

India

Sunil Seth and Vasanth Rajasekaran

Seth Dua & Associates

1 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market, what are the key concerns they should consider before they took such a step?

As a first step, the foreign contractor or designer should analyse their own objective for setting up an operation in India and thereafter examine the various legal options available for such a setup under Indian laws and regulations. Each form of business allows a varying degree of work freedom and flexibility. Primarily, the following choices of entry are available to a foreign contractor or designer:

- a liaison office or representative office (which merely acts as a communication channel);
- a project office of the foreign entity (for execution of a specific project);
- a branch (which provides greater flexibility than a liaison or project office);
- an Indian joint venture company (with Indian partner); or
- an Indian wholly owned subsidiary (WoS) in India (without an Indian partner).

For example, the objective behind setting up a liaison office has to be very limited since it cannot conduct any business operations in India. It can only act as a communication channel between the parent entity and potential Indian clients. On the other hand, an Indian joint venture company or a WoS has full freedom, flexibility and authority to conduct business in India. The approval process and permissions for setting up an office or a company are also different and one needs to be aware of this.

Depending upon the form of entry option chosen by the contractor or designer, relevant registrations and approvals are required under various laws including tax, labour and local laws, etc. The applicability of tax and the rates thereof also differ from one form of operation to another. Further, various laws need to be regularly complied with after commencement of operations. Generally, employers are required to provide employees with written terms and conditions of employment including salary, hours of work, disciplinary rules, the notice period for termination, holidays, the provident fund, pensions, gratuities, etc. Specifically, the statutes requiring payment of gratuity, bonus, provident fund contributions, etc, must be strictly adhered to, as non-compliance would entail penal consequences and may even result in prosecution.

2 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

Apart from the above-mentioned registrations and approvals, a contract labour licence is required for engagement of contract labour under the Contract Labour (R&A) Act 1970 (CLRA Act), provided

the contractor is employing more than 20 persons. The contractor's licence remains valid for a period of 12 months.

Further, if a contractor to whom the CLRA Act is applicable does not have a licence under the said Act, it is prohibited from undertaking or executing any work through contract labour.

However, in addition to labour licensing, all foreign designers and contractors are required to follow certain compliances including work permit registration, tax registrations, etc.

3 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

There is no such legislation that provides for benefits to domestic contractors. Preference is not given to domestic contractors over foreign contractors, as bids are awarded to both domestic and foreign contractors as per the principles of fair play, equity and natural justice.

4 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Contracts obtained through bribery are void ab initio. Further, in most construction contracts the contractor and the owner enter into a pre-contract agreement, known as an 'integrity pact', to avoid all forms of corruption by following a system that is fair, transparent and free from any influence or prejudiced dealings prior to, during and subsequent to the subject matter of the contract.

The integrity pact specifies the validity period of the contract from the date of its signing and extends up to a stipulated number of years or until the complete execution of the contract to the satisfaction of both the contractor and the owner. The integrity pact also sets out a complete list of acts or events that would be classified as violations along with prescribing sanctions for the same.

In India, the law prohibiting bribery and corruption is the Prevention of Corruption Act 1988. According to the Act, both bribe-taking by a public servant and bribe-giving are equally wrong and, in the event of conviction, both are punishable by anywhere between six months' and five years' imprisonment as well as a fine. Facilitation payments are not an exception and are considered bribery under the India laws.

5 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

In India, there is no restriction on contractors and design professionals working for public agencies in the event of financial support provided by them to political candidates or parties. Making political contributions is not generally part of doing business in India.

The Representation of Peoples Act 1951 deals with the right of political parties to accept donations from any person or company and lays an obligation on the political parties to declare the donations received. However, there is no restriction on persons or companies providing financial support, or in relation to association with the political parties to which they provide support.

6 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

The improving growth curve of the real estate and construction sector is primarily due to the booming economy and liberalised FDI regime. A number of changes were approved in the FDI policy to remove the cap in most sectors. Investor-friendly policies are in place, and there are fewer restrictions as compared with other developing countries. Today, India provides higher returns on FDI than any other country in the world.

7 Construction contracts

What standard-contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

Construction contracts serve as a means of pricing construction as well as structuring the allocation of risk to the various parties involved. The owner has sole power to decide what type of contract should be used for a specific facility to be constructed and to set forth the terms in a contractual agreement.

While there are no standard-contract forms adopted by the Indian construction industry, certain uniform sets of documentation based on FIDIC (International Federation of Consulting Engineers) forms are used. FIDIC forms are clear and coherent, all clauses are essential, the definitions are detailed and the structure of every standard contract is consistent with the other FIDIC standard contracts. There are different types of FIDIC manuals available detailing the conditions of the contract. The conditions of a contract for construction are stated in the new red book, whereas manuals exist for conditions of contract for plant design, turnkey projects, etc, as detailed under the yellow and orange books. Further, basic requirements of employer-employee relations have also been inserted in the new FIDIC yellow book. FIDIC has also published its model terms of appointment for a dispute adjudication board. Recent modifications to the contract conditions and the standard forms of contracts, such as FIDIC or the forms/templates approved by the government or department concerned (Public Works Department, National Buildings Construction Corporation, Central Public Works Department, etc), are more balanced for both the parties.

However, in addition to this, private parties are also involved in construction projects through concession agreements with the government via public-private partnerships. Model concession agreements (MCAs) are drafted in cases of several construction projects between project developers and the government for addressing the

issues that are typically important for limited recourse financing of infrastructure projects, such as:

- mitigation and unbundling of risks;
- allocation of risks and rewards;
- symmetry of obligations between the principal parties;
- precision and predictability of costs and obligations;
- reduction of transaction costs;
- force majeure; and
- termination.

MCAs also address other important concerns such as user protection, independent monitoring, dispute resolution and financial support from the government. MCAs also elaborate on the basis for commercialising ports in a planned and phased manner through optimal utilisation of resources on the one hand and adoption of international best practices on the other. The objective is to secure value for public money and provide efficient and cost-effective services to the users.

There is no prescribed rule or law as regards the language of the contract. Neither is it specifically required that the contract be in the local language. In practice, the language used for contracts is generally English.

There are no restrictions on the choice of law or the venue for dispute resolution. These are generally agreed inter se between the parties to the contract. In the event that both the parties are Indian residents, the governing law is Indian and the venue for dispute resolution is India. However, if any foreign party is involved, the governing law or the venue for dispute resolution may be foreign, as may be mutually agreed between the parties.

8 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Generally the payment method for contractors, subcontractors and vendors is payment by cheque as per the terms of the contracts. The frequency of payments is generally upon the achievement of milestones agreed between the parties.

9 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

The general procedure for selection of a concessionaire agreement is a two-stage bidding process. Projects are awarded as per the model documents – RFQ, RFP and concession agreement – provided by the Ministry of Finance. In the construction industry, owners enter into a contract directly with the contractor who is the lowest bidder on their job through bid bonds at the tendered price. Good contract documents are FIDIC-based. In cases of model concession agreements, an independent engineer is appointed to supervise the entire project.

10 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Public-private partnership (PPP) broadly refers to long-term, contractual partnerships between public and private sector agencies, specially targeted towards financing, designing, implementing and operating infrastructure facilities services that were traditionally provided by the public sector. PPPs seek to engineer the delivery by the private sector of quality services to the public sector over a specified period of time (concession period) at a cost that represents value for money. This is achieved while at the same time transferring an

appropriate level of risk to the private sector. The major drawback in implementation is a weakness in enabling policy and regulatory framework for PPP in most of the infrastructure sectors. MCAs are being notified and the approval mechanism for PPPs in the central sector has been streamlined through the setting up of the PPP Appraisal Committee.

India, at present, has not adopted the PFI structure or model for any infrastructure projects.

11 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

Liability of each member of the consortia is governed by the terms and conditions of the Consortium Agreement. Normally, each member of the consortia is jointly and severally liable for the execution of the entire project. Though the members of the consortia may allocate roles and responsibilities among themselves, each member continues to be jointly and severally liable for the execution of the entire project. However, by virtue of the assignment clause in the consortium agreement, a member of the consortia may assign its role and responsibility to some other member. Nevertheless, such member continues to be jointly and severally liable for the execution of the entire project.

12 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

There is no law that permits a contracting party to be indemnified against all acts of the other party. Further, there is no provision in Indian law under which one can contract out of an act of negligence. The right of a contracting party to be indemnified against the acts, errors and omissions arising from the work of the other party is as per the terms between the parties privy to the contract. As a practice, a contracting party is indemnified against all damages and losses arising out of the acts of omission or commission of the other party unless attributable to any act of negligence or breach by such contracting party itself. As such, acts of negligence and breaches are not indemnified.

For example, under an MCA, the owner generally indemnifies, defends and holds harmless the general contractor against any and all proceedings, actions, third-party claims for loss, damage and expense arising out of a defect in title, the rights of the owner or out of a breach by the owner, its officers, servants and agents of any obligations of the owner under the agreement, except to the extent that any such claim has arisen due to the general contractor's 'event of default'. The general contractor will be responsible for the acts, errors and omissions arising from the work of a subcontractor or as per the terms between the parties privy to the contract.

13 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

The contractor has no contractual responsibility towards the third party to whom the building is sold or leased as no privity of contract exists between the parties. Further, no third-party claims can subsist against the contractor due to lack of privity. However, most construction contracts provide a complete framework for liability between the parties and tortious liability is limited to third-party liability. A builder of defective premises may be liable in negligence to persons who thereby suffer injury. A designer or builder owes a

duty of care to all persons who might reasonably be affected by the design or construction of the premises. Thus, the third party may pursue a claim against contractors under the law of tort despite lack of privity between the parties.

14 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards. Does the local law limit contractors' liability for damages?

It is an obligation upon the contractor to take out insurance against the loss or damage of property and the death or bodily injury to a person. The amount of the insurance may be prescribed by the employer or the contractor may secure appropriate cover taking into account the cost of the project and the risk involved. Insurance for delay damages and for damages due to environmental hazards are less common in the Indian construction sector.

There is no local law on limitation of liability of the contractor for damages. The liability is defined and fixed as per industry practice prevalent for the nature of the project.

15 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There are no requirements set out in any labour law legislation in India pertaining to the employment of a minimum number of local labourers or workers in a construction project. However, in respect of employment of migrant labourers, separate legislation has been enacted to regulate their working conditions. The Inter-State Migrant Workmen (Regulation Of Employment And Conditions Of Service) Act 1979 (the Act) applies to an establishment or contractor in which five or more inter-state migrant workers are employed. A migrant worker means any person who is recruited by or through a contractor in one state under an agreement or otherwise for employment in an establishment in another state.

16 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

A case of direct hiring of labour would constitute an 'employer-employee' relationship and such an employee (who falls within the definition of a 'workman' under the Industrial Disputes Act) would be entitled to various statutory rights and benefits under Indian labour laws. India has several labour laws, and compliance with all statutes pertaining to or applicable to foreign contractors is essential. The procedure, as laid down in law, has to be followed by the employer while terminating the services of the labourer, which includes fair notice period, appropriate compensation, due process of law and natural justice, etc, as stipulated under the relevant statutes (eg, the Industrial Disputes Act). The obligation of employers towards local employees employed directly depends on the contractual terms if employed on the basis of an employer-employee relationship or if employed as contract labour, daily wage earners, etc. Accordingly, requisite statutory guidelines need to be complied with. If there is a conflict between the terms of the agreement and provisions of any labour legislation, the legislative provision will override the terms of the agreement in the case of a workman. However, in the case of a limited duration project, it is possible to enter into a fixed-term employment agreement and to be able to extinguish the legal obligation upon completion of the employment or project without providing requisite compensation, as the provisions pertaining to 'retrenchment' under the Industrial Disputes Act are inapplicable.

In the course of regular employment (ie, unlimited contract term), notice needs to be served along with adequate compensation by the employer at the time of 'closure'.

The main social security legislation for employment includes:

- the Workmen's Compensation Act 1923 for accidents in the place of work, which has now been replaced by the Employees' Compensation Act, 2009;
- the Employees' State Insurance Act 1948 for health benefits;
- the Maternity Benefit Act 1961 for expectant women workers; and
- the Payment of Gratuity Act 1972 and the Employees' Provident Fund Act 1952 for retirement benefits.

However, in respect of employees, their terms and conditions are detailed in their agreement with the owner. At the end of the employment term or on completion of the project, if all statutory provisions are fulfilled and no legal dues are pending towards the employee, the employer is not left with any legal obligations at the time of termination.

17 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

In India, several labour laws have been enacted to regulate conditions of work, wages, service, labour relations and other such related matters. As per the labour law provisions, a foreign contractor intending to close the Indian operations of a business has to give at least 90 days' notice to the appropriate government to obtain permission to close. On permission being granted, workers will be entitled to receive compensation, which shall be equivalent to 15 days' average pay for every completed year of service or any part thereof in excess of six months. However, for employees performing managerial and administrative work, their terms of employment are essentially derived from the contract drawn up between the foreign contractor and the employee.

18 Payment rights

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

The terms of payment of fees and costs to the contractor are governed as per the clauses agreed under the agreement in furtherance of the laws applicable to the agreement. Where the owner is in breach of any of the provisions of the agreement, the contractor is entitled to settle the dispute as per the prescribed mode of dispute resolution laid down in the contract. The contractor may approach a dispute review board (DRB) at the first instance for a demand of payments along with interest. If the matter is not resolved at the DRB level, the contractor may initiate arbitration or litigation proceedings for recovery of its legal claim. In the event of failure on the part of the owner to repay its legal dues arising out of the contractual breach, damages or compensation may be imposed as per the provisions of the agreement in accordance with the prevailing contract laws. Further, as regards the concept of a lien or mortgaging of the owner's property, this is subject to the provisions of the agreement and the respective applicable property laws.

19 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

The government may not be entitled to claim sovereign immunity in respect of the non-payment of claims to contractors in cases of commercial contracts. The appropriate government cannot resort

to the defence of sovereign immunity provided it affects the fundamental rights of the contractors or the persons so affected and the same has been well-established through several judicial precedents. However, it is common practice to have specific provisions in the contract barring the government from asserting sovereign immunity in such matters.

20 Insolvency and bankruptcy

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Construction contracts usually contain a stipulation for forfeiture of earnest money or a security deposit of the contractor if it commits a breach of contract in the case of cancellation or any kind of hindrance or failure regarding the successful execution of the project. In most cases, the earnest money paid along with the tender is forfeited if the contractor fails to keep the offer open for the period mentioned in the tender notice or fails to sign and complete the contract documents and furnish the security deposits specified in the tender notice. In cases of default of the owner of the project, most contracts contain clauses conferring an express power of termination upon the contractor in the event of the failure of the employer or owner to make interim payments within the specified period due to bankruptcy of the employer, non-release of work-fronts or materials in time, etc.

There is no specific law to deal with the claims of unpaid contractors; however, according to contract law in India, claims for damages, specific performance of the contract as well as injunctions, cancellation and rectification of the terms of the agreement can be enforced in the event of breach of contract under the Indian Contract Act 1872 and the Specific Relief Act 1963. Further, an unpaid contractor can seek the winding-up of the defaulting project company for payment default as per the provisions of the Companies Act 1956.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The Indian Contract Act 1872 recognised the doctrine of force majeure and frustration wherein parties are exempted from their contractual liability arising out of the consequences of anything over which they have no control. The liability is excluded only on satisfaction of certain conditions wherein the Act proceeds from a cause not brought about by the defaulting party, making the execution of the contract wholly impossible to perform due to unforeseen and inevitable situations. If, due to the occurrence of an unexpected event, performance becomes 'impossible', a party may be condoned from carrying out its contractual obligations under most legal systems. The force majeure clause should be construed with close attention to the words that precede or follow it, and with regard to the nature and the general terms of the contract that specifically entail the situation where parties are exempted.

22 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

In India, there are no specialised tribunals constituted under any act for dealing with construction disputes. However, in most construction matters, at the initial level a DRB is constituted for resolving disputes, and in the event of failure, the case is adjudicated through an arbitral tribunal comprised of technical experts chosen by the parties through consent.

23 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

DRBs are very common in construction contracts. If a dispute arises, the board recommends settlement soon after the dispute occurs and before any adversarial attitude grows. The mere presence of a DRB prevents disputes from arising. DRBs are thus preventive in nature.

The board, after recording the parties' submissions, suggests a settlement. If it is not acceptable to both parties, they can make a request to the board to make further efforts, or pursue litigation or arbitration, as the case may be. The DRB's output consists of a written, non-binding recommendation for resolution of the dispute. However, in India, DRBs are not functioning effectively due to a half-hearted approach on the part of employers and contractors.

24 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from? If not, why not?

Mediation as a concept is not new in India. Widespread statutory incorporation of mediated settlement as a method of resolution for commercial disputes is relatively recent by way of amendment to section 89 of the Civil Procedure Code in 1999 and the introduction of conciliation as a method under the Arbitration and Conciliation Act 1996. Parties must agree to mediate; neither party can be forced to do so. By agreeing to subject their dispute to mediation after a dispute has arisen, parties take ownership of the manner in which their dispute is to be resolved. Mediation either results in settlement or it fails. Mediation has gained considerable acceptance and, as it is speedy and cost effective, it has become a widely acceptable option for dispute resolution. Even the courts encourage the litigation parties to consider mediation for resolution of their disputes. If the parties agree, the matter is referred to mediation.

No qualifications have been prescribed for individuals to be designated as mediators, but generally the panel is comprised of individuals with professional qualifications and expertise (legal and technical) for every branch of the industrial or commercial fields in order to give definite resolutions to diverse disputes, thus guaranteeing a tribunal of the highest proficiency.

25 Confidentiality in mediation

Are statements made in mediation confidential?

The mediation shall be strictly confidential. The mediator, the parties and any individual involved in one way or another in the mediation must strictly respect this confidentiality. Except for the joint and express agreement of the parties, the mediator must undertake not to act as an arbitrator or intervene in any way in any court or arbitration proceedings relating to any dispute that was the subject of mediation.

26 Arbitration of private disputes

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

The Arbitration Act was drafted to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, taking into account the UNCITRAL Model Law and Rules.

The main objects of the Arbitration Act are to make provisions for an arbitral procedure that is fair, efficient and capable of meeting the needs of the specific arbitration; to minimise the supervisory role of courts in the arbitral process; and to permit arbitral tribunals to use mediation, conciliation or other procedures during arbitral proceedings in the settlement of disputes.

Construction disputes are generally resolved through arbitration. Litigation in India is time-consuming, so most contracts have an in-built arbitration clause for the resolution of disputes. Arbitration is a fast and efficacious method of resolving disputes. The greatest advantage of arbitration (ad hoc or institutional) is that it combines strength with flexibility and yields enforceable decisions backed by the judicial framework.

27 Governing law and arbitration providers

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

International commercial arbitration has gained momentum in India. Arbitration is rapidly becoming the preferred process for resolving international commercial disputes. Arbitration, in a neutral state before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice. For example, in its model contract the National Highways Authority of India stipulates that, in the case of a dispute with a foreign contractor, the dispute shall be settled in accordance with the provisions of the UNCITRAL Arbitration Rules.

28 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

In cases of large projects where the contract value is substantial, the government agencies may agree to international institutional arbitration (before the ICC, for example). The Indian Arbitration and Conciliation Act 1996 (the Arbitration Act) is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976. The parties are bound by the arbitrator's award. Under section 36 of the Arbitration Act, an arbitral award is enforceable as a decree of the court, and could be executed like a decree in a suit under the provisions of the Civil Procedure Code 1908. An award resulting from international commercial arbitration is enforced according to the international treaties and conventions, which stipulate the recognition and enforcement of arbitral awards.

29 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Enforcement of foreign awards by the ICC or any other international tribunal may be refused at the request of the party against whom it is invoked by local courts, provided that party can furnish proof in respect of, inter alia:

- the invalidity of the agreement;
- incapacity of the party;
- want of proper notice;
- the award deals with disputes not referred to arbitration;
- the arbitral tribunal was defective in composition;
- the subject matter is not capable of arbitration;
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country where the award was made; or
- the award goes against the public policy of India.

Further, if an application for the setting aside or suspension of an award has been made to the appropriate forum, the court may adjourn the decision on the enforcement of the award and request the party to furnish suitable security. Indian courts may refuse

enforcement on any of the above-mentioned grounds and adjourn the enforcement of the award.

30 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services and are there any statutory preconditions for commencing or maintaining such proceedings?

The limitation period for filing suits is governed by the (Indian) Limitation Act 1963 (Limitation Act). As per the Limitation Act, the limitation period for the purpose of initiating lawsuits in relation to construction works and design services is three years from the date on which the right to sue (cause of action) accrues.

31 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The Indian Constitution has incorporated pro-environmental principles, especially through article 21 (protection of life and personal liberty) and article 48(A) (protection and improvement of environment and safeguarding of forests and wildlife).

The rule of law in India, which is a signatory to the Stockholm and Rio Conventions, must be read with regard to these conventions and has been interpreted by the courts to advance the cause of ecology and the environment, and has already been adapted in environmental legislation.

All infrastructure projects should have a certain degree of environmental and social assessment compulsory either at state or central level. Several laws have been enacted to protect wildlife and the environment at large, namely the Forest Conservation Act 1980, the Wildlife Protection Act 1972 and, most importantly, the Environment Protection Act 1986.

The judiciary, to fulfil its constitutional obligations, has always issued appropriate orders, directions and writs against those persons who cause environmental pollution and ecological imbalance.

32 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

The Environmental Protection Act 1986 regulates the protection and improvement of the environment in India. This is an umbrella legislation that consolidates the provisions of the Water Act 1974 and the Air Act 1981. Within the framework of the legislation,

Pollution Control Boards are established in order to prevent, control, and abate environmental pollution.

The Environmental Protection Act provides for both civil and criminal penalties (fines and imprisonment) for the violation of its pollution standards.

33 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

With the liberalisation of the foreign investment policy of India, the government has undertaken negotiations with a number of countries and entered into several bilateral investment promotion and protection agreements with them. A bilateral investment treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state. BITs are established through trade pacts. The Model Agreement on Bilateral Investment drafted by the Ministry of Finance defines 'investment' as every kind of asset established or acquired, including changes in the form of such investment, in accordance with the national laws of the contracting party in whose territory the investment is made.

34 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

India has entered into double taxation avoidance agreements (DTAA) with several countries pursuant to which tax exemptions can be utilised by foreign contractors. This acts as an impetus to investment in India. Double tax avoidance treaties are comprised of agreements between two countries, which, by eliminating international double taxation, promote the exchange of goods, persons, services and investment of capital.

The object of a DTAA is to provide for the tax claims of two governments both legitimately interested in taxing a particular source of income either by assigning to one of the two the whole claim, or else by prescribing the basis on which tax claims are to be shared between them. Double taxation of the same income in the hands of the same entity would give rise to harsh consequences and impair economic development.



**Seth Dua &
Associates**
Solicitors & Advocates

**Sunil Seth
Vasanth Rajasekaran**

**sunil.seth@sethdua.com
vasanth.rajasekaran@sethdua.com**

601-603 and 607-608, 6th Floor, DLF South Court
Saket
New Delhi 110017
India

Tel: +91 11 416 44700 / +91 11 416 44400
Fax: +91 11 416 44500
www.sethdua.com

35 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

Currency control issues are regulated by the Foreign Exchange Management Regulations 2000 under FEMA. No separate guidelines specifically exist for construction contracts. The procedure for dealing with foreign currency transactions has been delegated to the various authorised dealers (banks).

36 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

India is the third-largest economy in the world in terms of purchasing power parity, and a preferred destination for FDI. Industrial policy reforms have substantially reduced industrial licensing requirements, removed restrictions on expansion and facilitated easy access to foreign technology and FDI. All foreign investments are freely repatriable, except for those cases where non-resident Indians choose to invest specifically under non-repatriable schemes. Profits, dividends, etc (which are remittances classified as current account transactions), can be freely repatriated.