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**STATE LIABILITY IN PUBLIC-PRIVATE  
PARTNERSHIP: ENFORCEABILITY AND RISK  
ALLOCATION IN INDIA**

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**ABSTRACT**

The prevalent framework in India is perhaps more appropriately characterised as private sector participation (PSP), rather than as PPPs. Nevertheless, the broad term ‘PPP’ is often used to cover all types of private sector participation across various sectors. PPP is prevalent in India and took root out of the economic crisis the country faced in the early 1990s. As a response to the crisis, PPP was a conscious policy choice of both the central government and the governments of various states to enable private sector participation in the development of infrastructure within their respective jurisdictions. Many states in India have enacted specific statutes or policy frameworks to support PPP in infrastructure development within their states. Such state-level statutes or policies usually provide a definition of PPP. There is no statutory framework at the level of the central government, except a notification dated 29 November 2005 under which the Cabinet Committee on Economic Affairs (CCEA) created the Public Private Partnership Approval Committee for approving proposals for PPP projects to be implemented at the level of the central government. Over the years, PPP projects have been adopted in almost all infrastructure sectors. The only exceptions are sectors relating to policing, or law and order, which do not have PPP projects. Almost all critical categories of the infrastructure sectors – including highways, airports, railways, power, natural gas, ports, telecommunications, water, renewable energy, schools, hospitals, government buildings and township development – are open to PPP projects.

**Keywords:** - Private Sector, Government, Infrastructure, Development & Partnership.

## INTRODUCTION

A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance. The project functions transferred to the private party—such as design, construction, financing, operations, and maintenance—may vary from contract to contract, but in all cases the private party is accountable for project performance and bears significant risk and management responsibility. PPP contracts typically allocate each risk to the party that can best manage and handle it—risk transfer to the private party is not a goal, but is instrumental for full transfer of management responsibility and for the alignment of private interests with the public interest. What is a PPP: Defining "Public-Private Partnership" provides more information on the range of contract types that constitute PPPs under this definition and the different nomenclature used to describe them. Throughout this Research, the term “infrastructure” is used to cover the range of sectors and services for which PPPs are used. In this context, “infrastructure” encompasses economic, social, and government infrastructure—that is, the “basic physical and organizational structures” needed to make economic, social, and government activity possible (using the Oxford English Dictionary definition). How PPPs Are Used: Sectors and Services further describes the range of sectors and services for which PPPs are used. At a minimum, a PPP will include a long-term commitment to provide infrastructure services—this implies the design and construction of infrastructure, or the renewal of existing assets, and the provision of long-term asset-maintenance. Most PPPs include additional services, including the full operation of the infrastructure when the private operator is able to commit to service quality and performance, and the procuring authority is able to define that same quality and performance. These additional services should also take place over the long term.<sup>1</sup>

Practitioners can, if their projects are well-selected and their PPPs carefully structured, design and implement projects that optimize cost effectiveness and social well-being by aligning private partner profit objectives with public sector service objectives that support the public interest. A substantial body of knowledge on Public-Private Partnerships (PPPs) has been generated across the world by a broad spectrum of practitioners from government, the private sector, international development institutions, academia, and expert advisors.

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<sup>1</sup> Yescombe, E.R. 2007. Public-Private Partnerships: Principles of Policy and Finance. Oxford: Butterworth-Heinemann.

## Development of Public Private Partnerships

The major development in case law in PPP in India during 2022–23 was the decision of the Delhi High Court in *Delhi Airport Metro Express Private Limited v Delhi Metro Rail Corporation Ltd.*<sup>2</sup>, to apply the doctrine of lifting the corporate veil to enable enforcement of an arbitration award against the Delhi Metro Rail Corporation Ltd (DMRC). This is an important development supporting the enforcement of arbitration awards against government entities. DMRC had lost an arbitration to Delhi Airport Metro Express Pvt Ltd and was directed to pay certain amounts aggregating to Rs 48 billion (approximately US\$645 million) to Delhi Airport Metro Express Pvt Ltd., the concessionaire that had developed the airport link from the Delhi Airport to the Central Business District of Delhi under a Concession Agreement executed in 2012. DMRC had failed to pay the amount, stating that it was only a special purpose vehicle implementing the metro project and did not have the funds, as its funds are based on grants and investments made by its shareholders, which are essentially the government of National Capital Territory of Delhi and the government of India. The High Court of Delhi directed enforcement of the arbitration award against the main shareholders of DMRC and lifted the corporate veil. It, inter alia, held that the Union and Delhi Government are the principal shareholders of DMRC (ie, sovereign governments). Government cannot shirk from its liability to abide by binding judgments, decrees and awards. Earlier decisions by the Supreme Court of India in high-profile litigation on PPP issues in the railway sector (bullet train case) and airport sector (airport charges case) have also strengthened the framework of PPP in India.

In the case of *National High Speed Rail Corporation Limited v Montecarlo Limited & Anr.*<sup>3</sup>, the dispute was over the terms of the tender conditions relating to tenders issued in relation to the ‘bullet train’ project for a high-speed rail link between the cities of Mumbai and Ahmedabad. The Supreme Court of India clearly held that the bullet train project is a fully foreign-funded project envisaged between the Japanese and Indian governments, which is fully funded by a concessional Official Development Assistance loan by the Japan International Cooperation Agency that was made on the basis of specific terms and conditions, including terms on which the contractors would be chosen to implement the project. The Supreme Court held that a foreign-funded agency that invests large funds for a mega project pursuant to bilateral talks is justified in having such clauses and to insist that information relating to the evaluation of bids and recommendation be not disclosed, and also that it can call certain bidders

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<sup>2</sup> 2023 SCC OnLine Del 1619.

<sup>3</sup> (2022) 6SCC 401.

for negotiations and not others. Although factually this is a very specific case, the ratio in relation to interference by courts in matters of tendering process will benefit all PPP projects in India. The Supreme Court in relation to the scope of interference in the tendering process of PPP projects has held that a court, before interfering in a contract matter in exercise of powers of judicial review, should pose to itself the following questions: whether the process adopted or decision made by the authority is mala fide or intended to favour someone, or whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'; and whether the public interest is affected. If the answers to the above questions are in the negative, then there should be no interference. The Supreme Court also held that the scope of judicial review in a foreign-funded contract should be far much less than in ordinary government-funded contracts funded from the Consolidated Fund of India, and in such projects should be limited to a minimum.<sup>4</sup> In such foreign-funded projects, the only ground for judicial review ought to be on a limited aspect (ie, the action of the executing authority does not suffer from favouritism or nepotism) and based on grounds that have been concealed from the foreign financing authority. This provides a certain level of protection and certainty to foreign-funded PPP projects that do not rely on government funding. The Supreme Court in the case of *Delhi International Airport Limited v Airport Economic Regulatory Authority of India and ors.*<sup>5</sup> has re-emphasised that judicial review is not concerned with matters of economic policy. The court does not substitute its judgment for that of the legislature or its agents as to matters within the province of either. The court does not supplant the 'feel of the expert' by its own views.

The Constitution (the Seventh Schedule) has allocated between the central government and the state governments legislative powers and corresponding executive powers over various sectors. Each category of the infrastructure sector is governed by an applicable statute enacted by the legislature vested with jurisdiction over the relevant sector. Over the years, PPP projects have been adopted in almost all infrastructure sectors. The only exceptions are sectors relating to policing, or law and order, which do not have PPP projects. Almost all critical categories of the infrastructure sectors – including highways, airports, railways, power, natural gas, ports, telecommunications, water, renewable energy, schools, hospitals, government buildings and township development – are open to PPP projects. In the absence of a PPP framework for a particular segment, a proposal can be submitted to the central government seeking its specific

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<sup>4</sup> Ibid.

<sup>5</sup> 2022 SCC Online SC 850.

approval for the same, with approval being at the discretion of the central government.

Infrastructure development in India is a cornerstone of economic growth, shaping connectivity, trade, and employment. Projects ranging from highways and metro systems to airports and power stations rely heavily on EPC contracts and PPP models, which combine public oversight with private expertise, while attempting to allocate risk predictably. Recent global and domestic disruptions, including the Covid-19 pandemic, supply chain disruptions, and geopolitical tensions, have exposed the limits of traditional risk frameworks. Rising costs, project delays, and financial pressures on both concessionaires and government authorities have underlined the urgent question of who will bear the burden of unforeseen risk posed by unforeseen circumstances. As India's infrastructure ambition expands, its contracting ecosystem has evolved. Traditional risk-sharing agreements are being revisited, contracts are being refined, and judicial approaches increasingly emphasise equitable allocation and appropriate risk mitigation. The revised contracting arrangement marks a significant shift in the force majeure clauses which were previously used to accommodate and safeguard the parties to the contract, ensuring effective risk mitigation and equitable risk distribution between the private concessionaire and the authority.

### **Legal framework for risk allocation in India**

Ongoing challenges in PPP and EPC projects were primarily recognised by the Government of India when it constituted the Kelkar Committee in 2015, chaired by Dr Vijay Kelkar. The Committee's mandate was to revisit and revitalise the PPP model of infrastructure, which, at that time, was facing widespread difficulties. Several PPP projects were facing obstructions in the form of disputes, the private investment had slowed, and banks were burdened with rising non-performing assets in infrastructure lending.

The Committee diagnosed the central problem as excessive and poorly designed risk allocation. It acknowledges the fact that the concessionaires were required to carry risks that they could not reasonably manage or control, such as delays in land acquisition, regulatory approvals, etc. In India, allocating risk in infrastructure projects is as much an art as it is a science. While the law offers remedies when contracts cannot be performed, the real power lies in how parties write their agreements. Thoughtfully drafted contracts do not just assign risk, they can make or break a project, shaping outcomes long before courts ever get involved. The current Indian legal framework offers both contractual and statutory mechanisms for addressing unforeseen events. Particularly, the Indian Contract Act, 1872, recognises frustration of contracts and allows agreements to be declared void where performance becomes

impossible.<sup>6</sup> However, the Hon'ble Supreme Court in *Energy Watchdog v CERC* made it clear that when a contract/PPA already contains a force majeure clause, relief must be sought under that clause, rather than through section 56 of the 1872 Act.<sup>7</sup>

This principle highlights the primacy of contractual arrangements. When parties have anticipated potential contingencies and set out agreed mechanisms for addressing them, the courts will uphold those negotiated provisions. Put simply, the agreed contractual terms take precedence over the statutory doctrine of frustration. Frustration under Section 56 of the Indian Contract Act, 1872, terminates the contract entirely, which is likely to hinder long-term infrastructure projects. In contrast, force majeure clauses provide additional, circumstantially specific relief to the parties, such as suspending obligations, granting time extensions, or offering limited compensation to ensure the continuity of the contract. This flexibility is particularly significant in EPC and PPP projects, where disruption does not necessarily mean failure; instead, keeping the project alive often serves the broader public interest.

Indian courts have applied this principle in other cases of *Halliburton Offshore Services v Vedanta Ltd.*<sup>8</sup> The Court granted interim protection to the contractor whose performance was hindered by the Covid-19 lockdown, recognising that the pandemic could fall within the scope of force majeure. Similarly, in *Standard Retail Pvt Ltd v G S Global*,<sup>9</sup> the Court emphasised that force majeure relief must be tested against the actual wording of the clause, rather than being assumed under general hardship. These cases reflect a growing judicial sensitivity to commercial realities. Courts are not quick to discharge contracts under Section 56 but instead prefer to uphold the contractual framework that the parties themselves devised, while interpreting force majeure clauses in a manner which balances fairness, economic sustainability, and public interest.

### **The Evolution of force majeure clauses in India**

The trajectory of force majeure in India has been significantly influenced by contemporary crises. The onset of the Covid-19 pandemic exposed serious drafting deficiencies in many contracts, particularly in the infrastructure sector, where supply chains were paralysed and projects brought to a standstill. In response, the Ministry of Finance issued its Office

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<sup>6</sup> Indian Contract Act, 1872 (Act No. 9 of 1872), Sec.56.

<sup>7</sup> (2017)14 SCC 80.

<sup>8</sup> 2020 SCC OnLine Del 542.

<sup>9</sup> 2020 SCC OnLine Bom 704.

Memorandum in February 2020,<sup>10</sup> recognising Covid-19 related disruptions as qualifying force majeure events in the context of government procurement. However, this memorandum was merely advisory in nature and did not displace the supremacy of contractual terms in private agreements. For many stakeholders, this underlined the limitations of relying on generic clauses and the urgent need for greater contractual precision.

In the aftermath, procurement manuals and contractual practices evolved to address these shortcomings. Structured notice requirements, mitigation obligations, comprehensive documentation standards, and reliance on technical expertise have since become central features of force majeure management. Courts and arbitral tribunals, while cautious in their treatment of supply-chain disruption claims, have consistently insisted on two key thresholds: that the disruption must have directly impeded performance, and that the affected party must demonstrate genuine efforts to mitigate delay. In practice, evidentiary records such as correspondence with suppliers, attempts at alternative sourcing, and contemporaneous communications have often determined the success of such claims. The drafting of force majeure clauses has also undergone a marked transformation. Moving beyond the traditional and vague reference to ‘Acts of God’, modern contracts specifically identify events such as pandemics, quarantines, port closures, import/export restrictions, supplier insolvency, cyber-attacks, and geopolitical disruptions, including sanctions and trade embargoes. These clauses are increasingly supplemented by obligations requiring timely notifications, proactive mitigation efforts, the pursuit of insurance, and regular updates to the employer on remedial steps undertaken. Such drafting developments reflect the lessons drawn from the uncertainties of the pandemic period, during which imprecise or incomplete provisions resulted in inconsistent judicial outcomes and, in some instances, project failures.

Concurrently, government procurement contracts have revived and reinforced the use of price-variation clauses, particularly in the wake of Covid-19. By linking payments to indices such as the Wholesale Price Index (WPI) or sector-specific commodity benchmarks, these clauses provide a degree of predictability in volatile markets and complement force majeure provisions, by mitigating risks associated with long-term projects.

Ultimately, the approach to force majeure has shifted from being a peripheral consideration to a critical component of contractual architecture. Today, these clauses are designed not only to apportion risk fairly but also to ensure continuity of projects in times of

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<sup>10</sup> Government of India, Department of Expenditure Procurement Policy Division, Ministry of Finance, Office Memorandum on force majeure, [https://doe.gov.in/files/circulars\\_document/FMC.pdf](https://doe.gov.in/files/circulars_document/FMC.pdf). (last visited Dec. 14, 2025).

crisis. By specifically addressing risks ranging from pandemics to geopolitical conflicts, and by embedding obligations of mitigation and documentation, force majeure provisions safeguard the interests of contracting parties, while simultaneously supporting the resilience of infrastructure development in India.

### **Force majeure in PPP and EPC projects: lessons from practice**

Force majeure has become a defining feature of risk management in PPP and EPC projects. The Covid-19 pandemic starkly revealed how vulnerable infrastructure contracts could be when provisions were vaguely worded or procedurally weak. Many concessionaires discovered that, even where force majeure was contractually recognised, the absence of clear notice procedures, mitigation requirements, or adequate insurance left them struggling to secure meaningful relief. Prolonged stoppages often resulted in case-by-case negotiations or costly litigation, undermining the financial viability of projects.

In response, recent drafting practices in Indian PPP and EPC contracts have shifted focus from merely listing qualifying events to embedding operational clarity. Contracts are increasingly mandating structured notices, obligations to mitigate, contemporaneous documentation, and stepwise remedies, such as deadline extensions or partial cost sharing. This emphasis on process ensures that relief is not only recognised in theory but also practically accessible in times of crisis. The pandemic also highlighted that force majeure clauses cannot function in isolation. A critical gap was the underuse of insurance policies covering political risk, construction delays, or even health-related disruptions, which existed but were rarely integrated into concession frameworks. Without such mechanisms, concessionaires remained financially exposed despite contractual relief. Going forward, the integration of risk-transfer tools such as political risk insurance, delay-in-start-up cover, and specialised products for pandemics or supply chain shocks is increasingly seen as essential.

The evolution in India mirrors international best practice. Standardised forms such as the World Bank's PPP frameworks and FIDIC contracts not only define force majeure with precision but also align it with structured notice, mitigation, and compensation mechanisms. They further stress the importance of linking contractual relief to financial structures, including insurance and guarantees, thereby ensuring project continuity even under extreme disruptions. Indian practice is gradually moving in this direction, although gaps remain in implementation and enforcement.

The central lesson is clear: effective force majeure management requires more than careful drafting. It must combine precise contractual obligations with fair risk allocation and robust

financial safeguards. Only then can PPP and EPC projects withstand crises, without derailing the broader infrastructure ambitions on which they depend.

### **Judicial perspectives and case studies from Indian projects**

The judiciary has played a significant role in shaping the practical allocation of risk. Courts have repeatedly stressed that contracts must be interpreted in accordance with their precise terms, while also recognising fairness where extraordinary events occur.

In *Halliburton Offshore Services v Vedanta Ltd.*,<sup>11</sup> interim relief was granted recognising that Covid-19 lockdowns had severely affected performance. In this case, Halliburton Offshore Services Inc was contracted by Vedanta Ltd for oil and gas exploration activities in Rajasthan. Due to the Covid-19 lockdown, Halliburton invoked the force majeure clause, seeking to prevent Vedanta from encashing eight performance bank guarantees. The Delhi High Court, in its *ad-interim* order dated 20 April 2020, restrained Vedanta from invoking the guarantees, recognising the lockdown as a prima facie force majeure event. Several high-profile projects illustrate how risk allocation plays out practically. The Delhi-Gurgaon Expressway became embroiled in disputes over toll revenue sharing and traffic management.<sup>12</sup> The lack of clear renegotiation mechanisms meant that disagreements escalated into prolonged litigation, delaying the resolution and undermining public confidence.

In the airport sector, disputes at Delhi International Airport highlight how unclear terms in PPP contracts can lead to conflicts between government regulations and the autonomy of private operators.<sup>13</sup> For instance, during the Covid-19 pandemic, Delhi International Airport Limited (DIAL) invoked a force majeure clause in its 2006 agreement with the Airports Authority of India (AAI) to suspend its revenue-sharing obligations. This move was prompted by a significant decline in passenger traffic, which had a severe impact on revenue. Subsequently, an arbitral tribunal ruled in favour of DIAL, ordering AAI to refund approximately INR 500 crore and waive about INR 1,800 crore in dues for the period from March 2020 to February 2022. The tribunal's decision also extended DIAL's concession period by nearly two years to compensate for the force majeure period. The Delhi High Court upheld this arbitral award, affirming the relief granted to DIAL. These developments underline how

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<sup>11</sup> 2020 SCC OnLine Del 542.

<sup>12</sup> 'No toll on Delhi-Gurgaon expressway, agrees Supreme Court', NDTV, 12 September 2012 <https://www.ndtv.com/india-news/no-toll-on-delhi-gurgaon-expressway-agrees-supreme-court-499134>. (last visited Dec. 14, 2025).

<sup>13</sup> 'Delhi Airport wins arbitration against AAI, secures refund & payment waiver', *Business Standard*, 8 January 2024 [https://www.business-standard.com/india-news/delhi-airport-wins-arbitration-against-aii-secures-refund-payment-waiver-124010800331\\_1.html](https://www.business-standard.com/india-news/delhi-airport-wins-arbitration-against-aii-secures-refund-payment-waiver-124010800331_1.html). (last visited Dec. 14, 2025).

ambiguities in PPP contracts can disrupt even high-profile projects when unforeseen events occur.

The shift in the highways sector from Build-Operate-Transfer (BOT) to Hybrid Annuity Model (HAM) projects is itself a case study in adaptive risk allocation. Under BOT, traffic and revenue risks left many concessionaires financially stressed, with several projects stalled or abandoned. Under HAM, risk is more evenly distributed, and projects have achieved higher completion rates. These examples underline that risk allocation is not a theoretical construct but a determinant of real project outcomes.

### **Future directions**

The evolving experience of India's infrastructure projects suggests several directions for reforms. Contracts must move beyond rigid or contemporary templates that combine certainty with adaptability. Risks should be allocated not simply on paper but in ways that reflect the practical capacity of parties to manage them. Dispute resolution must be swift and credible, with institutional mechanisms that prevent projects from stalling. Financial and insurance innovations must be mainstreamed into project design, ensuring that disruptions do not immediately translate into insolvency or abandonment. These insights have particular resonance in the present world scenario. With global supply chain shocks, inflationary pressures, and geopolitical risks disrupting projects, the need for adaptable and equitable risk allocation is greater than ever. The Kelkar Committee's framework provides a valuable foundation for reforming and understanding India's contractual practices.

### **CONCLUSION**

Public private partnerships are designed so that risk is transferred between the public and private sectors, allocating particular project risk to the partner best able to manage that risk cost effectively. With financing risk routinely transferred to the private consortium, any delays in meeting the agreed upon timelines can lead to additional costs for the private partner as it alone carries the debt for a longer period of time. Therefore, the private sector has a direct financial interest in ensuring that projects and services are delivered on-time, if not sooner. By bringing together the strengths from the public and private sectors. PPPs have the unique ability to share a diverse range of resources, technologies, ideas and skills in a cooperative manner that can work to improve how urban infrastructure assets and services are delivered to the people. Public private partnerships represent good opportunities to lower overall project costs. However, when

compared with traditional procurement, the complete PPP process invites additional costs that, if not managed properly, can erode some of the potential economic benefits of this model. A key concern with the long-term committal nature of PPP procurement is that it limits the public sector's ability to make changes to the contract if unexpected economic or situational challenges arise. In the event that a change is required to either the use of an infrastructure asset, or to the type of urban service offered, PPPs have proven to be inflexible both in terms of the time and administrative burden associated with altering the contract.

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