

## DISPUTE RESOLUTION IN PUBLIC-PRIVATE PARTNERSHIPS: NEED, IMPORTANCE AND VARIOUS MECHANISMS

Aradhya Bindal<sup>89</sup>

### Abstract

Public-private partnerships (PPPs) have become a widely adopted strategy for tackling social issues by harnessing the respective advantages of the public and private sectors in the provision of public infrastructure and services. This article examines the necessity, significance, and many processes for resolving disputes in Public-Private Partnerships (PPPs).

During the past decade, India has witnessed a significant increase in the utilisation of Public-Private Partnerships (PPPs), which has resulted in the attraction of private investments across diverse sectors like transportation infrastructure, renewable energy, and urban development. The policy efforts and reforms implemented by the government were designed to promote the participation of the private sector in solving the infrastructure needs of the country.

Disputes may potentially develop at various phases of Public-Private Partnership (PPP) projects, and this article underscores the importance of implementing effective processes for resolving such disputes. Disagreements may arise at several stages of the project, such as contract management, procurement, or other phases.

This paper examines many dispute resolution approaches that are commonly employed in the context of Public-Private Partnerships (PPPs), including expert committees, mediation, conciliation, and arbitration. The incorporation of these procedures within public-private partnership (PPP) agreements enables the involved parties to easily and rapidly address disagreements, thereby mitigating potential delays and legal intricacies. The efficiency of conflict settlement systems is exemplified by the case study of a toll road project. Doctrinal Methodology has been devised to arrive at the key findings.

### Keywords

Arbitration, Conciliation, Dispute Resolution, Expert Committees, Mediation, State Legislations, Public-Private Partnerships

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<sup>89</sup> The author is available at aradhyabindal585@gmail.com

## Introduction

Public-private partnerships (herein after referred to as PPPs) have gained widespread attention as a means to leverage the strengths of both the public and private sectors in delivering public infrastructure and services. The inherent complexities of modern societies, coupled with limited public resources, have led governments to explore alternative approaches to address societal challenges efficiently and effectively. PPPs have emerged as a flexible and adaptive framework that allows for shared responsibilities, risks, and rewards between the public and private entities involved.

In recent years, several notable trends have emerged within the field of PPPs. First, there is an increasing focus on social infrastructure sectors such as healthcare, education, and affordable housing, alongside the traditional focus on transportation and utilities. Second, the integration of sustainability and environmental considerations has gained prominence, with PPPs being used as a vehicle for implementing green infrastructure and renewable energy projects. Third, there has been a growing emphasis on inclusive and equitable partnerships, ensuring that PPP projects benefit all segments of society.

While PPPs offer potential benefits, they are not without challenges. Criticisms often revolve around issues such as the allocation of risks, transparency, accountability, and the potential for private entities to prioritize profit over public interest. Moreover, concerns have been raised regarding the capacity of governments to effectively manage and monitor PPP projects, as well as the potential for unequal distribution of benefits and social exclusion.<sup>90</sup>

How has the PPP model taken over the Indian Market for infrastructure development?

In the preceding decade leading up to 2021, India had a notable surge in the utilisation of Public-Private Partnerships (PPPs) for the development of infrastructure projects. The government acknowledged the potential of private sector involvement in addressing the infrastructure requirements of the nation and endeavoured to attract private investments through a range of policy initiatives and reforms.

The following important elements elucidate the expansion of Public-Private Partnerships (PPPs) inside the Indian market pertaining to infrastructure development:

The infrastructure industry in India has been witnessing significant inflows of investment from private entities. Based on a survey jointly conducted by the Confederation of Indian Industry (CII) and KPMG India, it has been observed that the aggregate worth of infrastructure projects granted through the Public-Private Partnership (PPP) framework has

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<sup>90</sup> Puharic, R.P. (2019) 'Alternative Forms of Dispute Resolution in Public Procurement and Public-Private Partnerships in Slovenia', *Romanian Arbitration Journal / Revista Romana de Arbitraj*, 13(1), pp. 87–104. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edshol&AN=edshol.hein.journals.romabj13.11&site=eds-live>

exhibited a notable rise from INR 12,632 billion (equivalent to roughly USD 172 billion) in 2016 to INR 24,000 billion (equivalent to approximately USD 326 billion) in 2019. The data presented suggests an increasing level of interest from private investors in the infrastructure projects of the country.

The road sector has been a leading proponent in the adoption of the Public-Private Partnership (PPP) model. The National Highways Authority of India (NHAI) has been instrumental in effectively executing public-private partnership (PPP) initiatives in the domain of roads and highways. The annual report of the National Highways Authority of India (NHAI) for the fiscal year 2019-2020 highlights that around 30% of the total national highway projects are being executed via the utilisation of the Public-Private Partnership (PPP) framework.

Public-private partnerships (PPPs) have played a significant role in facilitating private sector engagement in the renewable energy sector. The Ministry of New and Renewable Energy (MNRE) in India has observed a notable surge in private investments in projects related to renewable energy. The investments in question have played a pivotal role in facilitating the government's ambitious objectives of augmenting the nation's renewable energy potential.

The Smart Cities Mission was launched by the Indian government with the objective of improving urban infrastructure via the use of Public-Private Partnerships (PPPs). In the context of this endeavour, a number of intelligent urban initiatives were being executed through partnerships with private firms.

Transport Infrastructure: In addition to roads and highways, public-private partnerships (PPPs) were also examined in several other areas of transport infrastructure, including airports and metro rail projects. Public-private partnership (PPP) arrangements were utilized to execute numerous metro rail projects in different cities of India.<sup>91</sup>

#### Need for dispute resolution

The necessity for conflict settlement predominantly occurs during the stage of contract management. However, it is important to acknowledge that the potential for a dispute to arise cannot be completely eliminated, even prior to the implementation stage. For instance, during the procurement process, there is a possibility that the award of a project may be contested in a court of law on the basis of arbitrary and illegal practises. In addition to the public policy concerns pertaining to land acquisition and environmental clearance, which government agencies may need to address in the initial stages. The Indian judiciary has consistently asserted that judicial review does not encompass policy matters, which fall

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<sup>91</sup> Ko, C.W.J. (2007) "Is adoption of Public Private Partnership (PPP) model in infrastructure contract an effective form of contract to minimize disputes?" Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edsndl&AN=edsndl.OCLC.oai.xtc.at.oclc.org.OCLCNo.145021900&site=eds-live>

within the purview of the government. Furthermore, the judiciary has emphasised the importance of expeditiously resolving cases related to challenges against economic policies, as any delay would be detrimental to the public interest. According to the Supreme Court, the primary responsibility of the court is to limit its focus to matters pertaining to illegality, irrationality, and procedural impropriety. Therefore, the courts have typically exercised caution in intervening in issues pertaining to the bidding and awarding of projects, unless there is clear evidence of arbitrariness and illegality.<sup>92</sup>

During the phase of Contract Management, disputes primarily pertain to matters such as the legitimacy, enforceability, interpretation, or non-fulfillment of contractual obligations. These disputes may involve seeking legal remedies such as injunctive relief, compensation, or specific performance. Consequently, they fall within the purview of the original jurisdiction of a civil court that possesses the necessary authority and competence. Nevertheless, litigation is not the favoured method of resolving disputes, likely due to considerations such as probable delays and the requirement for specific expertise. The Supreme Court in the case of *UPSEB v. Banaras Electric Light & Power Co. Ltd* (2001, 7 SCC 637)<sup>93</sup> has underscored the importance of expert adjudication in matters pertaining to infrastructure projects.

#### State legislation governing PPP in India

State Legislation	Mode of Dispute Resolution
Gujarat Act No. 11 of 1999	This statute provides a roadmap for private sector participation based on worldwide best practises and project experience in Gujarat and the nation. BOT law allows private sector engagement in State infrastructure finance, construction, operation, and maintenance. This law establishes a clear project cycle for infrastructure project completion. The statute falls under the State Government's executive jurisdiction under the Indian Constitution.

<sup>92</sup> K.S., H., & G., S. (2013). Rethinking Dispute Resolution in Public–Private Partnerships for Infrastructure Development in India. *Journal of Infrastructure Development*, 5(1), 21–32. <https://doi.org/10.1177/0974930613488292>

<sup>93</sup> Harisankar K.S. & Sreeparvathy G., Rethinking Dispute Resolution in Public–Private Partnerships for Infrastructure Development in India, 5 *J. Infrastructure Dev.* 21–32 (2013).

<p>Maharashtra Urban Infrastructure Development Co. Ltd.</p>	<p>MUIDCL is strategically positioned to effectively facilitate the entire process encompassing the identification of priority projects, their preparation, securing funding, and their execution.</p>
<p>Andhra Pradesh Infrastructure Development Enabling Act, 2006</p>	<p>A Conciliation Board is constituted, possessing the jurisdiction and authority comparable to those of a civil court. The legal ramifications of the settlement award will be on par with those of an arbitral decision, as stipulated by the requirements outlined in the Arbitration and Conciliation Act of 1930. During the conciliation procedure, the parties are not permitted to participate in arbitration or litigation proceedings.</p>
<p>Bihar Infrastructure Development Enabling Act, 2006</p>	<p>The establishment of a Conciliation Board serves the purpose of offering impartial and objective support to the Government Agency, Local Authority, and Developers in the resolution of their disputes in a just and collaborative manner, as stipulated in the relevant legislation or Concession Agreement. All proceedings carried out in the presence of the Board must be deemed to be judicial proceedings and shall be treated as if they were taking place in a Civil Court. The jurisdiction of lower courts is limited by specifying that the resolution of disputes related to any matters regulated by the Act must solely fall within the scope of</p>

	<p>the High Court, so excluding any other court or courts that are subordinate to the High Court.</p>
<p>Gujarat Infrastructure Development and Regulation Act, 1999</p>	<p>The Concession agreement does not specify any particular system for resolving disputes, other for the requirement that it must include an arbitration clause. This clause mandates that all parties involved in the agreement must agree to submit any disputes to arbitration. The text does not provide any information regarding the method for selecting a project or concessionaire.</p>
<p>Punjab Infrastructure Development and Regulation Act, 2009</p>	<p>The Punjab Infrastructure Regulatory Authority is vested with the jurisdiction to function as a civil court for the purpose of adjudicating disputes that may occur among several Concessionaires, operators of infrastructure projects, the State Government, and the Board. The possibility of seeking redress through the High Courts is a viable recourse. The Punjab Infrastructure Development Board functions as the principal and authoritative entity tasked with the responsibility of giving project approvals and bestowing concession contracts. The High Court provides a venue for individuals to seek an appeal against an order made by the Public Interest Disclosure Board (PIDB). The jurisdiction of the civil court is constrained</p>

	in instances where the Authority and Board are bestowed with explicit powers. The concession agreement should provide mechanisms for resolving disputes, such as conciliation and arbitration. <sup>94</sup>
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### Various Dispute Resolution Models that can be used in Public-Private Partnerships

In instances where the existing contract-management practises prove insufficient, the escalation of disputes may occur, prompting the inclusion of provisions within the contract for the establishment of an expert committee or review board. These entities serve as avenues for both parties involved to lodge appeals. The composition of these committees is determined by party nominations, with the objective of resolving the issue in accordance with the contractual provisions. The binding nature of a judgement is contingent upon the contractual provisions.

Instead of employing an expert committee or a review board, the contractual agreement may instead incorporate provisions for the designation of an unbiased expert who evaluates and delivers a determination based on the facts presented by each respective party. Alternative dispute resolution (ADR) is occasionally utilised in situations where the matter at hand relates to a substantial technicality. As per the terms outlined in the contract, the determination made by the expert has the potential to carry legal weight and enforceability, however it is not necessarily obligatory for the involved parties.<sup>95</sup>

If a problem persists without a settlement, mediation can be utilised as a method of resolving the issue. The mediator, who is a neutral person, is selected either through mutual consent of the parties concerned or by an independent third party in line with the contractual conditions and approved mediation protocols. Mediation is a procedural approach distinguished by its active and organised nature, in which a mediator helps the communication between the parties engaged in a conflict, aiming to reach a resolution that is mutually agreeable. The principal role of a mediator is to facilitate the negotiation process and foster efficient communication among the parties concerned. The mediator accomplishes this by facilitating dialogues and discerning the unique concerns and inequalities held by each party involved. The mediator utilises a variety of strategies to guide

<sup>94</sup> Harisankar K.S. & Sreeparvathy G., Rethinking Dispute Resolution in Public-Private Partnerships for Infrastructure Development in India, 5 J. Infrastructure Dev. 21, 32 (2013), DOI: 10.1177/0974930613488292, <http://joi.sagepub.com>.

<sup>95</sup> Van Der Ende, M. (2016) 'Dispute Boards in Public Private Partnerships: Best Practice or an Impossible Dream?', Building & Construction Law Journal, 32(5), pp. 300-310. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edo&AN=120241244&site=eds-live>

the proceedings in a positive direction and assist the involved parties in discovering a suitable conclusion. The mediator lacks the authority to provide legally binding determinations.

Another potential alternative, akin to the process of mediation, is conciliation. The contract stipulates the nomination and procedures, without any enforceable decision being rendered. Nevertheless, the work of the conciliator in the resolution process is more proactive compared to that of the mediator. The conciliator engages with the involved parties, both individually and collectively, with the aim of resolving their conflicts by offering constructive suggestions and recommendations.

The final alternative, in order to circumvent the involvement of the courts, is arbitration. This process is the submission of a dispute to one or more arbitrators, as agreed upon by the parties involved, who then render a legally binding ruling on the matter. When parties select arbitration as their preferred method of dispute settlement, they make a deliberate choice to engage in a private procedure for resolving their conflicts, as opposed to pursuing litigation in a court of law. The concept of arbitration will be further discussed in the subsequent section.<sup>96</sup>

If the disagreement is not resolved voluntarily through a non-binding alternative dispute resolution (ADR) process, the local court serves as the ultimate recourse. The expenses associated with courts and the lengthy nature of legal procedures may lead to outcomes that may not align with the project's timeline. Furthermore, the judicial rulings are founded upon legal principles, which may not necessarily align with the underlying intent of the contractual agreement.<sup>97</sup>

The complexities and technicalities surrounding a PPP dispute render it potentially challenging for a local court to efficiently resolve. It is worth mentioning that Public-Private Partnership (PPP) initiatives often entail the participation of international firms who exhibit a lack of confidence in the local judicial system. When the provision of this option is included in contracts, international enterprises tend to either abstain from participation or see an increase in their capital costs.

### Hypothetical Case Study

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<sup>96</sup> Sree Parvathy and Harisankar K. S. (2012) 'Dispute Resolution in Public Private Partnerships for Infrastructure Development in India: In Search of an Alternative', *SSRN Electronic Journal* [Preprint]. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edsair&AN=edsair.doi.....26db97a3d83936d3b93ba72ad61afe43&site=eds-live>

<sup>97</sup> Sinha, A.K. and Jha, K.N. (2020) 'Dispute Resolution and Litigation in PPP Road Projects: Evidence from Select Cases', *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, 12(1). doi:10.1061/(ASCE)LA.1943-4170.0000336.



**Introduction:** The subject of examination in this case study is to a transportation infrastructure initiative undertaken in India, wherein a public-private partnership (PPP) was established for the purpose of constructing and managing a toll road.

**Context:** The toll road project encompassed the development of a substantial motorway linking two cities of considerable economic importance. The governmental organisation tasked with overseeing transportation infrastructure has formed a collaborative alliance with a consortium consisting of construction companies, specialists in operation and maintenance, and financial institutions. The partnership was awarded the concession to undertake the development and administration of the toll road for a predetermined duration.

**Occurrence of Dispute:** Throughout the construction phase, a range of challenges arose, encompassing delays, exceeding budgetary limits, and inconsistencies in design. Furthermore, the consortium expressed apprehensions regarding alterations in legislative prerequisites and unforeseen obstacles pertaining to land procurement. Consequently, the relationship between the public and private parties became increasingly strained, resulting in the formalisation of conflicts.

The PPP agreement included a detailed system for resolving disputes that may arise throughout the duration of the project. The procedure encompassed the subsequent stages:

a. **Negotiation:** In the beginning, the parties made an effort to address the conflicts through amicable negotiations. Multiple rounds of discussions were conducted in order to ascertain areas of agreement and examine potential avenues for resolving the issues at hand without the need for external mediation.

b. **Mediation** was stipulated as the subsequent course of action in the PPP agreement, following the unsuccessful outcome of discussions. A mediator, who was mutually agreed upon by both sides, guided structured discussions with the objective of identifying mutually acceptable solutions.

b. The **Expert Review Panel (ERP)** was utilised as a means of resolving disputes in cases when mediation proved unsuccessful. The **Enterprise Resource Planning (ERP)** team consisted of individuals who possessed expertise in the fields of construction, transportation, and legal affairs. The panel conducted a thorough and unbiased assessment of the conflicts and offered recommendations that do not carry legal obligations.

d. **Arbitration:** In the event that the parties continued to express dissatisfaction with the recommendations made by the ERP, the dispute would progress to the stage of arbitration. The arbitration proceedings were carried out in compliance with the provisions of the Indian Arbitration and Conciliation Act, and entailed the selection of either a single arbitrator or a group of arbitrators. The arbitral award possessed legal enforceability.

Litigation may be pursued as a means of resolving the disagreement if either party decides to oppose the arbitration outcome. Nevertheless, the Public-Private Partnership (PPP)

agreement served as a catalyst for parties involved to adhere to the arbitration ruling and abstain from engaging in superfluous legal proceedings.

Result: Regarding the toll road project, several disputes were effectively settled during the mediation phase for certain matters. The Enterprise Resource Planning (ERP) system played a pivotal role in effectively settling various issues. In certain cases, the process of arbitration was initiated, resulting in legally binding settlements. The utilisation of the dispute resolution process enabled the prompt resolution of conflicts and mitigated the need for protracted legal proceedings, hence reducing disruptions to the project.

#### Key Takeaways

The case study underscores the significance of a well delineated conflict resolution system in public-private partnerships (PPPs). The main findings from this case study are as follows:

- The prompt highlights the significance of promptly identifying and resolving disputes through discussion and mediation as a means to prevent minor concerns from growing into more significant conflicts.
- The inclusion of domain specialists in the enterprise resource planning (ERP) system enhances the legitimacy of the settlement process and facilitates a deeper comprehension of the technical dimensions of conflicts for all parties involved.
- The maintenance of a prosperous and enduring relationship in public-private partnership (PPP) initiatives hinges upon the crucial task of effectively balancing the interests of both parties involved.

The inclusion of a well-defined dispute resolution mechanism inside the Public-Private Partnership (PPP) agreement serves to foster confidence and instill a feeling of assurance among investors.

#### Conclusion

The emergence of Public-Private Partnerships (PPPs) in the realm of infrastructure development in India has showcased their capacity to harness the respective advantages of both the public and private sectors. Nevertheless, given the heightened intricacy of public-private partnership (PPP) initiatives, the want for a proficient system to resolve disputes has assumed utmost significance. This article examines the significance of dispute resolution in public-private partnerships (PPPs) and presents an analysis of different techniques that can be utilised to effectively manage and resolve disagreements.

The adoption of public-private partnerships (PPPs) in the Indian market has experienced a notable increase, leading to the attraction of private investments across diverse sectors such as roads, renewable energy, and smart cities. Public-private partnerships (PPPs) present notable benefits; yet, conflicts can emerge during the management of contracts or even in earlier phases, posing obstacles to the seamless advancement of projects. In order to address

these problems, it is imperative to incorporate a proficient conflict resolution system inside public-private partnership (PPP) agreements.

Legislative measures in India have played a significant role in creating the conflict resolution mechanism within public-private partnerships (PPPs), offering many alternatives including the establishment of expert panels, mediation, conciliation, and arbitration. These mechanisms provide adaptable methods for resolving conflicts, with arbitration being a favoured option when parties desire a confidential conclusion instead of resorting to litigation.

The significance of a properly organised conflict resolution mechanism was shown through the analysis of a hypothetical case study involving a toll road project. The resolution of specific conflicts was facilitated through the utilisation of negotiations and mediation, whilst for other disagreements, the Expert Review Panel offered non-binding advice. In certain instances, the process of arbitration was employed, resulting in the establishment of settlements that carry legal obligations. The utilisation of these procedures enabled prompt resolutions, hence minimising disruptions to the project.

The case study underscores the need of promptly identifying and resolving problems through negotiation and mediation as a means of preventing further escalation. The inclusion of domain specialists in the process of resolving disputes serves to bolster the credibility and comprehension of technical facets. The inclusion of a clearly defined dispute resolution procedure inside the Public-Private collaboration (PPP) agreement serves to enhance investor trust and cultivate a mutually beneficial and enduring collaboration.<sup>98</sup>

In conclusion, the efficacy of Public-Private Partnerships in India is contingent upon not only efficient collaboration but also the adeptness in promptly and equitably addressing problems. By including resilient dispute resolution procedures, public-private partnerships (PPPs) have the ability to effectively address obstacles, foster fair collaborations, and provide enduring infrastructure solutions to support the nation's progress and advancement.

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<sup>98</sup> Manika Mitra, Shreekant Sharma and Jahid Hossain (2017) 'Public-Private Partnerships Framework in India and Bangladesh for Infrastructure Development', *Journal of Global Economy*, 13, pp. 121-130. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,sso&db=edsair&AN=edsair.doi.....699e2f6862a520f74818c1461ad6f091&site=eds-live>