indian Telegraph Act, 1885, Central Government has the exclusive privilege of establishing, maintaining and working of "telegraphs" (i.e., a device used or capable of use to transmit or receive signals of any nature by wire, visual or other electro-magnetic emissions, radio waves or Hertzian waves, galvanic, electric or magnetic means). Central Government may grant licenses on such conditions and in consideration of such payments as it thought fit, to any person to establish, maintain or work a telegraph in any part of India. The governance framework is as follows:

- ***Department of Telecommunications of the Union Ministry of Communications and Information Technology:*** Formulates policy, licensing and coordination of matters relating to telegraphs, telephones, wireless, data, facsimile and telematic services and other like forms of communications.
- ***Telecom Regulatory Authority of India:*** Ensures compliance of terms and conditions of licence, lays down the standards of quality of service to be provided by the service providers and ensures quality of service.
- ***Telecom Disputes Settlement & Appellate Tribunal:*** Adjudicates any dispute between a licensor and licensee, between two or more service providers, between a service provider and a group of consumers, and hears and disposes of appeals against any decision/order of the Telecom Regulatory Authority of India.

M&A & Permitted Foreign Investment

SECTORAL CAPS – FOREIGN DIRECT INVESTMENT		
Sector/Activity	**FDI**	**Route**
Exploration activities of oil and natural gas fields, infrastructure related to marketing of petroleum products and natural gas, marketing of natural gas and petroleum products, petroleum product pipelines, natural gas/pipelines, LNG Regasification infrastructure, market study and formulation	100%	Automatic

SECTORAL CAPS – FOREIGN DIRECT INVESTMENT		
Sector/Activity	**FDI**	**Route**
and petroleum refining in the private sector.		
Construction, operation and maintenance of: (i) suburban corridor projects through PPP, (ii) high-speed train projects, (iii) dedicated freight lines, (iv) rolling stock including train sets, and locomotives/ coaches manufacturing and maintenance facilities, (v) railway electrification, (vi) signalling systems, (vii) freight terminals, (viii) passenger terminals, (ix) infrastructure in industrial park pertaining to railway line/ sidings including electrified railway lines and connectivity to main railway line and (x) mass rapid transport systems	100%	Automatic
Airports (green-field and existing)	100%	Automatic
Scheduled air transport services, domestic scheduled passenger airlines, and regional air transport services	100%	Automatic (up to 49%) Government (> 49%)
Non-Scheduled air transport services	100%	Automatic
Telecommunication Services	100%	Automatic (up to 49%) Government (> 49%)
Construction-development projects (which includes development of townships, construction of residential/ commercial premises, roads or bridges, hotels, resorts, hospitals, educational institutions, recreational facilities, city and regional level infrastructure, townships)	100%	Automatic
Industrial parks (new and existing)	100%	Automatic
Power Exchanges	49%	Automatic
* In sectors/ activities not listed in the FDI Policy, foreign direct investment is permitted up to 100% on the automatic route (subject to applicable law, security and other conditions).		

SECTORAL CAPS – FOREIGN DIRECT INVESTMENT		
Sector/Activity	**FDI**	**Route**
† FDI is prohibited in railway operations and atomic energy		

Modes of Entry

Subject to the investment restrictions and sectoral entry requirements (if applicable), the modes by which a foreign entity may enter the Indian infrastructure space can be broadly classified as follows:

- ***Greenfield Mode:*** A foreign entity may bid for infrastructure projects (and thereafter undertake the design, building, construction and/or operation of the project) or conceptualize and develop infrastructure projects of its own accord.
- ***Acquisition Mode:*** A foreign entity may acquire a company engaged in infrastructure services (and thereby its infrastructure assets and interests) through a 100% stake purchase or by way of a strategic shareholding interest as may be commercially agreeable to the parties. Further, it is to be borne in mind that approval of the Competition Commission of India may be required if the fiscal thresholds provided in the Competition Act, 2002 are exceeded.

Recent Reforms & Trends

Dispute Resolution: Enforcing Contracts

- To facilitate ease of doing business and to expedite resolution of commercial disputes, the ***Arbitration & Conciliation Act, 1996*** was amended with effect from 23 October 2015. Some of the amendments made are as follows:
  - Even in foreign-seated arbitrations parties can approach Indian courts for interim relief (subject to an agreement to the contrary).
  - An application for appointment of an arbitrator should be disposed of as expeditiously as possible and an endeavour should be made to dispose of such application within 60 days from date of service of notice to the other party.
  - Court's jurisdiction in an application for appointment of an arbitrator has been confined to examination of the existence of an arbitration agreement.
  - An award should be passed within a period of 12 months from the date the tribunal enters upon the reference. The parties can by consent extend the period of making of the award for a further period of maximum 6

months. Any extension beyond this period of 18 months can only be granted by Court (for sufficient cause and on such terms as the Court may impose)

- Fast track procedure for resolution of dispute by arbitration has been introduced. Under the fast track procedure, an award should be passed within a period of 6 months from the date the tribunal enters upon the reference (unless extended by Court).
- Regime for costs has been introduced as per which, the tribunal has the power to determine whether costs are payable by one party to another and the quantum of such costs. "Costs" include the fees and expenses of the arbitrators, courts and witnesses, legal fees and expenses, administration fees and any other expenses incurred in connection with the arbitration, court proceedings or the award.

- If an application has been filed to set aside an award, there is no automatic stay of the operation award. A separate application seeking stay of operation of the award has to be made. ***The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015*** was enacted to:
  - Resolve high pendency in courts. Following courts have been established:
    - Commercial Courts at the district level;
    - Commercial Division of the High Court;
    - Commercial Appellate Divisions of the High Court.
  - Introduce case-management for efficient conduct of proceedings
  - In 2018, the act was amended, *viz*., -
    - Pre-institution mediation has been made compulsory where urgent relief is not contemplated;
    - Introduces Commercial Appellate Court at the district level;
    - Allows for setting-up of commercial courts in jurisdictions where the concerned High courts have ordinary original civil jurisdiction;
    - Creates two levels of commercial courts – at the District Judge Level and a lower judicial officer.
- ***Specific Relief (Amendment) Act, 2018 ("SRA Act")*** has revised the existing regime such that specific performance has to be considered as the rule rather than an exception by the courts, subject to certain limitations. The SRA Act also introduces the concept of substituted performance, wherein a party affected by breach of contract can choose to get the contract performed by a third party/ own agency at the cost of the contracting party in default. Special Courts have been proposed to try suits related to contracts of infrastructure companies and dispose cases within 12 months (extendable by 6 months). Further, it is proposed that the courts cannot grant injunction in respect of infrastructure projects, if such injunctions would hinder or delay the completion of a project.
- ***Expert Sectoral Regulators:*** Another structural reform which had salutary impact on the investment climate in several infrastructure sub-sectors (power, petroleum & natural gas, telecom, broadcasting, aviation) is the institution of expert economic regulators. Issues like entry (licensing); exit and consolidation; price regulation including subsidy and cross-subsidy; safety regulation; non- discriminatory open access to bottleneck/ network infrastructure; quality/ performance regulation and dispute resolution are handled by permanent multi-disciplinary expert bodies in a statutorily defined framework and timeframe. Time bound appeals on fact and law lie before a similar expert appellate tribunal where the bench comprises a judicial and a sector/ technical expert. Appeals are permitted within 45 days and required to be disposed of in 180 days. Most cases then attain finality unless appealed to Supreme Court (file within 60 days – maximum 120 days). As such in these sectors, all proceedings/ disputes invariably are settled within 3 to 4 years – down from the old refrain of "20 years".

New Options for Infrastructure Financing

To unshackle the emerging challenges of stranded infrastructure projects and facilitate their refinancing, certain new options are now available for financing/ refinancing infrastructure projects.

- ***INVITS:*** Infrastructure investment trusts (InvITs) are business trusts enabling investment in underlying infrastructure projects and are similar to REITs. Under the regulations, a sponsor (project company) may raise funds by transferring assets to a trust (managed by the

trustees). At least 80% of the portfolio of transferred assets must be operational and revenue generating. Units issued by the trust are to be listed. Sponsor would continue to hold at least 26% of the units for a period of 3 years. Part of the capital raised would go into repayment of at least 50% of the debt and balance may go to the sponsor. InvITs would thus result in unlocking of funds for the banks and reducing the debt burden for the sponsor. Once the InvIT is formed, 90% of net distributable cash flows have to be repaid in the form of dividends to unit holders. Aggregate consolidated borrowings and deferred payments (net of cash and cash equivalents) are not to exceed 49% of the value of the InvIT assets.

- ***Masala Bonds:*** These are rupee denominated bonds issued overseas by Indian corporate entities. The proceeds from can be used for any purpose, except for:
  (a) Real estate activities (other than integrated township/ affordable housing)
  (b) Investing in capital market, and/or using proceeds for domestic equity investment
  (c) Activities prohibited as per the FDI guidelines
  (d) On-lending to other entities for any of the above purposes, and/or
  (e) Purchase of land.

  In April, 2018 NHAI listed its masala bonds to raise USD 3805 million intended to be used towards improving India's road infrastructure.
- ***National Infrastructure & Investment Fund (NIIF):*** NIIF is an alternative investment fund set up by GOI. It aims to catalyse infrastructure development by investing in green-field and brown-field projects. Initial authorized corpus is USD 6,250 million, which may be increased as decided by the Ministry of Finance, GOI.
- ***Bond Market:*** The primary market for corporate debt is private placement market (banks, MFs, PFs, etc.). Total issuance of corporate bonds has grown at CAGR of 20% over the past decade, reaching USD 7,329 billion in 2016.
- ***Pension & Sovereign Fund:*** These are key funding sources for long-gestation infrastructure projects. Long- term and stable in nature, and protects against market volatility.

Key Diligence Issues

While the framework for foreign direct investment and the sectoral laws facilitate foreign investment in infrastructure, all investors must suitably evaluate and price/build for risk identified below in their bid price and price structuring:

- ***Renegotiation/Reset:*** Some projects do get stalled/ delayed due to the emergence of risks that may not have been contemplated at the time of signing (e.g., unexpected construction delay due to lack of approvals or environment consents, the increase in the cost of imported coal in context of the electricity sector). There is now realization in the government that for long term infrastructure projects, there is need to have provisions for renegotiation of agreements. It is now expected that the new generation of PPPs across sectors will have suitable ex-ante provision for a reset/ renegotiation framework – as seen in power sector.
- ***Delay in grant of approvals:*** Some infrastructure projects have been delayed for want of requisite approvals and clearances from concerned authorities. Clearances under environment laws and permissions to construct in forest areas have been of particular concern. GOI has taken this on board with seriousness and has constituted the Cabinet Committee of Investment to facilitate expeditious grant of approvals/ clearances in identified sectors.
- ***Land:*** Investors should pay due regard to
  (i) the ownership status of the land (whether government-owned, privately–owned or leased);
  (ii) provisions for escalation of lease rent;
  (iii) provisions for additional deposits and charges in case of escalation in cost of land procurement and development works incurred by State Industrial Development Corporations;
  (iv) ability to sub-lease land for allied facilities that may be developed through the special purpose vehicle; and
  (v) provisions in relation to commencement of operations and changes in ownership/ management.
- ***Lock-in Commitments and Change in Control:*** Concession agreements may contain equity lock- in requirements for the whole or part of

the concession period or changes in control of the concessionaire may be subject to prior approval of the authority granting the concession. Additionally, if the investor is part of a consortium, exit may be subject to consents and clearances.

For Further information please contact:

projects@jsalaw.com

This note is not an advertisement or any form of solicitation. This newsletter has been compiled for general information and does not constitute professional guidance or legal opinion. Readers should obtain appropriate professional advice.

J Sagar Associates | advocates and solicitors

Ahmedabad | Bengaluru | Chennai | GIFT IFSC | Gurugram | Hyderabad | Mumbai | New Delhi

Copyright © J. Sagar Associates | all rights reserved

AUGUST 2019