

Legal abroad: Doing business in India

By Sam Prentki and Havin Jagtiani | 26 June 2024

Our series turns to the subcontinent, where potential uncertainty over arbitration has recently cast a shadow over this land of legion construction opportunities



India is now the world's most populous country (at 1.4 billion people), has the fastest-growing economy (at 7.5%) and infrastructure construction is a priority. Road and rail production in particular has surged in recent years, with 10,000km of roads added every year since 2018. Construction opportunities are legion but not without challenges – an election, infrastructure-related emissions concerns and potential uncertainty in the dispute resolution process.

Construction a priority

Government infrastructure spend alone increased from 1.7% of GDP in 2012/13 to 2.5% in 2023/24, and the 2020 National Infrastructure Pipeline initiative estimated US\$1.4tn of investment needed between 2020 and 2025.

Increased investment in construction, of both real estate and infrastructure, is driven not only by the growing population and wealth levels but also by the election issues of unemployment and underemployment. Construction is seen as part of the solution, and for India to achieve its ambitions, most notably to become a “developed” economy by 2047, it is estimated that employment in the industry needs to grow to around 100 million. Construction is clearly hugely important for the world's fifth-largest economy.

International collaboration

To meet its infrastructure targets, India needs considerable investment and professional skills, which means opportunities for international construction companies, particularly in sectors such as advanced engineering. UK-headquartered firms have provided design and engineering services on many projects, and that involvement looks set to continue.

Chennai Industrial Corridor (state-of-the-art transport, energy, and industrial infrastructure)

- Specialist support for Mumbai's fully underground metro network (India's first)
- Construction, supervision and management of the interior of Mumbai International Airport's Terminal 2
- Front-end engineering and design for a new LNG terminal in Ennore
- Transport consultation, masterplanning and urban design of the redevelopment of New Delhi's main railway station.

The law

India's legal system consists not only of both civil and common law, which can be expected to apply to international contracts, but also equitable, customary and religious laws. The Indian Contract Act 1872 (as amended in 2019) provides a legal framework for construction contracts, and common law also applies with Supreme Court judgments binding on lower courts. Construction disputes may even draw on English case law.

Many forms of construction contract are in use, and the National Institution for Transforming India has recently introduced a model EPC contract targeting cost and time issues. For larger projects, FIDIC contract forms are commonly used.

Dispute resolution

Arbitration is the preferred form of dispute resolution in construction matters (both domestic and international), rather than the courts, and the main source of arbitration law is the Arbitration and Conciliation Act 1996, which broadly incorporates the 1976 Uncitral Model Law on International Commercial Arbitration.

India's legal and judicial system is gradually adopting a pro-arbitration international mindset, as seen in recent court judgments.

Moreover, in 2023, the country's Ministry of Law and Justice established an expert committee to propose reforms to India's arbitration framework, including the 1996 act, with the aim of fostering an efficient and competitive environment for international arbitration in India. The expert committee's recommendations earlier this year bring hope that they will increase India's attraction as a key venue for international arbitration and reinforce the work of India's Construction Industry Arbitration Council,

will only apply the convention to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

A note of caution was sounded, however, by a recent Supreme Court decision, exercising a very rarely used extraordinary power, setting aside a US\$960m award in the Delhi Airport Metro Express arbitration, on the basis of “patent illegality”.

Naresh Thacker, a partner at ELP in Mumbai, says the decision “is seen by India’s arbitration practitioners as a setback for India as a hub for arbitration. Courts, more particularly the Supreme Court, have time and again advocated a less interventionist role for themselves, and yet in the fifth round of litigation the very same court stepped in to correct what it said, using this rarely used power, was ‘patently illegal’.

“As with the issue of ‘public policy’, ‘patent illegality’ is not a defined term and thus open to misuse. The decision opens the door to a wider interpretation and a greater potential for misapplication in future challenges.”

Despite this measure of unpredictability in the dispute process, India still presents many attractive construction opportunities.

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