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CONCESSION AGREEMENTS: EVOLVING LANDSCAPE OF PUBLIC-PRIVATE PARTNERSHIP

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Public-Private Partnership is aimed at catering to the strategic need of investments in various domains, thus concession agreements come into play, signifying the duties and obligations of the concerned stakeholders.

ABSTRACT

Earlier, it was expected that all the functions directed towards the betterment of society or the state functions would be executed under the name of the government of the country or the state, where the government itself undertakes all the operational aspects. There used to be significantly less involvement of private enterprise in it. However, in the modern-day scenario, governance has become complex and resource-intensive job, and the government must delegate its operational aspects to private individuals with specific expertise to execute such operations. Apart from that, it is believed that executing such functions through forums with expertise makes it more efficient and allows the government to focus on other prominent socio-economic issues. At this juncture, the public-private partnership or the concession agreements come into play, which define the duties and obligations of both the government and the private entity that acts on behalf of the government/state to execute operations. In real life, the pragmatic aspects of such partnerships/relationships are visible in ports, mining, energy generation, transmission, oil exploration, and other infrastructural projects. Concession agreements are very crucial in nature when it comes to public-private partnerships, where a non-governmental entity or concessionaire functions on behalf of the government with an exclusive right to build, operate, and transfer for a stated time under specified conditions. A concession agreement is primarily backed by a concession arrangement, which covers a share of revenue, concession fees, or responsibilities pertaining to upkeep, maintenance, and repairs. All such responsibilities are mutually clarified between the governmental and non-governmental entities. A common area for concession agreements between governments and private businesses involves the right to use specific public infrastructure, such as railways. Rights may be granted to individual businesses, resulting in exclusive rights, or to multiple organizations. As part of the agreement,

the government may define rules and regulations pertaining to operational procedures that are to be followed by the concessionaire. Collectively, in case of a government entering into a concessionary agreement, it has reason to believe that the project which is the subject of the concessionary agreement requires sound technical know-how, and the government considers it absurd to engage resources to understand its technical modalities. Thus, at that juncture, the government seeks to enter into a concession agreement or a public-private partnership.

The article will unravel the intricacies and modalities of a concession agreement and the objectives it seeks to achieve. The article will also examine the importance of public-private partnerships in various forms of commercial domains or the areas witnessing their pragmatic applications. The article will also emphasize the model concession agreement used in commercial space and general disputable regions, such as claims of expropriation and nationalization.

Keywords – Concession Agreements, Public-Private Partnership, Expropriation, Nationalization, Concession Arrangement.

CONCESSION AGREEMENTS: DEFINITION AND NATURE

In general, if we try to define a concession agreement, then they are nothing but a contract that gives the company the right to operate a specific business in a particular government's jurisdiction or another firm's property. Concession agreements often involve contracts between the nongovernmental owner of a facility and a concession owner, or concessionaire. The agreement grants the concessionaire exclusive rights to operate their business in the facility for a stated time and under specified conditions. The strategic difference between a concession agreement and a standard contract, though both of them work on a similar line, is that the authentic feature of the concession agreement is that it stipulates the right to exploit, work and service on the area which is the subject matter of the contract.

PUBLIC-PRIVATE PARTNERSHIP: A STRATEGIC TOOL FOR ECONOMIC GROWTH ¹

Public-Private Partnership allows the government to unlock significant financial capabilities that exist with the private entity, along with the innovative solution that the entity aims to

¹ (3rd January 2024) *A snapshot of Public Private Partnership Monitor: India.*

deliver to nourish their market fit and ultimately contribute towards the effectiveness of the project. A major advantage for the government is that, when funding is required, private players bring a range of investment proposals, reducing the need for public debt. For example, suppose a city wants to pivot its local transport into electric mobility. In that case, if the government undertakes the development independently then they may encounter numerous roadblocks, which primarily involve a lack of technical know-how and other essential resources. Resultantly, at that juncture, if they manufacture it in-house, then it is going to be a resource-intensive task. Thus, a public-private partnership in this case will be the best-suited alternative, allowing the government to agree with a concessionaire to develop necessary infrastructural capabilities for the stated purpose. Ultimately, the objectives of such a partnership or the cooperation between the state and business are to solve the problems that are highly capital-intensive and complex

1. Concessionaire's participation in project financing.²

When a private entity invests in a state project, the primary motive behind such investment is to assure consistent returns on investment (ROI), and there exists an onus for both parties of concession agreement to create a balance between investment and return both at the time of building up of object and during its operational phase. Therefore, the bigger target for both is to mitigate the risk and execute a mutually beneficial operation. Thus, at the stage of project financing and the financial framework planning, the concessionaire's participation is strategically essential.

2. Risk associated with Concession Agreements, possible claims and mitigation strategies.

Concession agreements give rise to a strategic investor-state relationship and substantial investor-state disputes, which give rise to claims against expropriation and nationalization. These disputes are pretty common in the space where concession agreements are made for energy generation. It is a well-established fact that the global energy demand is spiking at a very rapid pace, and the state alone cannot cater for that space. Thus, strategic public-private partnerships are required to develop sound investment propositions to satisfy the rising energy demands through efficient technological advancements and generation and transmission techniques.

² 'Problems of legal regulation of concession agreements' (19th December 2019) in.

Through a plethora of cases pertaining to claims of nationalization and expropriation against the state, it is quite evident that there exist a few operational roadblocks in the domain of PPP models. Investments in the energy industry are marked by distinctive economic and legal considerations that separate them from other modes of foreign direct investment. Host countries often view energy resources as a part of the national economic policy and immediately associated with sovereignty and strategic autonomy matters. At the same time, investors sink large amounts of capital anticipating long-term profitability despite the sectoral nature of regulatory, political, and market risks. Therefore, where there is a dispute related to energy investments, the host state and the investor alike risk facing substantial exposure to costs, with the determination of such disputes being of major consequence to both.

In this situation, the investor can be at a huge loss or get less return than expected from their investment.

SECTORS THAT WITNESS PROMINENCE OF CONCESSION AGREEMENTS AND PPP MODELS.

The Concession Agreements and Public Private Partnerships (PPPs) have developed into essential tools for infrastructure development and service delivery in the country. The integration of the public sector and private business allows the completion of comprehensive and capital-intensive projects that the government cannot accomplish single-handedly due to a lack of funds or technical know-how. The government of India has been aggressively pursuing the policy of PPPS for many sectors because it helps bridge the so-called infrastructure gaps, invites private investment, and brings operational efficiency from the business world.

A fundamental contract under PPPs is concession agreements. It gives private players called concessionaires the right to construct, operate and manage the public infrastructure for a limited time period from which they can recover by cashing out user charges or receiving annuities. These contracts detail the public and private parties' obligations, risks and returns. A drastic change has become quite visible in financing infrastructure projects in developing countries through these agreements because they require a long-term commitment of funds and efficient service delivery.

1. Energy Sector

In accordance with the number of projects and total investment, the energy sector of India is the most active area for PPP implementation in India. In terms of total investment, energy projects continue to lead all sectors with over \$157 billion in investments from 1990 to 2022 according to the ADB PPP Monitor. These projects include electricity generation, transmission and distribution, renewable energy and storage systems.

The national importance of the industry, considerable capital needs, and the demands for fast-paced technological improvements fuel PPP engagement in energy. The strengthening of private participation has been supported by critical legislative milestones like the Electricity Act of 2003³ and policy initiatives such as the Saubhagya scheme and the National Green Hydrogen Mission. These initiatives tend to facilitate the availability of power and aid in the green energy transition.

Because of the politically motivated nature of the projects, energy concession agreements tend to have a long duration, are heavily regulated, and utilize a tariff revenue system, making them intricate in nature. However, complex they may seem, there is no denying the importance of these projects to the nation's priorities of energy security, emission reduction, and rural electrification.

2. Road and Highway Infrastructure

The road sector is a prime example of successful PPP deployment in India. With over 500 PPP projects reaching financial closure and investments exceeding \$98 billion, roads are second only to energy in project scale and volume. The National Highways Authority of India (NHAI) has played a pivotal role in structuring PPP models through Build-Operate-Transfer (BOT), Toll-Operate-Transfer (TOT), and Hybrid Annuity Model (HAM) contracts.

The evolution of concession frameworks in this sector has been marked by standardized Model Concession Agreements (MCAs), which help mitigate risks and enhance investor confidence. Government support in viability gap funding (VGF) and revenue guarantees has also been crucial to ensure bankability of projects in less lucrative geographies.

³ Electricity Act, No. 36 of 2003 (India).

Beyond national highways, the push toward multimodal logistics parks and urban road development under the Smart Cities Mission has further expanded PPP engagement in road infrastructure.

3. Ports and Maritime Transport

India's port sector was one of the early adopters of the PPP model, starting in the mid-1990s. The sector now accounts for approximately \$10 billion in PPP investments. Given the growing focus on trade and logistics, private funding has been sought within the maritime infrastructure segment for greenfield port projects and to modernize existing facilities.

In 2021, the launch of a revised Model Concession Agreement for major ports aimed at adjusting terms to be more favorable and balanced for both the government and concessionaires. Significant domestic and foreign investment has been garnered owing to the 100% FDI even in port PPPs, long-term leases, and revenue share models.

The major port trusts and state maritime boards lead the concession contracts for terminal operation, cargo handling, and dredging works in active collaboration with private partners, ensuring sustained improvements in port competitiveness and performance.

3. Airports and Aviation Infrastructure

There has been tremendous accretion in participation of the Private Public Partnership (PPP) in the aviation industry, mainly regarding the operation and development of large airports. These include success cases like Delhi, Mumbai, Hyderabad, and Cochin airports, which were developed under a concession-based PPP model. In these projects, there is usually a lease or a joint venture where the private partner has to upgrade and maintain the facility and provide specific standards of services.

With the recent changes in the National Monetization Pipeline, PPP provisions have been taken to another level by the government, declaring 25 more airports to be privatized through the leasing model. The transition has also been eased by the Airports Economic Regulatory Authority of India (AERA) Amendment Act, 2021⁴, which permits tariff setting for clusters of airports, thus increasing the financial attractiveness of operating multiple airports under a single concession.

⁴ Airports Economic Regulatory Authority of India (Amendment) Act, No. 20 of 2021, § [section number] (India).

5. Railways

Indian Railways, a traditionally public-dominated sector, is now open to private participation in station redevelopment, rolling stock manufacturing, and freight corridors. Concession agreements aim to modernize rail services, enhance passenger experiences, and reduce operational inefficiencies.

Projects such as the redevelopment of Coimbatore and Vijayawada stations exemplify the growing acceptance of PPP in railway infrastructure. The government continues to pursue a hybrid model combining PPP and engineering-procurement-construction (EPC) to balance efficiency with risk allocation.

6. Water and Sanitation

PPP projects in the water sector are less evolved but are steadily increasing. They cover water treatment plants and sewerage disposal systems to integrated solid waste management. With 100% FDI permitted by the government and VGF extended in this area, PPP has become more viable for urban local bodies and municipalities.

Model Concession Agreements prepared for integrated solid waste management and storm water drainage schemes mirror a changing legal and policy environment conducive to PPP expansion in urban utilities.

Projects in the water sector tend to be confronted with issues such as dispersed governance, resistance to pricing, and environmental hazards. Still, public-private collaboration has resulted in enhanced service provision and technological improvement in a number of cities.

7. Urban Infrastructure and Affordable Housing

Urban development has emerged as a major catalyst for PPP implementation, especially in smart cities, metro rail, and affordable housing sectors. The granting of infrastructure status to affordable housing in 2017 greatly increased private interest. Tamil Nadu and Gujarat have formulated focused schemes using PPPs to provide rental housing and residential schools for poor students.

Urban infrastructure public-private models generally entwine government subsidies and incentives with private design, operational capacity, and financial support. Viability gap

funding is often used to cushion limited cost-recovery potential.

8. Health and Education

While comparatively less developed than core infrastructure, the health and education sectors are increasingly following the PPP model. The COVID-19 pandemic accelerated the demand for scalable healthcare infrastructure, and NITI Aayog developed guidelines for establishing medical colleges and improving hospitals through PPPs.

In education, especially vocational and medical education, concession-based PPPs are also being considered. Although limited application of model concession agreements has taken place so far, efforts currently underway indicate growing momentum in the near term, particularly in view of the National Education Policy, 2020.

DISPUTE RESOLUTION ⁵

In public-private partnership (PPP) projects, dispute resolution is essential to guarantee project sustainability, ensure service quality, and uphold the cooperative spirit of the public-private relationship. Disputes may occur for several reasons, such as contract uncertainties, failure in performance, scope changes in the project, or external environmental and social factors. To deal with these efficiently, PPP contracts have a tiered system of mechanisms for resolving conflicts, from informal negotiations to formal legal proceedings. The different modes are designed to address different kinds of conflicts and escalation levels.

1. Negotiation

Negotiation is the most casual and desired method of dispute resolution. It enables the contracting parties to settle differences directly, usually through formal or informal discussions. It is cost-saving, relationship-sustaining, and flexible. Nevertheless, it needs well-prepared and empowered representatives and can fail if parties are intransigent.

2. Mediation

Mediation brings in a third-party neutral to mediate resolution between the parties in conflict. Though non-binding, it provides structure and objectivity to negotiations, promoting

⁵Global Infrastructure Hub (2018) *The GI Hub is now part of the World Bank's Public-Private Infrastructure Advisory Facility (PPIAF), Disputes - PPP Contract Management*. Available at: <https://managingppp.gihub.org/report/disputes/> (Accessed: 24 April 2025).

compromise and confidentiality. Mediation is especially effective when conflicts are over relationship breakdowns or need a creative solution beyond the strict terms of the contract.

3. Dispute Resolution Boards (DRBs)

DRBs are pre-appointed panels that operate throughout the project lifecycle, actively tracking developments and providing early resolution to potential disputes. Their ongoing involvement allows for early identification of issues, minimizing the risk of escalation. Effective as they are, they involve ongoing costs irrespective of dispute occurrence.

4. Expert Determination

Used mainly for technical or specialized cases, expert determination is a procedure where a qualified professional makes a ruling based on the technical facts of the case. It is quicker and less expensive than arbitration or litigation, but limited in scope and enforceability. The neutrality and expertise of the expert are critical to the success of this mechanism.

5. Arbitration and Litigation

These are formal and binding instruments employed when other means fail. Arbitration provides flexibility and confidentiality and is frequently favored by private partners, while litigation provides transparency and may be required by local legal systems. Both are costly and confrontational and thus reserved as the last option due to their capacity to harm relationships.

Conclusion

Successful conflict resolution in PPPs relies on timely intervention, transparency of contractual terms, active monitoring, and strategic application of suitable mechanisms. Whereas negotiation and mediation are cost-saving and relationship-preserving, DRBs and expert determination yield targeted, timely solutions. Arbitration and litigation, though binding, are best left for persistent disputes because of their complexity and expense. The ultimate objective is not just to settle disputes, but to settle them in a manner that facilitates project continuity, value for money, and the integrity of the public-private partnership. A combined, adaptable, and well-governed approach to dispute resolution is thus critical to the long-term success of PPP projects.