

## INDIAN GOVERNMENT'S MOVE TO ENCOURAGE PRIVATE PARTICIPATION IN INFRASTRUCTURE

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According to various studies undertaken on the infrastructure sector in India, in many cases where the award is made against government bodies, the government sector would inevitably challenge the award, and the private player would inevitably have to await not only the arbitration process, but also the entire challenge process. According to the available data, over 85% of the claims raised against the Government bodies are still pending of which 11% is pending with the Government agencies, 64% with the arbitrators and 8.5% with the Courts. An amount of nearly Rs. 3,400 crore is the awarded dues and another Rs. 4,500 is still under arbitration. No wonder the report commissioned by the CII indicates pointed out that the pending claims from government bodies are the key factor behind burgeoning debt of construction companies, accounting for about 150 % of the debt.

However, the Government of India has decided to change all this to encourage private participation in infrastructure and improve the overall condition of Infrastructure in the country.

On 31<sup>st</sup> August, 2016, the Cabinet Committee on Economic Affairs, chaired by Mr. Narendra Modi, Hon'ble Prime Minister of India, approved various measures to revive the construction sector<sup>1</sup>. The decision was taken in the backdrop of the constant stress that the sector has been undergoing. According to the decision, in cases where the award is made against any Government agency or a Public sector undertaking, and the agency is challenging the award, it will have to pay 75 per cent of the amount of the award in an escrow account against margin free bank guarantee. This escrow account will thereby be used to repay bank loans or to meet commitments in ongoing projects. The measures will strengthen the ailing construction sector.

The benefits of this step are manifold. There is expected to be a drastic increase in the employment opportunities, for the construction sector, which is the largest sector of direct and indirect employment. Moreover, the projects which had to be halted, for the want of funds, will be able to resume the construction. The regime will, thereby, ensure that the contractor does not suffer once the dispute is resolved by arbitration. The average time settlement of claims is estimated to be more than seven years, and a majority of arbitration awards are given against the Government agencies. Therefore, the step will ensure the loss of time and blockage of capital and material is avoided.

It is also likely to benefit the banking sector. Once the projects get restarted, the companies would begin to repay the interests and the principal dues, thereby, the books of the banks are expected to improve, however the improvement will be gradual. Currently, the exposure of financial service sector

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<sup>1</sup> Press note released by Press information Bureau, 31<sup>st</sup> August, 2016, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=149388> >

on the construction is more than of Rs. 3 lakh crore, out of which 45 % are under stress. Therefore, there is expectation of increase in liquidity of financial service sector.

Several other measures have also been introduced. One of them is that in all new contracts, there would be a provision for conciliation board, which will comprise of independent subject experts. This has been included to ensure that there will be a contractual mechanism for renegotiations without bringing projects to a standstill, when public servants are reluctant to participate in the renegotiations on changes in commercial circumstances. Moreover, it will promote a cheaper and less time-taking mechanism of dispute resolution. Further, the contractors have also been provided with an option of shifting their pending disputes with government bodies, to the new arbitration procedures, from the old Arbitration Act. This will provide them with the opportunity of utilizing the cheaper and fast track arbitral process, as introduced by the recent amendment.

The construction companies are expecting an immediate benefit out of the regime. So far the implementation seems to be a success. Government bodies seem to be already acting on these initiatives. On 23<sup>rd</sup> March, 2017, ONGC issued a Protocol for the implementation of the Niti Aayog's initiative for the revival of construction sector, as approved by its Board on 31<sup>st</sup> January'17 in the 289<sup>th</sup> meeting<sup>2</sup>. It laid down comprehensive guidelines for complying with the regime. With a total of around 597 cases pending, under arbitration proceedings or pending before the court, in respect of PSUs, this step was most welcomed. With the co-operation of PSUs like ONGC, the implementation seems to be proceeding at a decent rate. The regime has received a positive response in the market and is expected to divulge outcomes within 2-3 years.

With all these measures in place, India would definitely become a much more attractive investment option for the private players as far as the infrastructure sector is concerned.

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<sup>2</sup> Available at: <<http://www.ongcindia.com/wps/wcm/connect/b8748ba3-ca01-43ac-a045-dc27a2c12060/NITIAayog.pdf?MOD=AJPERES>>