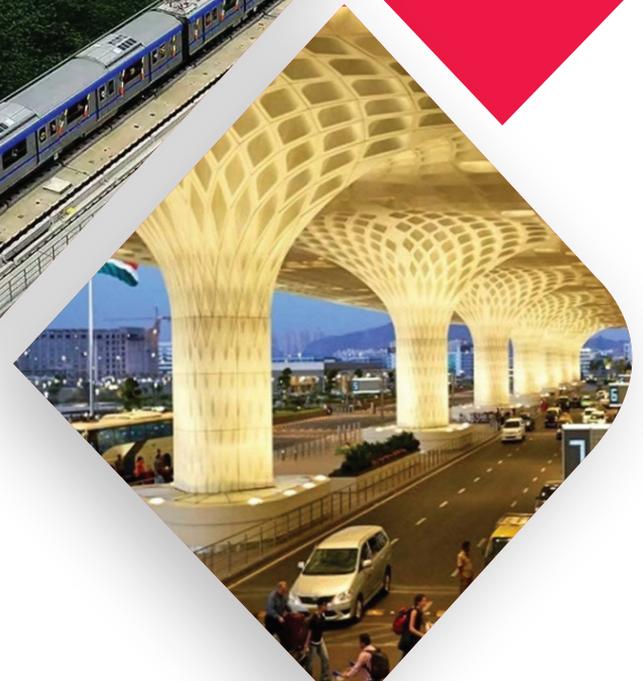
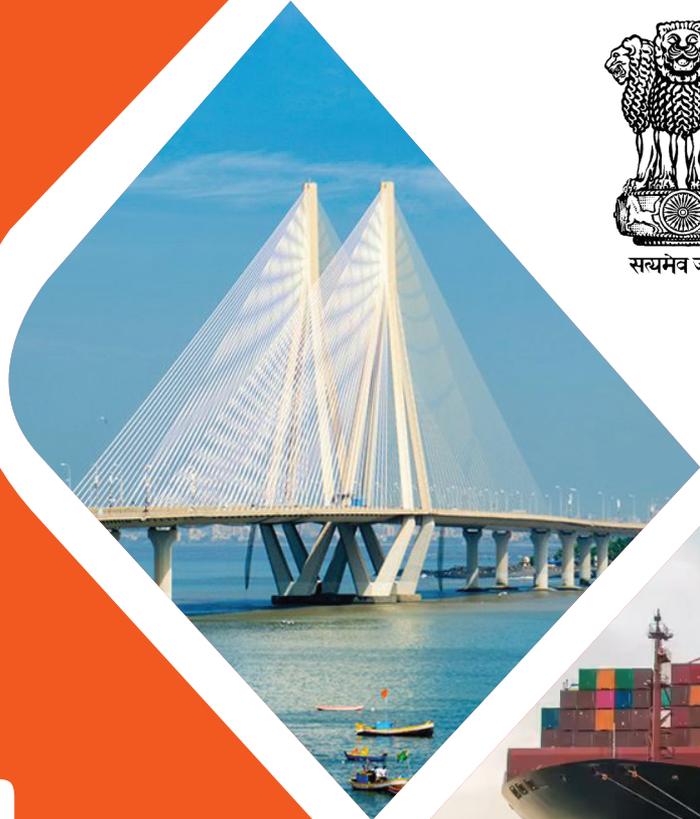




Reference Guide for Concession Principles in Public Private Partnership Projects



**Infrastructure Finance Secretariat
Department of Economic Affairs
Ministry of Finance
Government of India**



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GOVERNMENT OF INDIA

Reference Guide for Concession Principles in Public Private Partnership Projects

Infrastructure Finance Secretariat
Department of Economic Affairs
Ministry of Finance
December 2025

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Department of Economic Affairs
Ministry of Finance
Government of India

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FOREWORD

Recognising the importance of infrastructure in shaping a nation's growth journey, India has placed a strong emphasis on developing world-class assets that enhance productivity, connectivity, and inclusion. As we progress toward *Viksit Bharat @2047*, infrastructure will remain central to enabling economic transformation and improving quality of life. Given the scale of investment and technical expertise required for modern infrastructure, Public-Private Partnerships (PPPs) have emerged as a vital instrument to mobilise private capital, technology, and efficiency in developing infrastructure while safeguarding public purpose. Over the past two decades, India has developed one of the world's most extensive PPP ecosystems—supported by model concession frameworks, institutional capacity, and a growing body of experience across sectors.

With this evolution, comes diversity. Multiple Model Concession Agreements (MCAs) have been designed and refined for sectors such as roads, ports, power; reflecting their own technical and risk profile. As we move forward, the next demand for infrastructure will emanate from new sectors, especially social and urban infrastructure. This will require creation of new model concession agreements and sector-specific agreements that not only capture the technical aspects of the sector but also are aligned to the standard practices discovered through experiential usage of existing concession agreements.

The Reference Guide for Concession Principles in PPP Projects, developed by the Infrastructure Finance Secretariat, Department of Economic Affairs, seeks to bridge this gap by comparing and contextualising key provisions across MCAs. It aims to bring knowledge parity among PPP stakeholders by articulating the rationale, intent, and sectoral nuances of various clauses. This Guide is not intended to prescribe a uniform template but to serve as a knowledge reference—enhancing clarity, consistency, and confidence in PPP project formulation. It is expected to support policymakers, developers, advisors, and financiers in crafting agreements that are robust, balanced, and aligned with best practices.

I commend Shri B. Purushartha, Joint Secretary (Infrastructure), and his team for leading this important initiative to harmonise understanding across India's PPP ecosystem and further strengthen the quality of infrastructure partnerships.


Anuradha Thakur
Secretary, Economic Affairs

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Government of India
Ministry of Finance
Department of Economic Affairs

31st October, 2025

Foreword

Public–Private Partnerships (PPPs) have been at the forefront of India’s infrastructure journey, enabling the mobilisation of private capital, innovation, and efficiency for public benefit. PPPs demand not only financial and technical rigour, but also a clear understanding of the contractual frameworks that underpin risk allocation, accountability, and long-term service delivery.

Over the past two decades, India has developed one of the most diverse PPP portfolios supported by consistent developments in the technical and contractual space. The Model Concession Agreement (MCA) has served as the foundation for this partnership - translating policy intent into enforceable commitments between the public and private actors. Sector-specific models—developed for roads, ports, airports, urban, and energy—reflect the operational and regulatory nuances of each sector.

As India’s infrastructure programme continues to expand, new models and sectors are emerging that will require the development of fresh MCAs or the adaptation of existing ones. In this evolving context, a deeper understanding of the principles, intent, and logic underlying key MCA clauses becomes increasingly important for policymakers and practitioners.

It is in this context that the ‘Private Investment Unit’ in Infrastructure Finance Secretariat has developed the *Reference Guide for Concession Principles in Public Private Partnership Projects*. By systematically comparing provisions across MCAs, the Guide distils the rationale and variations of articles and clauses, thereby promoting knowledge parity and informed decision-making. It is intended as a reference—helping practitioners interpret model agreements more consistently and adapt them effectively for future requirements.

This initiative reflects the continued commitment of the Department of Economic Affairs to strengthen India’s PPP ecosystem by ushering clarity through knowledge dissemination building technical capacity among practitioners, enhance institutional learning, and handhold project authorities for structuring better PPP projects. I commend my team for their extensive efforts in shaping this reference guide and hope that the Guide will serve as a valuable resource for all stakeholders engaged in structuring, appraising, and implementing PPP projects.


(B Purushartha)

Disclaimer

This Reference Guide (hereinafter referred to as the 'Guidebook') is designed as a practical guidebook for formulating model or project specific agreements for public private partnership (PPP) projects. The Guidebook is based on standard formats and model concession principles outlined in model or project-specific concession agreements (MCA/ signed CA) of central ministries, as well as the set of draft model concession agreements (DCAs) for different sectors.

The primary aim of the Guidebook is to facilitate project sponsoring authorities in developing robust and bankable PPP agreements, capable of effectively achieving project objectives. It discusses the broad structure and key articles and provisions of a model or project concession agreement, explaining the purpose, applicability, and guiding principles for determining terms under various scenarios.

The principles presented herein are applicable across a wide range of PPP projects, with article-wise guidance provided, where relevant, for adoption and adaptation based on project requirements. However, as each project is unique, the inclusion, exclusion, and drafting of specific clauses must be independently assessed on a case-by-case basis. This Guidebook, in no manner, precludes the requirement for diligent project structuring or professional legal, financial, and technical advice necessary for drafting individual PPP agreements. Further, the categorisation of various provisions into standard, model-specific, sector-specific or project-specific is solely for reference in this Guidebook, and not a standard practice. It has only been used to indicate possible variations across clauses and for identifying broad thumb rules for modification in same. Neither the categorisation, nor the list of provisions therein are exhaustive and may vary on the basis of project specific requirements.

The standard formulation included under this Guidebook is based on extant market practice and statutory, regulatory framework. The project sponsoring authorities need to exercise due caution and undertake due diligence while adopting guidance provided in this Guidebook.

Finally, it is emphasised that the success of a PPP initiative is fundamentally dependent on the robustness of its project structure and its ability to meet project objectives. This Guidebook does not address aspects related to structuring of projects and is largely limited to prudential principles of structuring and sample clauses from MCA/CAs. While due care has been taken in formulation of the Guidebook, any inadvertent error is regretted.

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Abbreviations

Acronym	Full Form
AAI	Airports Authority of India
AD	Appointed Date
BOO	Build-Own-Operate
BOT	Build Operate Transfer
CA	Concession Agreement
COD	Commercial Operations Date
CP	Condition Precedent
CCEA	Cabinet Committee of Economic Affairs
CERC	Central Electricity Regulatory Commission
CoI	Committee on Infrastructure
CPI	Consumer Price Index
CPSE	Central Public Sector Enterprise
COD	Commercial Operation Date
DBFOO	Design Build Finance Operate Own
DBFOT	Design Build Finance Operate Transfer
DEA	Department of Economic Affairs
EPC	Engineering, Procurement and Construction
FCI	Food Corporation of India
GOI	Government of India
HAM	Hybrid Annuity Model
IFS	Infrastructure Finance Secretariat
IMG	Inter-Ministerial Group
ISTS	Inter State Transmission System
KPI	Key Performance Indicators
MCA	Model Concession Agreement

MCA/CA	Model Concession Agreement/ Concession Agreement
MoHUA	Ministry of Housing & Urban Affairs
MoRTH	Ministry of Roads Transport & Highways
MoPSW	Ministry of Ports, Shipping & Waterways
MoST	Ministry of Surface Transport
MMLP	Multi Modal Logistic Parks
NHAI	National Highways Authority of India
O&M	Operations & Maintenance
PPP	Public Private Partnership
PSA	Project Sponsoring Authority
OMDA	Operation, Management and Development Agreement
RBI	Reserve Bank of India
RFP	Request for Proposal
RFQ	Request for Qualification
RoW	Right of Way
SAROD	Society For Affordable Redressal Of Disputes
SBD	Standard Bidding Document
SEBI	Securities and Exchange Board of India
SPV	Special Purpose Vehicle
SWM	Solid Waste Management
TBCB	Tariff Based Competitive Bidding
TOT	Toll Operate Transfer
VFM	Value for Money
VGf	Viability Gap Funding
WPI	Wholesale Price Index

PART I: CONTEXT

1. Introduction

Public Private Partnerships (PPP) enable efficient development of economic and social infrastructure sectors by leveraging private sector investment and expertise, while also fostering innovation and better service delivery.

The concession agreement, in conjunction with the other supplementary agreements, applicable laws, permits etc. forms the legally binding framework for Public Private Partnership (PPP) arrangements in India. It is therefore necessary that concession agreements are clearly and comprehensively drafted, keeping in view the intent of the project, and based on standard prudential principles which ensure protection of public interest as well as those of other stakeholders.

To this end, standard contractual frameworks i.e. model concession agreements (MCAs), which can be suitably adopted for fast-tracking of PPP projects, have been formulated in various sectors over time. These include, inter alia, MCAs in highways sector - for Build Operate Transfer (BOT Toll), Build Operate Transfer (BOT Annuity), Toll Operate Transfer (TOT) and Hybrid Annuity Model (HAM), MCA in food storage sector for Food-grain Silos, MCA in logistics sector for multi modal logistic parks (MMLP) and MCA in ports sector for PPP in Major Ports. Similarly, various standard bidding documents have been formulated in power sector for private participation in respective sub-sectors. Of these that for inter-state transmission network on tariff based competitive bidding (TBCB) has been adopted extensively. MCA for integrated solid waste management (SWM) projects has also recently been notified by Ministry of Housing and Urban Affairs (MoHUA) for adoption by respective project sponsoring authorities (PSA). Benefits of formulating and adopting model concession documents/principles has hence been recognised across sectors. Further, to incorporate changing market and regulatory scenario, challenges in implementation of contracts etc, these documents have been revised from time to time based on market experience and feedback.

To further catalyse uptake of PPP projects across various sectors, it is necessary that new sectors mainstream model concession principles - both in MCAs as well as project specific concession agreements. Accordingly, an exercise has been undertaken by Infrastructure Finance Secretariat, Department of Economic Affairs (IFS, DEA) to identify the essential clauses of an MCA as well as to compare various provisions of an MCA for drawing up prudential principles for reference of project sponsoring authorities (PSA) same across sectors and modes.

Following reference guide (Guidebook) has been prepared as a result of this exercise to

facilitate drafting of MCA and project specific concession agreements. The objective is to ensure dissemination of knowledge on contractual provisions in PPP contracts based on last two decades of experience in infrastructure sector of Central Ministries, which in turn can help ensure higher penetration of PPP projects in India – with robust structuring and contracting – in a time and cost-efficient manner.

This Guidebook provides the broad structure, key principles and detailed list of provisions in a typical PPP concession agreement. It then details these contractual provisions in terms of their need, applicability, variation in formulation across various MCA/CAs and principles for incorporating or adapting these to the project under consideration.

The principles and guidance covered as part of this Guidebook are applicable for both greenfield and brownfield PPP projects in infrastructure sector, undertaken on generally adopted modes such as DBFOT/ BOT(Toll), BOT (Annuity)/ HAM, OMT etc. While the focus of this Guidebook is limited to infrastructure sector, standard provisions under these approved/draft MCAs have been successfully used to concession out PPP projects in non-infrastructure sectors as well.

For ease of readers, this Guidebook has been divided into three parts. The first part (i.e. Chapter 1 and 2) provides the context of this document, an overview of model concession agreements in PPP projects along with international practice and Indian experience on adoption of the same. The second part (i.e. Chapter 3 to 10) deals with the end-to-end framework including (i) basis and methodology used for arriving at standard contractual provisions/ principles (ii) general structure and typical list of provisions under an MCA/CA along with principles for formulation of the same, change in thresholds/covenants based on model, sector or project in question. Chapter 11 discusses the extant methodology for preparation, consultation and inter-ministerial review of MCAs/CAs.

2. Model Concession Principles– Concept & Evolution

2.1. Concession Agreement

Public Private Partnership (PPP) in infrastructure¹ is a contractual arrangement between a public entity and a private partner for building and/or operating projects with the objective of providing efficient services at affordable costs. This collaborative model mobilizes resources that would otherwise be unattainable through public funding alone while distributing project risks and allowing the government to primarily focus on regulation and oversight.

Given the huge demand for economic and social infrastructure investment in India, coupled with a specific focus on lifecycle costs and long-term service delivery quality, there is inherent merit in evaluating PPPs as an implementation alternative. Adoption of PPP alternative, however, necessitates robust and bankable project structuring that results in value for money for the public sector proponent and effective translation of envisaged terms and conditions into a legally binding contractual framework.

The principal document incorporating the contractual provisions of PPP arrangements – as also the policy and regulatory framework for the project in question – is the ‘PPP Contract’ or the ‘Concession Agreement’ (‘Concession Agreement’).

The Concession Agreement (CA), in conjunction with other supplementary agreements, applicable laws and permits etc, acts as the governing framework for private participation in infrastructure. It can enable private investors to secure a reasonable return at manageable levels of risk – while assuring the beneficiaries of adequate service quality at an affordable cost, and facilitate the government in procuring value for public money. It lays down this intent of various parties by way of a legally binding document so as to ensure the following objectives of PPP:

Table 1: Objectives of a Concession Agreement

Objective	Description
Authority	Of the private party to undertake the project, levy charges etc and of the public authority to insist on performance, quality of service etc <i>(for clarity on rights of respective parties)</i> .

¹For the purpose of for various policy and financial incentives, infrastructure sectors in India are those classified under the Harmonized Master List of Infrastructure, maintained by DEA https://infrastructureinindia.gov.in/documents/20121/42406/1690367959933_-_15%20HML%20October%202022.pdf

Objective	Description
Accountability	Of parties involved in the project and overall protection of public interest (<i>for clarity on obligations of respective parties</i>).
Predictability	Of project outcomes, costs and viability etc. - especially in such long -xterm project scenarios where both foreseen and unforeseen variation in technological, commercial, regulatory or operational aspects of project may occur; As also to document eventualities and contingencies and action plan for mitigating the same
Optimality	Of risk-reward structure to ensure symmetry of obligations and risk-reward among principal parties etc.
Validity	Of the terms of the project and the provisions of the agreement with the extant legal and regulatory landscape.

Concession Agreements delineate the contractual provisions for each step of a PPP project lifecycle - starting from the award of the project up till the divestiture or termination with hand back of assets. It spells out inter alia (i) the conditions for award of the project and continued subsistence of agreement and rights thereunder (ii) scope, including terms and conditions for development and operations, maintenance of the project, technical specifications related to asset creation and commissioning, asset /service outputs (iii) financial rights and obligations including concession fee, user-fee, other revenue sources, additional payments etc. (iv) monitoring mechanism including performance indicators, conditions of defaults, penalties etc (v) mechanism for addressing eventualities or contingencies viz. force majeure, pre-mature termination, divestiture etc and (vi) other legal, regulatory and commercial provisions.

It may be noted that contractual arrangements under PPP may not always be by way of concessions (i.e. grant to a private sector entity permitting it to undertake actions for the provision of public good or service, which would, otherwise be provided by a public-sector entity²) and may in fact take other forms such as procurement of service by authority, leasing of assets etc. For the purpose of this document, however, the term ‘Concession Agreement’ or ‘Model Concession Agreement’ has been used to mean the underlying document for all such PPP Contracts. Further, the prudential principles of optimal risk sharing, protection of public interest etc. would in most cases remain same – irrespective of the form of arrangement being entered into. Most underlying contracts for PPP arrangements hence – irrespective of form or name – can suitably incorporate standard principles/ provisions covered under this Guidebook.

²Refer DEA Reference Guides on Waterfall Model, PPP Project Appraisal for possible models of PPP Projects and that on Lease vs License for ‘concessions’

https://www.pppinindia.gov.in/guidance_material_and_reference_doc

2.2. Model Concession Agreement

In absence of a specific legislative framework for PPP projects in India, as also other prerequisites for successful private participation in infrastructure viz. predictable tariff regime, independent regulators etc, Concession Agreements act as a critical tool for redressing market failures, operational and regulatory eventualities etc. It is therefore necessary that concession agreements are clearly and comprehensively drafted, keeping in view the intent of the project, and based on standard prudential principles which ensure protection of public interest as well as those of various parties involved. Further, the intricate and unstructured nature of PPP transactions - coupled with the need to tailor them to specific attributes of a sector or a project –often results in significant time and resources for contract preparation and finalisation. To this end, standardisation of concession principles and contractual provisions in PPP projects is an efficient practice. With the aforementioned objective and also for establishing a faster rollout of PPP projects in a fair and transparent manner, Model Concession Agreements (MCA) have been formulated for various sectors and the respective models therein.

2.2.1. What is Model Concession Agreement

A model concession agreement is a fully formulated standard document providing exhaustive list of contractual provisions, schedules etc for PPP projects - as applicable to a particular scope, model, sector – however providing necessary flexibility and guidance for inclusion of project specific details, stipulations etc

The MCA establishes a detailed policy and regulatory framework aimed at managing the complexities inherent in PPP projects while balancing the interests of sponsoring agency, project investors and end-users. It addresses critical issues like risk mitigation and allocation in a project, ensuring that risks are assigned to the parties best equipped to manage them, and returns correspond to the risks assumed. Furthermore, it covers vital aspects such as user safeguarding, independent monitoring, dispute resolution, force majeure events and termination protocols, governmental financial support etc.

Through standardized terms and provisions, MCAs offer a clear and precise mechanism for customising projects to specific needs. Only the fundamental requirements related to project design, construction, operation, and maintenance are specified, allowing ample room for the Concessionaire to incorporate technological advancements, technical and commercial value additions, architectural enhancements etc.

2.3. Evolution of Model Concession Agreements in India

2.3.1. MCA for Highways & Model Bidding Documents

Ministry of Surface Transport (MoST now Ministry of Roads Transport and

Highways) was one of the pioneering institutions in initiating PPPs (at Central Government level). A few projects on the Build Operate Transfer (**BOT**, Toll) model were launched by Central and State Governments during 1990s. However, challenges to large scale implementation, as well as delay in individual projects was witnessed due to lack of an institutional framework including standard bidding documents.

A High-Powered Committee was constituted in January 1997, under the chairmanship of Secretary (**MoST**) to evolve standard BOT terms and conditions - which inter alia included formulation of MCA for approval by the cabinet. The first version of the MCA for development of highway projects was developed during the 1998-2000 period. Thereafter, the Committee on Infrastructure (**CoI**) constituted in 2005, recommended formulation of MCAs for (i) BOT (Toll), (ii) BOT (Annuity) and (iii) Operation, Maintenance and Tolling (OMT) projects. Draft of these MCAs were prepared by the erstwhile Planning Commission - in consultation with the sponsoring ministry and various other stakeholders - which were then put to deliberation in an Inter-Ministerial Group (**IMG**) and thereafter approved by the COI during the 2005-2006 period. The MCA for National Highways was formally adopted for all its PPP projects starting December 2008.

Similar structured efforts to draw out model concession principles in other sectors were also initiated. MCA for ports sector was also formulated after detailed stakeholder consultation in 2008.

Further, with a view to laying down model pre-qualification criteria and for short-listing of applicants who should be invited to make financial offers etc, CoI constituted an Inter-Ministerial Group under the chairmanship of Secretary (DoE). With approval of CoI, guideline document for qualification and selection under PPP projects was approved in May 2007. Model Request for Qualification (**RFQ**) and Model Request for Proposal (**RFP**) have thereafter been issued in 2009 with approval of Ministry of Finance. Model Concession Agreement along with Model RFQ, RFP form the complete set of standard bidding documents for tendering out a PPP Project.

2.3.2. MCAs of erstwhile Planning Commission

Based on the experience of formulation and adoption of model concession principles in highways sector, similar initiatives for various other sectors were led by PPP & Infrastructure divisions of erstwhile Planning Commission. The objective was to broad-base the adoption of PPPs in such sectors based on robust, bankable concessioning principles. MCAs for sectors such as ports, silos, railways etc were accordingly developed for adoption in project specific concessions during the 2007-10 period. In addition to this, project specific CAs based on similar prudential

principles were formulated for sectors such as urban rail, power transmission etc. By 2014, similar draft MCAs spanning across a variety of sectors and models were formulated. These included models such as BOT, annuity, OMT, DBFOT, DBFOO etc. In terms of sectors, this included economic infrastructure sectors such as airports, power generation, power transmission etc, social infrastructure sectors such as education, core industries such as coal mining etc. The philosophy, structure and formulation principles under these documents have accordingly been the primary guiding framework for PPP MCA/CAs across a variety sectors.

2.3.3. Periodic Review of MCAs and New Age PPP MCAs

As newer PPP structures and models were adopted for development and operations of highways by the central ministry, MCAs for those too were drafted, deliberated and approved through inter-ministerial consultations. These include MCAs for the Hybrid Annuity Mode, Toll Operate Transfer. MCA for HAM and TOT were first published in 2016 and 2017 respectively and the provisions thereunder have thereafter been amended as necessary from time to time. Both the models have evinced sizeable interest in the market and projects have accordingly been rolled out on a continuous basis.

Further, based on experience of undertaking BOT projects in highways, MCA for the same has been revised from time to time. The latest version for BOT (Toll) was published in 2020. This version introduced provisions for enhanced risk sharing with private party and improved pre-preparation under the project such as change in bid/ concession fee parameter from fixed concession fee to revenue share, higher commitment on access, clearances etc prior to appointed date etc.

Further, considering the change in policy environment due to enactment of Major Port Authorities Act, 2021 and exploring provision for further flexibility to respond to dynamic market and regulatory conditions, Ministry of Ports, Shipping & Waterways (MoPSW) decided to review and revise its MCA through inter-ministerial consultation. Latest version of this MCA has been issued in November 2021.

Similarly, various standard bidding documents have been formulated in power sector for private participation in respective sub-sectors, of which that for inter-state transmission network on TBCB has been adopted extensively. MCA for integrated SWM projects has also recently been notified by MOHUA for adoption by respective project sponsoring authorities.

In sectors that do not have duly approved MCAs, project-specific concession agreements adopt prudential principles based on those of MCA for highways etc. Some of these sectors which extensively adopt PPP include aviation, tourism infrastructure etc.

2.3.4. Procedure for formulation of MCAs

Formulation of a model concession agreement is specifically encouraged in sectors/sub-sectors where private participation is adopted or envisaged as a sustained mode of financing. It is also suggested for use cases where multiple such PPP projects are required to be undertaken, either by same or different project sponsoring agencies, for different size, location, levels etc viz. water and sanitation, healthcare, education etc.

Formulation of MCA for a sector is the responsibility of the respective line ministry. In this regard, DEA and NITI Aayog, may also, assist administrative ministries towards development of the MCAs through sustained discussions and knowledge assistance. The prepared MCA/CA document is strengthened through a robust procedure of Inter-Ministerial Consultation (IMC) procedure, consisting of DEA, NITI Aayog, Department of Legal Affairs among others³. Post-approval by the competent authority as prescribed by the Cabinet⁴, the MCA is then used as a model template for Central projects in the sector, and deviation against the same, if any, by any Central sector project is assessed by the PPPAC, during their appraisal process.

Further, the MCA so prepared needs to be periodically reviewed by the IMC in context of evolving market practices, technological trends, other contemporaneous requirements etc. as well as for overall policy and regulatory approach on sector-specific matters learned after project implementation etc. Such a review is ideally recommended as frequently as required, but otherwise, at least once in every year, or in case of a major shift in sector-specific policies, regulations. The process for review and modifications to the MCA is via inter-ministerial consultation as described above.

³All such ministries and departments as are required to be consulted as per Rule No. 4 of Govt. of India Transaction of Business Rules

⁴Cabinet Secretariat OM dated 28.09.2007 on “Clarification for the term ‘duly approved’ in Clause 6.3 of Guidelines on Formulation, Appraisal and Approval of PPPAC projects”

1.1. Benefits of Standard Concession Principles

Experience of private participation in India – both in infrastructure and non-infrastructure sectors – seems to suggest a positive inclination towards adoption of standard concession principles within and across sectors where potential for replication and reuse of standard concession principles is higher. It is believed that adoption of standard principles for PPP agreements entail various advantages to growth of PPP as a mode in a sector. It can potentially help in:

- (i) Shorter Timeline from conceptualization to award – Availability of standard bidding documents can potentially reduce time, cost and effort in development of transaction specific documents; as also the time in appraisal, approval and award of these projects – in turn reducing the end to end time from conceptualization to award.
- (ii) Higher Private Sector Interest- MCAs – once successfully adopted for an initial portfolio of projects – have established market understanding and track record of performance. It generally would lead to higher acceptance of contract conditions among private sector players and improved participations, efficiency of bid process etc;
- (iii) Bankability & Limited Recourse Financing – An MCA ensures improved predictability of costs, viability etc, fall-backs in case of disputes, termination etc and thus are more amenable to no or limited recourse financing by both domestic and international financing community. Compliance with international best practices ensures higher acceptance by global investor and financing community.
- (iv) Relatively lesser implementation surprises – Clear cut output specifications and service performance -backed by commensurate incentive / compensation mechanism ensure reliability of project outputs. Experience of implementation and performance based on such established incentive and penalty allows lesser pre- and post-construction surprises. Which in turn result in improved success rate, lower disputes etc.
- (v) Overall lower costs to Govt.- All of these combined, ensure lower costs to government in form of project preparation, implementation, overrun, compensation amounts etc.

1.1.1. Sectoral Experience

Roads and bridges – with standard MCAs across variety of models - has sizeable PPP play for both greenfield and brownfield projects. MCA for BOT (Toll) in highways gave a fillip to PPP projects with 29 projects totalling 1686 km being awarded during 2006-08 period. Further, with revision in MCA in 2009 (based on recommendations of B.K. Chaturvedi Committee report), annual number of projects awarded under

PPP route went up to more than ~40 and with longer stretches. The average length of stretch awarded on PPP mode increased from 50 km in 2002-03 to 100 to 130 km during 2009-12⁵.

With the global economic challenges and domestic banking crisis impeding further appetite for pure BOT (Toll) based projects, HAM model was introduced in 2015 followed by formulation of a model concession agreement in 2016. In addition to neutralising the traffic risk, the model concession agreement for HAM resolved issues pertaining to land acquisition, clearances etc - faced in previous BOT projects. Further, to enable long term private participation in brownfield projects Toll Operate Transfer (TOT) framework was conceptualised in 2018, for which the MCA has been formulated in 2019. Both for TOT & HAM, the formulation of standard concession agreements and agreement on same by the investor community, has enabled consistent year-on-year uptake of projects - with a rising trend in values - for the two models.

Similarly, sectors such as logistic parks, power transmission infrastructure, post-harvest storage etc. which dominantly adopt PPP as a mode of implementation, have developed standard bidding documents/ MCAs.

1.2. Global Best Practices

Worldwide, various government agencies have leaned in favour of legislative mechanisms or standardized documentation/terms and conditions for PPP contracts. Where on one hand, countries such as Brazil and Chile resort to legislative mechanisms (by way of Federal PPP law and Concessions law respectively), other countries such as South Africa and Philippines adopt model tender documents and standard contractual frameworks for private sector engagement. There are others such as Australia which have evolved a 'National PPP Practitioners' Guide' where potential for replication and reuse of model concession agreement is high due to similar government agency functionality, role & responsibilities for similar expected outputs or service outcomes⁶.

Standard agreements - both model/sector specific as well as sector agnostic - have been adopted across countries and sectors for private participation in infrastructure - such as design build finance maintain (DBFM) model agreement for infrastructure in Netherlands, build transfer operate contract for road projects in South Korea, standardised PF2 contracts in UK, standardised PPP agreement in New Zealand, Model PPP core toll concessions guide of US etc⁷.

A study of such standard PPP contractual provisions, based on international best practices, has been undertaken by the World Bank. The study highlights key aspects and considerations

⁵<https://www.iima.ac.in/sites/default/files/rnpfiles/5564292122012-07-01.pdf>

⁶<https://ppp.worldbank.org/public-private-partnership/managing-bid-process>

⁷<https://ppp.worldbank.org/public-private-partnership/standardized-ppp-contracts-and-contract-clause>

While these are the dominant frameworks adopted in these countries, others are also being implemented depending upon sector and asset class

for contracting authority on core contractual provisions viz. Force Majeure, change in law, refinancing, termination, hand-back etc. The study also provides drafting guidance on such provisions, taking into account the varying levels of PPP transactional experience and different legal systems⁸. Through the adoption of these guidelines and toolkits, there is accelerated adoption by government stakeholders and greater acceptance and familiarity for private sector participation in infrastructure asset creation.

1.2.1. Key But Not only Ingredient to Successful PPP

It is pertinent to highlight that adoption of standard contractual terms does not automatically guarantee successful award or implementation of PPP project. There have been various instances where despite adoption of standard templates, project could not be successfully bid out or later ran into implementation risk. This is since the conceptual elements of project selection, preparation and structuring viz. (i) relevance of PPP as a model for a project (ii) detailed due diligence and (iii) robustness of model and commercial principles adopted are the foundation on which a robust contract builds itself.

⁸Guidance on PPP Contractual Provisions: https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/2021-03/Guidance%20on%20PPP%20Contractual%20Provisions_2019%20edition.pdf

PART II: GUIDANCE FRAMEWORK

2. Expanding Adoption of Model Concession Principles

Given the variety of PPP transactions possible, coupled with the sector/sub-sector level variations, as also the model or project specific variations, development of a universally applicable comprehensive guidance on PPP Contracts appears impractical. However, there is merit in focusing on standard contractual provisions which are seen to undergo limited variation across various model contracts. Further, delineation of broad principles for model, sector, project specific provisions – based on market experience, international best practices and prudential norms for PPP transactions in India – can help in formulation of robust, bankable project documents.

This Guidebook has, therefore, been prepared to provide guidance formulation for a typical MCA/CA. It includes broad structure of a concession agreement, key elements and inclusions, list of provisions in a typical concession agreement along with their objective, applicability and principles of formulation etc. The objective is to broad-base the benefits of model concession principles to a diversified set of projects and sectors – both where PPPs are currently are being undertaken, as well as to newer areas where:

- (i) MCAs have not been drafted, or where review of existing MCAs needs to be undertaken; or
- (ii) PPP models are in early stages of adoption and there is lack of consensus on suitability/ optimality of respective contractual provisions; or
- (iii) PPP is yet to be adopted.

2.1. Basis of Guidebook

In doing so, the document draws from the experience of following sectors and the models thereunder, where MCAs have been formulated or standard contractual provisions have been adopted across multiple projects, which in turn, has resulted in a higher roll-out of PPP projects followed by successful implementation and operations on ground. This is not to say that there have not been challenges or conflicts at various stages in these projects. But attempts to address the same have been made by respective project sponsoring authorities for continued/ renewed interest of investors. This includes the following MCA/CAs (**Base MCAs/signed CAs**) listed under Table 2.

In addition to these, Draft MCAs prepared by the erstwhile Planning Commission (**'Draft MCAs'**) have also been referred for the purpose of guidance in this document. These Draft MCAs adopt consistent principles, common agreement structure and standard contractual provisions which have been used as the basis for aforementioned Base MCAs/signed CAs as well as for other successfully implemented PPP projects across sectors.

Table 2: Model, project-specific concessions used for preparation of Guidebook

#	Document	Sector	Central Ministry	Year ⁹
A. Model Concession Agreements approved by competent authority				
1.	MCA on Built Operate and Transfer (BOT Toll)	Highways/ Roads	Ministry of Roads Transport & Highways (MoRTH)	2020
3.	MCA on Hybrid Annuity Model (HAM)			2016
4.	MCA for Tolling, Operation, Maintenance & Transfer of National Highways			2017
5.	MCA for Multi Modal Logistics Parks (MMLPs)	Logistic Parks		2022
6.	MCA for PPP Projects in Major Ports	Ports	Ministry of Ports, Shipping & Waterways	2021
9.	PPP in Storage of Food grains	Silos	Department of Food & Public Distribution	2014
8.	SBD for procurement of Inter-State Transmission Services (ISTS) through TBCB	Power Transmission	Ministry of Power	2021
B. Sector or Authority specific concession agreements – including standard core contractual provisions – and with established evidence of award and implementation across projects				
10.	Concession Agreement for Brownfield Airports	Airports	Ministry of Civil Aviation (MoCA)/ State Govt.	NA
11.	Concession Agreement for Greenfield Airports			NA

It may be noted that MCA for integrated solid water management (SWM) projects has recently been approved and notified by MOHUA for adoption by respective PSAs. The Standard Provisions for SWM projects are same as above other MCAs/Draft MCAs. However, pending roll-out of projects based on same, it has not been listed above under Base MCAs/signed CAs. Learnings from inter-ministerial consultations, stakeholder discussions etc have also been included as part of this document (where relevant).

While the focus of this Guidebook is mostly limited to infrastructure sector, it is highlighted that standard provisions under these Draft/Base MCAs have also been successfully used to concession out PPP projects in non-infrastructure sectors such as the recent e-buses contract under FAME

⁹This refers to the latest year of comprehensive formulation or review – post which section wise amendments have been issued from time to time by Ministry;

scheme etc. The guidance under this Guidebook can hence be considered for adoption in both infrastructure and non-infrastructure sectors, however with suitable review of need, applicability, sector specific constraints etc.

It is emphasised that this Guidebook is not exhaustive. The objective is only to set out formulation or drafting guidance for a typical set of provisions on the basis of successfully procured PPP transactions, and to describe the rationale for these provisions. This, by no means, precludes the need for review of suitability or applicability of provisions, as also the need for modifications on a case-to-case basis including the norms or thresholds thereunder. Further, each concession agreement is unique and the PPP Contract in its entirety (along with its related agreements) will need to be independently and holistically reviewed - with the assistance of qualified legal, financial and technical specialists- for suitability of same depending on the objective, structure etc of a PPP project.

2.2. Learnings from comparative assessment of Base MCAs/CAs

2.2.1. Key principles for MCA/CAs

Comparative assessment of Base MCAs/Signed CAs shows similar prudential practices and principal intents across various sectors. This includes the following, among others:

- *Clear and precise formulation of envisaged project scope and rights, obligations of parties involved;*
- *Clearly spelling out intended risk sharing structure, however, with provisions for addressing foreseeable contingencies without resorting to disputes/termination;*
- *Clear & precise formulation of agreed financial terms – with provisions covering possible, probable scenarios for traffic risk, price risk, inflation, cyclicity etc - as also those spelling out the rights of either party with respect to potential upside;*
- *Well-defined mechanism for monitoring and penalties, incentives based on same; without being intrusive;*
- *Transparent mechanism for addressing – unintended contingencies viz. change in scope change in law etc – and suitably compensating aggrieved party for same;*
- *Transfer/ hand-back at end of concession or termination; mandatory in cases where the projects entail public land/property, residual economic value; and*
- *Parity in damages, liabilities, risks etc for both Authority and Concessionaire.*

2.2.2. Categories of Provisions

Based on the Base MCA/CAs, typical provisions of an MCA/CA can be categorised following categories. This is based on (i) commonality of formulation across Base MCAs/CAs (as also the Draft MCAs) (ii) principles for determining the thresholds/values under an otherwise standard provision and (iii) specificity of an article or a clause to the project/sector under consideration.

Table 3: Category of Provisions under PPP Concession Agreement

Category	Description	Instances
Standard Provisions	Provisions with standard terms & conditions and drafting formulation, agnostic to the nature of project, sector or model being adopted	<i>Force Majeure, Performance Security, Representations & Warranties etc.</i>
Model Specific Provisions¹⁰	<ol style="list-style-type: none"> 1. Provisions where drafting formulation is standard, but thresholds or values vary based on the kind of PPP model and/or the bid parameter adopted 2. Specific provisions which are included only under a particular type of PPP model, however with standard formulation. 	<ol style="list-style-type: none"> 1. <i>Entry intro Commercial Service,</i> 2. <i>Termination, Payment etc</i> 3. <i>Maintenance obligations prior to COD etc (in brownfield projects)</i>
Sector Specific Provisions¹¹	Provisions that vary or are included/ excluded based on statutory requirements, operational or market practices in a particular sector/ sub-sector	<i>Key Performance Indicators, Specific provisions as Reserved Services in case of Airports etc</i>
Provisions based on combination of Model, Sector	Provisions for which formulation is combinedly derived based on model & sector	<i>Conditions Precedent, Competing facility etc</i>
Project Specific Provisions	Provisions based on scope and structure of project, tender conditions, bid received etc.	<i>Project Scope, Concession Period, Concession Fee, etc.</i>

These categories have broadly been covered under their respective chapters. For discussing principles of concession under this Guidebook, aforementioned classification of typical provisions of an MCA/CA has been used.

It may, however, be noted that the aforementioned classification is primarily, and to the extent feasible, to identify common principles across various provisions of an MCA/CA. This is used as basis to arrive at model concession provisions or guiding principles for formulating such provisions. This categorisation cannot be considered as a basis or general standard for PPP projects. Also, such categorisation is not precise or exhaustive. While some of the provisions may not fall into any of the above categories, certain others

¹⁰Model here is meant to refer to the mode used for PPP project implementation viz. BOT, Annuity/HAM, DBFOT, OMDA, OMT, TOT etc. As a matter of fact, these can also be classified simply into greenfield and brownfield models i.e. ones that mandate construction of a new asset and those that pertaining to O&M and augmentation of an existing asset. For purpose of this Guidebook, BOT, Annuity, HAM, DBFOT etc are greenfield models whereas OMDA, OMT, TOT etc are brownfield models.

¹¹Sector here is meant to refer to type of infrastructure being dealt with such as roads, highways, power generation, power transmission, ports etc.

which have been classified under a particular category may in fact deviate from such assumptions.

2.2.3. Principles from Base MCAs/CAs

In terms of concession structure, typical list of articles and formulation of standard provisions are broadly similar across MCAs of BOT(Toll), HAM, TOT, MMLP & Silos and CAs of recent greenfield and brownfield airports¹². They adopt similar categorisation of provisions, formulation methodology and drafting of standard formulation – which is largely that followed for Draft MCAs of Planning Commission as well. While a slightly different structure and drafting approach has been followed for MCA of Major Ports the list of key provisions, broad terms remain similar to MCAs of MoRTH or Draft MCAs.

As for SBD for ISTS projects *via* TBCB, these are principally and prudentially similar. However, they follow a slightly different operational mechanism, at least for the purpose of provisions applicable during the initial stages of concession. Unlike other PPP projects, here a special purpose vehicle (SPV) is already incorporated by the concessioning agencies. Necessary preconditions viz. legal rights are already available with this SPV at the time of tendering. The selected private party, for the purpose of entering into the agreement, purchases the shares of such SPV. Therefore, terms such as obligations of Authority & Concessionaire, conditions precedent etc may be slightly different under the SBD for the ISTS (TBCB). However, the experience from these projects provides valuable insights into PPP in power transmission sector, as also the SPV based tendering system. Relevant provisions from the SBDs have been delineated where found applicable.

The discussion in this Guidebook on (i) MCA/CA structure and (ii) formulation methodology is largely from MCAs of MoRTH and that of Draft MCAs of Planning Commission. *Variations from other MCAs/ CAs, wherever specifically applicable, have been highlighted as part of respective sections.*

As for Project specific provisions, objective and scope of these provisions, along with principles for inclusion/exclusions and that for determining values of such parameters have been provided. Further, with respect to sector specific provisions, broad guidance on deciding such provisions, along with key parameters, special clauses etc has been provided. With respect to model specific provisions, thresholds for various Base MCAs/Signed CAs have been indicated along with principles for determination of same for an MCA/CA.

3. Structure & Provisions of a Concession Agreement

3.1. Standard structure of a Concession Agreement

A concession agreement is formulated, applied and interpreted in its entirety – complete with all its recitals, definitions, articles (clauses, sub-clauses, provisos etc), schedules etc. Key parts of a concession agreement are discussed here:

3.1.1. Recitals & Definitions

The agreement starts with details and description of contracting parties i.e. the project sponsoring authority ('PSA' or 'Authority') and the private party ('Concessionaire'). It then goes on to describe the context of entering into this agreement, starting with the mandate of the Authority to undertake the particular project, and the procedural methodology adopted to engage the Concessionaire viz. the tendering and selection process etc. This portion of the agreement is called Recitals. This has further been discussed as part of Chapter 5.

This is followed by definitions i.e. commonly used terms across the concession agreement with a standard meaning/interpretation. List of common terms used across various PPP projects as well as in this Guidebook along with the standard definitions for same is as provided in Chapter 5.

3.1.2. Articles¹³

Thereafter the respective articles of the agreement are listed – generally in order of need, applicability etc further categorised into (i) Concession i.e. overall scope of the concession, obligations of parties and pre-requisites for initial/continued enforceability of the agreement (ii) Development & Operations i.e. detailed scope of work and performance obligations of parties during respective phases of project viz. provision of land, clearances, construction, operations etc. It also includes the mechanism for performing and monitoring of same. (iii) Financial Covenants i.e. all financial rights and obligations viz. funding of project, levy of user charges etc. It also includes the mechanism for payment/ receipt and monitoring of inflows/ outflows of the project. (iv) Force Majeure & Termination i.e. the definition of rare events and mechanism for addressing such eventualities, potential suspension and eventual divestment of rights (v) Other Provisions i.e. standard provisions viz. change in law, dispute resolution etc.

¹³For the purpose of this Guidebook, the term 'Article' has been used to identify a chapter or a provision in the concession agreement. This is then divided into subheadings and numbered provisions. These have been together referred to as Clauses.

3.1.3. Schedules

Recitals, Definitions and Articles form the main body of the concession agreement which is then followed by Schedules which generally include exhaustive details of (i) location viz. site, map etc (ii) project master plan, facilities, standards & specifications etc (iii) non-core facilities and its specifications (iv) project construction timelines (v) construction and operational performance indicators (vi) fee notifications, format for payments, sampling, monitoring etc (vii) terms of reference for third party agents (viii) format of supplementary agreement viz. escrow agreement, state support agreement etc.

List of Schedules, as generally applicable to a typical PPP Project, with description and reference for same is as provided in Appendix I.

3.2. List of Articles in a Typical PPP Concession

List of articles under a typical MCA/CA for PPP projects, their description, along with the clauses thereunder and broad categorisation of same (in terms of Standard, Model Specific, Sector Specific, Project Specific etc.) is as provided below. These articles have been discussed in detail in later chapters with guidance on formulations.

It may be noted that the above listing is a typical set of articles found in PPP concession agreements. While most of these provisions are found to be present across sectors and models, a few say construction, monitoring of construction or completion of certificate may only be found under models that mandate construction/ augmentation such as DBFOT, BOT, OMDA, HAM etc.

Table 4: Common articles under PPP projects

Article/ Sub-Article Head	Category	Refer
Recitals		
<i>This provides the context of the agreement</i>		Section 4.1
Definitions		
<i>This lists out the standard defined terms used in the MCA/CA along with definition for same.</i>		Section 4.2
Part I – Concession		
Article: Scope of the Project		
<i>The Article defines the scope of activities and primary deliverables under the concession.</i>		
Scope of the Project	Project Specific	Section 9.2
Article: Grant of Concession		
<i>This Article lists the overall rights and obligations along with tenure and conditions for such rights, augmentation obligations, non-core/estate development etc</i>		
(i) The Concession	Project Specific	Section 9.4.
(ii) Augmentation	Project Specific	Section 9.5
(iii) Non-Core Development	Project Specific	Section 9.3
Article: Conditions Precedent		
<i>The article lists out the conditions to be fulfilled for rights and obligations of the parties to be effective</i>		
(i) Conditions Precedent	Model & Sector Specific Conditions	Section 5.2 and 8.2
(ii) Damages for delay by Authority & Concessionaire, Deemed Termination on Delay	Standard Provisions with varying thresholds	Section 5.2
Article: Obligations of Concessionaire		
<i>This Article lists out the obligations of the Concessionaire which is a mix of standard, sector-specific and project-specific conditions</i>		
(i) Obligations of Concessionaire	Project Specific Obligations	Section 5.3
(ii) Obligations related to Change in Ownership; Obligations related to Project Agreements; Sole purpose of Concessionaire; Obligations related to engagement of foreign nationals and trained personnel,	Standard Provisions	Section 5.3

Article/ Sub-Article Head	Category	Refer
(iii) Obligation relating to procurement of equipment and/ or goods, services, Branding etc	Standard Provisions	Section 9.6.3
(iv) Other Obligations	Sector Specific Obligations	Section 9.6.2 & 9.7.4
Article: Obligations of Authority		
<i>This Article lists out the obligations of the Authority which is a mix of standard, sector-specific, model-specific and project-specific conditions</i>		
(i) Obligations of Authority	Project Specific Obligations	Section 9.7
(i) Obligations related to Competing Facility, Obligations related to Refinancing	Standard Provisions	Section 8.3
(ii) Other Obligations	Sector & Models Specific Obligations	Section 9.6.3, 9.7.4
Article: Representations & Warranties		
<i>These include representations and warranties (R&W) of Concessionaire, that of Authority and disclosures for the purpose of entering into the CA.</i>		
(i) Representations of Concessionaire, Representations of Authority, Disclosure	Standard Provisions	Section 5.5
Article: Disclaimer		
<i>This includes standard provisions for covering mistakes, errors, risk of inadequacy etc on part of eitherparty</i>		
Disclaimer	Standard Provisions	Section 5.5.2
Part II - Development & Operations		
Article: Performance Security		
<i>This provides the terms and conditions for securing the performance of contract by way of an unconditional irrevocable guarantee</i>		
(i) Performance Security, Appropriation, Release, Deemed Performance, References to Performance Security	Standard Provisions <i>With model/ sector specific variations on thresholds</i>	Section 5.6 Section 6.4

Article/ Sub-Article Head	Category	Refer
Article: Right of Way		
<i>This Article lists the stipulations with respect to provision of site by Authority, rights over such site, right of way and respective parties' obligations with respect to same</i>		
(i) Site, Licence, Access & Right of Way, Procurement of Site, Site to be free from Encumbrances, Protection of Licensed Premises from Encumbrances, Access to the Authority and Independent Engineer, Geological and archaeological finds	Standard Provisions <i>With model specific variations on threshold for site access provided upfront</i>	Section 5.7
(ii) Land for Non-Core Development, Additional Land for Augmentation	Model, Project Specific Provisions	Section 9.3
Article: Utilities, Associated Roads & Trees		
<i>This article pertains to obligations for existing utilities, new utilities, felling of trees, procedural methodology and sharing of costs for same</i>		
(i) Existing utilities and roads, Shifting of obstructing utilities, New utilities and roads, Felling of trees	Standard Provisions	Section 5.8
Construction of Project		
<i>This Article pertains to rights and obligations of Concessionaire for undertaking preparatory activities for construction of projects, including master plan, architectural drawings etc, actual construction obligations, timelines for completion and rights pursuant to such activities</i>		
(i) Obligations prior to start of construction, Drawings, Construction of Infrastructure, Construction of Project Facilities, Milestones & Timelines & other Project-Specific Obligations Milestones & Timelines & other Project-Specific Obligations	Project Specific Obligations <i>The article, however, is excluded from pure operations and maintenance projects viz, TOT etc</i>	Section 9.8

Article/ Sub-Article Head	Category	Refer
Article: Monitoring of Construction		
<i>This article stipulates the procedural methodology for periodic status updates, monitoring by independent engineer and remedial actions required on account of same</i>		
(i) Monthly progress reports, Inspection, Delays during construction, Suspension of unsafe Construction Works, Video recording	Standard Provisions	Section 5.9
Article: Completion Certificate		
<i>This Article provides the process for certifying readiness of use of infrastructure including the tests to be undertaken by independent engineer, issue of completion certificate</i>		
(ii) Tests, Completion Certificate, Provisional Certificate Completion of Punch List items, Withholding of Provisional or Completion Certificate,	Standard Provisions <i>The article, however, is excluded from pure operations and maintenance projects viz, TOT etc</i>	Section 5.10
Article: Entry in Commercial Service		
<i>This article provides the conditions for declaration of COD and damages payable in case of non-achievement of same as per stipulated timelines</i>		
(i) Commercial Operations Date, Damages for Delay	Model Specific	Section 6.2
Article: Change of Scope		
<i>This article includes the definition, procedure and payment for change in scope for change in scope along with power of Government to undertake works etc</i>		
(ii) Change of Scope, Procedure for Change of Scope, Restrictions on certain works, Power of the Authority to undertake works, Reduction in Scope of the Project Authority to undertake works, Reduction in Scope of the Project	Standard Provisions	Section 5.11
(iii) Payment for Change of Scope	Model & Sector Specific	Section 5.11.1

Article/ Sub-Article Head	Category	Refer
Article: Operations & Maintenance		
<i>This article pertains to operations & maintenance obligations of the Project</i>		
(i) O&M obligations of the Concessionaire, Maintenance Requirements	Project Specific	<i>Section 5.12</i>
(ii) De-commissioning due to emergency, section closure, Damages for maintenance obligations breach, Authority's right to take remedial measures, Overriding powers of the Authority, Excuse from performance of obligations	Standard Obligations	<i>Section 5.12</i>
(iii) Other O&M Provisions	Model & Sector Specific	<i>Section 5.12</i>
Specific Article for O&M¹⁴	Model & Sector Specific	<i>Section 5.12</i>
Article: Monitoring of O&M		
<i>The Article deals with monitoring obligations of Independent Engineer, Concessionaire obligations on status reports, reports of unusual occurrence, remedial measures etc</i>		
(i) Status reports, Inspection, Tests, Remedial measures, Periodic Statements, Reports of unusual occurrence	Standard Provisions	<i>Section 5.135</i>
Article: Independent Engineer		
<i>This Article delas with process for engagement of Independent engineer, payments, termination, interim arrangement etc</i>		
(ii) Appointment of Independent Engineer, Duties and functions, Remuneration, Termination of appointment, Authorised signatories, Dispute resolution, Interim arrangement	Standard Provisions	<i>Section 5.14</i>

¹⁴These generally are standalone Articles under the concession, however for the purpose of this Guidebook have been included under the Article for O&M

Article/ Sub-Article Head	Category	Refer
Article: Key Performance Indicator		
<i>This Article identifies the key performance indicators relating to O&M of the project facility, damages for shortfall, reports etc</i>		
(i) Key Performance Indicators and all sector-specific provisions	Sector Specific	Section 5.15
(ii) Status Reports, ISO certification, Damages for shortfall from Performance	Standard Provisions	Section 5.15
Article: Non-Core Development¹⁵		
<i>It details rights & obligations pertaining to such assets and/or services (i) which are in addition to the primary infrastructure and (ii) implementation or performance of which does not directly impact the obligations of the primary infrastructure ('Non-Core') development (where included)</i>		
Non-Core Development	Project Specific	Section 9.3
Part III – Financial Covenants		
Article: Financing Close		
<i>The Article includes obligations for tying up of necessary financial resources for upfront construction and implementation of the project.</i>		
(i) Financial Close & Termination due to failure to achieve Financial Close	Standard Provisions	Section 5.16
Article: Grant & Premium¹⁶		
<i>The Article includes the terms for payment of capital/ O&M grant to the Project (if applicable) and any entailing terms for premium on account of same.</i>		
Grant, Equity Support, O&M Support	Project Specific	Section 9.10.2
Article: Concession Fee/ Project Payments		
<i>The Article includes all relevant terms for payments by or to the Concessionaire</i>		
(i) Concession Fee, Additional Concession Fee, Determination, Payment, Verification OR	Project Specific	Section 9.11.3
(ii) Annuity Payments		

¹⁵If included

¹⁶If included

Article/ Sub-Article Head	Category	Refer
Article: User Fee		
<i>This article details the methodology for determination or stipulation of fee/ tariff along with the additional levies, penalties or exemptions, if any.</i>		
Collection & Appropriation User Fee, Revision, Display, Additional levy for non-payment etc	Project Specific	Section 9.10.1
Escrow Account	Standard Provisions	Section 5.17
Insurance	Standard Provisions	Section 5.18
Accounts & Audit	Standard Provisions	Section 5.19
Part IV – Force Majeure & Termination		
Article: Force Majeure		
<i>This Article elaborates on obligations of both parties in the face of unforeseen events that arise through no fault of either party, but have the capability to inhibit any or both parties from fulfilling their duties and obligations under the agreement. It includes, the definitions of force majeure and various events, effect, termination notice and payment on account of same.</i>		
(i) Definition of Force Majeure, Political Event, Non-Political Event, Indirect Political Event	Standard Provisions	Section 5.20.1
(ii) Duty to Report Force Majeure; Termination Notice for Force Majeure; Dispute Resolution; & Excuse from Performance of Obligations		
(iii) Effect of Force Majeure; Allocation of Costs; Termination Payment for Force Majeure	Model & Sector Specific Provisions	Section 5.20.2.2
Article: Compensation for Breach of Agreement		
<i>This Article relates to consequences of breach of agreement by either party or otherwise</i>		
(i) Compensation for default by Concessionaire; Compensation to be in addition	Standard Provisions	Section 5.21
(ii) Compensation for default by Authority; Extension of Concession Period; and Compensation for Competing Facility.	Model & Sector Specific Provisions	Section 5.21

Article/ Sub-Article Head	Category	Refer
Article: Suspension of Concessionaire Rights		
<i>This Article addresses potential situations for suspension of concessionaire rights and alternative course of service provision in such situations.</i>		
(i) Suspension for Concessionaire Default; Authority to act on behalf of Concessionaire; Revocation of Suspension; Substitution of Concessionaire; Termination	Standard Provisions	Section 5.22
Article: Termination		
<i>This Article elaborates on the events leading to termination viz. occurrence of a default by either party, force majeure etc and the consequences of termination for such scenarios.</i>		
(i) Termination for Concessionaire Default & Authority Default; Other rights and obligations of the Authority 202; Survival of rights	Standard Provisions	Section 5.23
(ii) Termination Payment; Certain limitations on Termination Payment; Extension of Concession Period	Model & Sector Specific Provisions	Section 5.23
Article: Divestment of Rights & Interest		
<i>This Article pertains to divestment of rights and interest post the completion of concession period or in case of terminations.</i>		
(i) Divestment Requirements; Inspection and cure; Cooperation and assistance on transfer of Project; Vesting Certificate; Divestment costs	Standard Provisions	Section 5.24
Article: Defect Liability & Termination		
<i>This Article pertains to liabilities of respective parties in the events of suspension and termination and treatment of money in escrow account thereunder</i>		
(i) Liability for defects after Termination; Retention in Escrow Account	Standard Provisions	Section 5.25

Article/ Sub-Article Head	Category	Refer
Part V – Other Provisions		
Article: Change in Law		
<i>This clause provides for investment/ return protection to in case of change in statutory conditions at any time during the subsistence of the concession</i>		
(ii) Increase & Reduction in Costs; Protection of NPV; Restriction in Compensation; No claim in event of recovery from Users	Model & Sector Specific Provisions	Section 5.27
Article: Dispute Resolution		
<i>This Article elaborates on issues arising out of a conflict between the Concessionaire and Concessions Authority and mechanism to address the same.</i>		
(i) Dispute Resolution Board; Conciliation; Arbitration	Sector Specific Provision	Section 5.28
Other Articles		
<i>These are standard Articles pertaining to permitted and restricted assignment rights, substitution agreement, rights & title over site, disclosure, redressal of grievances etc</i>		
Assignment & Charges	Assignment & Charges	Section 5.26
Disclosure	Standard Provisions	Section 5.29
Redressal of Public Grievance	Standard Provisions	Section 530
Miscellaneous	Mix of Standard & Project Specific Provisions	Section 5.31

In addition to above, there are other articles which are included depending on the sector under consideration such as traffic census and sampling in case of transportation projects, reserved services in case of airports etc. Similarly, there are others which are included depending on the model under consideration such as Maintenance Obligations prior to Appointed Date in case of brownfield projects and Non-Core development which is included in all PPP concessions that involve Non-Core development.

Following Chapters discuss these articles in detail including the need, applicability, variation across MCA/CAs and principles for formulation.

4. Recitals & Definitions

4.1. Recitals

Recitals provide the background of the concession agreement indicating the following:

4.1.1. Parties

The parties to the concession are listed at the start of the concession along with the establishment/ incorporation information, representative details, principal/ registered office etc. Concessions are generally bilateral between the Authority and the Concessionaire¹⁷.

The Authority is the administrative ministry/ department, or the statutory authority/ public sector agency thereunder, executing the concession agreement. Usually, it is the agency that has the primary obligation to undertake such projects or has been mandated or empowered by the government to enter such concession arrangements. Where applicable, recitals will indicate the statutes etc through which the Authority derives the power to execute the project or enter such PPP arrangements. The Authority, itself, or through an agency appointed by it, also undertakes the tendering process for the project.

The Concessionaire is the private entity responsible for the end-to-end execution of the project. Selection of private partner in PPP projects is via a transparent and competitive bidding process, key details of which are generally usually included as part of recitals¹⁸.

4.1.2. Special Purpose Vehicle

PPP Projects are ideally undertaken through entities set-up for dedicated and exclusive end-use in envisaged project i.e. special purpose vehicle. This is to ensure ring-fencing of assets created and rights provided under the concession, including the grant and other funds provided for same, cash flows generated, non-recourse financing etc. Usually, such SPVs are for-profit companies incorporated under Companies Act 1956/ 2013- except where the statutory/regulatory provisions mandate an alternative constitution, *for instance not for profit entities/trusts in education sector etc* – and are the owner and obligor under the concession.

¹⁷Concession agreements are generally bilateral. Tripartite or multi-party concession agreements are undertaken where such parties are obligated to recognize the rights and obligations of the parties under the concession and act in co-ordination with each other for implementation of project.

¹⁸Model documents for two stage bidding of PPP projects is available at: https://www.pppinindia.gov.in/report/Model%20Request%20for%20Qualification%20for%20PPP%20Projects.pdf_1685173644.pdf

https://www.pppinindia.gov.in/report/Model%20Request%20for%20Proposal%20for%20PPP%20Projects.pdf_1685173842.pdf

Further, creation of a separate SPV may not be mandated in cases where projects are of small size with limited rights under the concession or where creation of new entities may provide no significant benefits. Also, there may be cases where multiple small projects with similar objective and concession structure, with the same Authority are allowed to be undertaken under a single specially created entity. In such cases SPVs once created will continue to be used for future concessions (subject to a maximum cap on total asset value) without requirement for creation of new SPVs.

4.2. Definitions

Words or expressions, which are used repeatedly across the concession agreement to refer to a standard meaning or interpretation, are listed under the head of Definitions. These words/ expressions, wherever used with capital case initials, are meant to indicate such standard definition and are to be read and interpreted accordingly.

A definition is a clearly identifiable set of features or parameters which can be used to describe a term, precisely and unambiguously, for the purpose of an MCA/CA. These definitions capture key structural and commercial elements of the concession and therefore need to be formulated robustly to achieve intended project outcomes.

Several defined terms are common across MCAs/CAs.

4.2.1. Common Definitions:

I. Some of these use a standard definition which remains unchanged across all types of agreements ('Common Definitions') viz. 'Change in Ownership', 'Change in Law', 'Force Majeure etc. For others such as 'Total Project Cost', 'Commercial Operations Date' etc.

Some of the commonly used PPP terms, along with definitions as present in prevalent MCAs and signed Concession Agreements, have been provided below. For all others, Draft MCAs of Planning Commission or MCA for BOT (Toll), HAM and TOT of MoRTH may be referred.

Appointed Date

means the date on which [Financial Close is achieved and]¹⁹ every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Concession Period;

Change in Ownership

means a transfer of the direct and/or indirect legal or beneficial ownership of any shares, or securities convertible into shares, that causes the aggregate holding of the {selected bidder/

¹⁹Words in square bracket are included/excluded depending on whether financial closure is a pre-condition for project or not

Consortium Members}, together with {its/their}²⁰ Associates, in the total Equity to decline below (i) [51%]* thereof during Construction Period and until the [2nd]** anniversary of COD; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process for the purposes of meeting the minimum conditions of eligibility or for evaluation of its application or Bid, as the case may be,) in the proportion of the equity holding of {the selected bidder/ any Consortium Member} to the total Equity, if it occurs prior to [2]** years after COD, shall constitute Change in Ownership

Guidance

**, ** Principles for deciding on values and timelines included within square brackets are as provided in Section 9.1 of this document.*

Concession Period

means the period starting on and from the Appointed Date and ending on the Transfer Date

Infrastructure

Guidance

This is the primary infrastructure/ non-infrastructure facility, construction and/or operations & maintenance of which is envisaged under the Project. It therefore, mandatorily needs to be defined in all MCAs/CAs. The definition must be clear and precise with necessary locational details, non-core inclusions etc. where applicable. However, since this will vary from project to project a standard definition for same has not been provided here.

Sample definitions used in case of highways & airports are being provided for reference.

Project Highway: means the Site comprising the existing road comprising NH-** from km ** to km ** and all Project Assets, and its subsequent development and augmentation in accordance with this Agreement, and shall include Wayside Amenities;

Airport: means the Airport, located at the place specified in the Recitals, and includes civil, mechanical and electrical works, the Terminal Building, the Runway and all Project Assets necessary for and associated with operation of the Airport, and shall also include City Side Development;

O&M Expenses

means expenses incurred by or on behalf of the Concessionaire or by the Authority, as the case may be, for all O&M including (a) cost of salaries and other compensation to employees, (b) cost of materials, supplies, utilities and other services, (c) premia for insurance, (d) all taxes, duties, cess and fees due and payable for O&M, (e) all repair, replacement, reconstruction, reinstatement,

²⁰Words in curly brackets are included in model concession agreements. These are for the purpose of inclusion or exclusion, later in project specific concession agreements, depending on presence or absence respectively of consortium members

improvement and maintenance costs, (f) payments required to be made under the O&M Contract or any other contract in connection with or incidental to O&M, and (g) all other expenditure required to be incurred under Applicable Laws, Applicable Permits or this Agreement;

Project

means the construction, operation and maintenance of the [Infrastructure] in accordance with the provisions of this Agreement, and includes all works, services and equipment relating to or in respect of the Scope of the Project;

Project Assets

means all physical and other assets relating to and forming part of the Site including (a) rights over the Site in the form of licence, Right of Way or otherwise; (b) tangible assets such as civil works and equipment; (c) Project Facilities situated on the Site; (d) buildings and immovable fixtures or structures forming part of the [Infrastructure] (e) all rights of the Concessionaire under the Project Agreements; (f) financial assets, such as receivables, security deposits etc.; (g) insurance proceeds; and (h) Applicable Permits and authorisations relating to or in respect of the Project, [but does not include ***]²¹

Guidance Only

The definition should specifically clarify inclusions or exclusions if any. For instance in case of airports, the definition should clearly specify 'Aeronautical and Non-Aeronautical Assets'. Similarly in case of highway project the definition should specifically exclude Additional Facilities.

Termination

means the expiry or termination of this Agreement and the Concession hereunder

User

means a person who uses or intends to use the [Infrastructure] or any part thereof [on payment of Fee or] in accordance with the provisions of this Agreement and Applicable Laws

4.2.2. Model or Sector Specific Definitions

- I. Certain other words/ expressions entail a standard definition. However, their inclusion within an MCA/CA depends on the scope of the project or model being used. For instance, construction period and EPC Contractor when construction is involved or Additional Facilities when such facilities are envisaged under the concession. List of such typically used definitions, along with conditions of usage is as provided in Appendix II

²¹Words in square bracket are included in model concession agreements (or project specific concession agreements) if certain non-core assets are to be excluded for the purpose of Project Asset definition.

²²Words in square bracket are included or excluded in model concession agreements (or project specific concession agreements) depending on whether levy of fee is envisaged as part of agreement or not

- II. Similarly, there are terms with standard definition may only be applicable to a particular sector, model or project and are used accordingly. Such as 'Annuity' or 'Aeronautical Assets' and 'Aeronautical Charges' in Airports MCA or 'Initial Estimated Concession Value' and 'Unexpired Cash Flows' in TOT MCA etc.

4.2.3. Project Specific Definition

Certain other definitions are used across all MCAs; definitions of these, however, change based on project or model or other aspects of the concession. One of such definitions is the Total Project Cost - definition of which across various models has been provided as a case in point below:

Total Project Cost: This term is used to define the total expenditure towards creation or augmentation of asset and/or in case pure O&M projects, the indicative value of asset involved which is used as a benchmark for various operational and commercial provisions under the project:

In case of most DBFOT based PPP projects it is defined as follows:

“**Total Project Cost**” means the capital cost incurred on construction and financing of the Project, [excluding Non-Core Development]²³, and shall be limited to the lowest of:

- (a) the capital cost of the Project, {less Equity Support} as set forth in the Financial Package; and
- (b) a sum of Rs. ***** crore (Rupees ***** crore), less Equity Support²⁴;

provided that in the event Price Index increases, on an average, by more than 3% (three per cent) per annum for the period between the Bid Date and COD, the amount hereinbefore specified shall be increased such that the effect of increase in Price Index, in excess of such 3% (three per cent), is reflected in the Total Project Cost;

provided further that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in Price Index or Reference Exchange Rate occurring in respect of Adjusted Equity and Debt Due, as the case may be, in accordance with the provisions of this Agreement;

[provided also that the additional capital cost for augmentation as may be approved by the Senior Lenders and set forth in the Financing Agreements, and to the extent expended, shall form part of the Total Project Cost in addition to the capital cost set forth above for the Project;]

provided also that the Total Project Cost shall not exceed the actual capital cost of the Project, {less Equity Support};

²³Where Applicable

²⁴This amount includes project-specific cost estimates, including financing charges;

In case of HAM (Hybrid-Annuity-Mode)based projects it is defined as follows:

“Total Project Cost” means 60 % (sixty percent) of the Bid Project Cost specified in Clause *; provided that in the event WPI increases, on an average, by more than 3% (three per cent) per annum for the period between the Bid Date and COD, the amount hereinbefore specified shall be increased such that the effect of increase in WPI, in excess of such 3% (three per cent), is reflected in the Total Project Cost;

provided further that in the event of Termination, the Total Project Cost shall be deemed to be modified to the extent of variation in WPI or Reference Exchange Rate occurring in respect of Debt Due, as the case may be, in accordance with the provisions of this Agreement;

Provided also that the Total Project Cost shall not exceed 60% of the actual capital expenditure on the Project and capitalized in the books of accounts of the Concessionaire as certified by the Statutory Auditor.

In case of TOT (Toll-Operate-Transfer)based projects it is defined as follows:

“Total Project Cost” is not defined.

In case of Brownfield Airports on leasing model it is defined as follows:

Cost of works is the total of:

- (i) Capital costs projected to be incurred in relation to construction, implementation and commissioning of phase I of project
- (ii) Estimated Deemed Initial RAB
- (iii) Estimated Initial Non-Aeronautical Investments
- (iv) Amounts reimbursed by Concessionaire to authority pursuant to [.]

Guidance: Initial time period for fulfilment of CPs varies from 90-270 days depending on the effort required for obtention of such CPs as to (i) whether these pertain to brownfield assets where there are pre-existing clearances and (iii) the extent of multi-agency coordination or dependence on non-related entities for same. Ideally, critical pre-development activities should be completed prior to contract execution. Further time for fulfilment of balance activities should not be more than 90-180 days. Also, provision for extension of such timelines should be built in to cater to unforeseen circumstances. Including which the maximum time for fulfilment of CPs should be within a maximum period of 270-360 days.

5. Standard Provisions of MCA

5.1. What are Standard Provisions

Standard Provisions in PPP MCA/CAs are those that have standard terms & conditions and drafting formulation, agnostic of the nature of the project, sector or model being adopted. These provisions generally pertain to (i) procedural methodology for award, implementation or operations of PPP projects viz. performance security, escrow account, monitoring etc or (ii) prudential mechanism for catering to planned or potential project eventualities or rare events viz. force majeure, divestment, suspension etc.

These usually entail a similar set of terms and drafting formats across various Base MCAs/CAs. These formulations have emerged as standard after several rounds of project implementation across various sectors, in turn ensuring a wider acceptability amongst stakeholders.

Detailed list of such provisions along with (i) their objective (ii) range of thresholds (where applicable) and principles for arriving at such levels and (iii) any case-specific variations witnessed (i.e. exclusion or change in intent) have been provided below.

MCA for BOT (Toll), HAM and TOT of MoRTH or MCA for Shipping may be referred to for complete articulation of these Standard Provisions.

Standard Provisions under Part I: The Concession

5.2. Article: Conditions Precedent

The article lists out the conditions to be fulfilled by the Authority and Concessionaire, respectively, so as for rights and obligations of the parties to be effective. This ensures availability of necessary land, clearance, etc and fulfilment of conditions which are critical to project commencement or timely completion. It also indicates the timelines for fulfilment of same and mechanism for extension or waiver by either party. It also lists out the damages payable by respective parties for delay in achievement of such conditions precedent and scenarios of termination if any.

The primary list of conditions precedent for respective parties is usually model or sector specific. The same has been discussed in detail under Section 9.2. The clauses for damages and deemed termination, however, entail a standard formulation - with range bound thresholds for damages - and have accordingly been discussed here.

5.2.1. Damages for Delay by Authority & Concessionaire

These clauses are included as part of the Article for Conditions Precedent. These

pertain to damages applicable and payable by each party in case the respective Conditions Precedent are not satisfied within the stipulated time period. These damages are capped to a maximum level such that, upon reaching the maximum amount the Authority may, in its sole discretion and subject to other provisions of the agreement, terminate the CA.

These clauses have a standard formulation. Benchmark for daily damages and maximum amount for same, however, vary across Base CAs/MCAs as below.

Damages Due to Delay in Fulfilment of CP by Concessioneing Authority

- o Damages under Base MCAs/Signed CAs vary between 0.1% to 0.2 % of the Performance Security, for each day's delay, subject to a maximum of 5% to 20% In certain new MCAs for Roads, the maximum limit for damages is the amount of bid security.

Damages Due to Delay in Fulfilment of CP by Concessionaire

- o Damages under Base MCAs/Signed CAs vary between 0.1% to 0.3 % of the Performance Security, for each day's delay, subject to a maximum of 5% to 20%²⁵. In certain new MCAs for Roads, the maximum limit for damages is the amount of bid security, beyond which the Authority can, in its discretion, terminate the agreement.

5.2.2. Time for fulfilment of Conditions Precedent

The original time available to each party for fulfilment of conditions precedent, and maximum extension allowed thereunder, across Base MCAs/Signed CAs is as provided below.

Time available to Concessionaire

- o Original time for fulfilment varies between 150 days to 180 days; This may be extended for another 90-120 days with payment of damages.

Time available to Authority

- o The original time for fulfilment of CPs by Authority is indicated in the notice served by the Concessionaire to the Authority with respect to same. This usually varies between 90 to 120 days from the date of provision of performance security by the Concessionaire. This may further be extended by up to an additional 90 to 150 days.

²⁵In case of HAM projects the maximum applicable damages have been made equivalent to bid security. However, based on the recommended norms for bid security and performance security it works out to same as 20% of Performance Security.

Guidance: Initial time period for fulfilment of CPs varies from 90-270 days depending on the effort required for obtention of such CPs as to (i) whether these pertain to brownfield assets where there are pre-existing clearances and (iii) the extent of multi-agency coordination or dependence on non-related entities for same. Ideally, critical pre-development activities should be completed prior to contract execution. Further time for fulfilment of balance activities should not be more than 90-180 days. Also, provision for extension of such timelines should be built in to cater to unforeseen circumstances - including which the maximum time for fulfilment of CPs should be within a period of 270-360 days.

Similar level of damages for delay by Authority and Concessionaire - to the extent of 0.1% to 0.2% of Performance Security for each day of delay - should be stipulated. This should further be subject to a maximum possible amount which is commensurate with the various extensions allowed under the concession for fulfilment of CPs. It generally is up to 20% of performance security.

5.2.3. Deemed Termination

This clause pertains to automatic termination of concession in case Conditions Precedent are not met by either party by first anniversary of the date of agreement.²⁶ The clause has a standard formulation. Further, on deemed termination due to non-fulfilment of CPs, bid security or performance security is forfeited (to extent applicable). In case of delay/default by Authority the performance security is refunded.

In case of TOT projects if the Concession Fee has already been paid by the Concessionaire, then the same is refunded without interest.

Guidance: Deemed termination in case of non-compliance of CPs by either party should be built-in; Timelines for same be linked to maximum possible extension in timelines for compliance; but no later than first anniversary of Appointed Date

5.3. Article: Concessionaire Obligations

This Article includes the various obligations of the Concessionaire during project implementation, operations and subsistence of the concession agreement. This is mix of Project Specific, Sector Specific and Standard Provisions. Project & Sector Specific conditions are based on project scope, sectoral/ regulatory requirements etc - which have been dealt under Section 10.6 & 8.3. Standard Provisions, pertaining to manpower, project agreements, change in ownership and other general checkpoints for compliant and quality implementation under this article, have been discussed here. Inclusion of following clauses in line with the standard formulation is recommended under all MCA/CAs.

5.3.1. Obligations relating to Project Agreements

Project Agreements include the contracts entered into with third parties for

²⁶In case of CA for brownfield airports under the recent bidding undertaken in 2019 this limits is 270 days. Maximum limit under MCA for MoPSW is pending to be included.

construction, operations & maintenance etc of the project and discharging other obligations under the concession agreements. This clause includes obligations for ensuring compliance with terms and conditions and validity of such Project Agreement, submission to Authority for review (where necessary), no changes/ amendments without information/ approval of Authority and step-in rights for Authority or lenders' representative. Inclusion of these clauses is necessary to ensure continued validity of and exercise of rights under these agreements for smooth execution of the project. It also enables step-in rights in case of suspension, termination, transfer etc.

The formulation of this clause is more or less standard across all Base MCA/CAs. Only exceptions include (i) exclusion of clause pertaining to financing agreements in projects where no upfront investment and therefore no financing is necessary e.g. OMT, TOT.

5.3.2. Obligations related to Change in Ownership

Change in ownership refers to any transfer of equity ownership, in part or full, that causes the aggregate holding of the selected private party to decline below a stipulated threshold. This clause needs to be included in CAs/MCAs from the perspective of security, fair competition, non-monopolistic practices and sustained involvement of original bidders for a pre-specified time in the project.

Change in ownership clause has a standard language across various Base MCAs/ signed CAs. However, the time period for maintaining majority shareholding by the selected bidder in the concessionaire, as also a minimum level of equity holding by all of the participating members in the consortium, changes from case to case. Lock-in period threshold is as discussed in Section 9.1.

5.3.3. Employment of trained personnel, foreign nationals

This clause includes general obligations for (i) obtaining work permit, security clearance etc in case of foreign personnel (ii) ensuring availability of requisite number of skilled/ trained resources against each category for safe, compliant and efficient execution of project.

The formulation is standard across all Base MCAs/Signed CAs.

5.3.4. Sole purpose of Concessionaire

This clause represents the Project as being the primary business of the Concessionaire and prevents undertaking of any other business – except as provided under the terms of the agreement or with prior approval of Authority. This clause is included in all Base MCAs/Signed CAs except where incorporation of a separate SPV has not been mandated under the concession (as discussed under Section 5.1.2 above).

The formulation is standard across all Base MCAs/signed CAs.

5.4. Article: Authority Obligations

This Article includes the various obligations of the Authority during the course of project implementation, operations and subsistence of the concession agreement. This is mix of Project Specific, Sector Specific, Model Specific and Standard Provisions. Project & Sector Specific conditions pertain to site access, right of way, support for permits and clearances etc - which have been dealt under Section 10.7 & 8.3. Standard Provisions, pertaining to refinancing has been discussed under this Section. Certain other clauses which entail a standard formulation but are included only in case of brownfield projects such as TOT, OMDA etc and may therefore be categorised as model specific clauses have been included under Section 7.5.1.

Inclusion of following clause with a standard formulation is usually followed in all prevalent MCAs/signed CAs where financing agreements are involved.

5.4.1. Obligations relating to Refinancing

This clause includes Authority obligations for permitting and enabling to Concessionaire to procure refinancing of project debt. This is necessary to enable the Concessionaire to procure most efficient lending terms in the market - while also enabling Authority oversight over the terms of such agreement. This oversight is specifically relevant from the perspective of termination payments which are frequently linked to debt due etc as well as other stipulations for prudential asset and fund management which is necessary for functioning of the projects.

The formulation is standard across all Base MCAs/Signed CAs.

5.5. Article: (I) Representations & Warranties (II) Disclaimer

5.5.1. Representations & Warranties

These include representations and warranties (R&W) of Concessionaire, that of Authority and disclosures for the purpose of entering into the CA. From the Concessionaire's perspective these include duly organized and validly existing under the laws of India, necessary financial standing and capacity to execute the project, compliance with applicable laws, regulations and policies, correctness of information provided under the bid, no impending suit, case, legal action etc, no conflict of prosed business with other business activities etc. From the Authority's perspective these include power and authority to enter into the agreement, necessary financial standing to fulfil the obligations, compliance with applicable laws, good and legal access of site (where applicable) etc. All these clauses a standard formulation across most Base MCAs/CAs; There may, however, be variations linked to provisions elsewhere in the MCA viz.:

- *Change in Ownership* (as later discussed under Section 9.1);

- Also, certain representation such as those related to financing etc may be excluded if the same i.e. financial close is not a pre-requisite under financing agreement etc.

The formulation is standard across all Base MCAs/Signed CAs.

5.5.2. Disclaimer

This includes standard provisions for covering mistakes, errors, risk of inadequacy etc on part of either party.

The formulation is standard across all Base MCAs/Signed CAs.

Standard Provisions under Part II: Development & Operations

5.6. Performance Security

This is an unconditional and irrevocable guarantee (usually in form of a bank guarantee) to be furnished by the Concessionaire in favour of Authority for due performance under the contract. This can be appropriated in the event of a default by the Authority, based on conditions pre-defined in the Concession agreement. Conditions for appropriation generally include (i) concessionaire default (ii) failure to meet any Conditions Precedent by the Concessionaire (iii) failure to make timely payments to the Authority etc

5.6.1. Performance Security, its Appropriation

This details out the quantum of Performance Security to be provided, eligible instruments, timeline for creation, conditions and mechanism for appropriation and that for replenishment. While the Article has a standard formulation, percentage value and basis for the amount of Performance Security provided, varies on a case-to-case basis. Variations in quantum of Performance Security stipulated have been discussed under Section 6.4.

Further, the timelines for provision of Performance Security varies from 30 days to 180 days across concessions. The time for replenishment varies from 15 days to 30 days replenishment (if required in case of appropriation). In cases, where the guarantee needs to be rolled-over, the same needs to be undertaken 30 days prior to expiry of existing performance guarantee.

Further, in cases where the performance security has been appropriated due to concessionaire default and the same has been successfully replenished in accordance with the provisions of this Article, an additional period for cure of default is available. This is the same as that under Article for Key Performance Indicator or Termination and varies from 90-120 days.

Guidance: Provision of Performance Security may be stipulated within 45-120 days of signing of the concession agreement. This time-period will be lower in cases where the value of performance security is small, generally in O&M based projects. And higher in other cases. Further, time for replenishment may be stipulated as 30 days from the date of appropriation.

5.6.2. Release of performance security and deemed performance security

Performance guarantee is to be maintained up till a defined stage in the life of concession. Further, under the MCA for BOT & HAM of MoRTH and Draft MCAs of Planning Commission there is provision for the performance guarantee to be released after completion of a specific project milestone. This is since the quantum of investments in these projects is large and therefore the value of performance guarantee. Such a formulation ensures cost and compliance savings for the concessionaire. From Authority perspective, value of asset created up till this milestone serves as deemed performance security, which can be leveraged for addressing issues of non-performance. This is a prevalent practice, prudential norms for which are also covered under Section 7.4.

5.6.3. Other Variations

Other variations witnessed across Base MCAs/Signed CAs are as below:

- (i) Provision of additional performance security in case of HAM projects where the quoted Bid Project Cost is less than 90% of Estimated Project Cost of Authority to cover for aggressive bidding and non-performance thereunder.
- (ii) Subsequent performance security to be provided in case of multiple phases of project are to be undertaken, as in case of concession for MMLP.
- (iii) Listing of events of default by Concessionaire in which case Performance Security can be appropriated in case of TOT Projects.

Article for Performance Security includes a typical list of provisions with standard drafting – except for variations in value and thresholds as discussed under Section 7.4.

5.7. Site and Right of Way

A key element in PPP projects is land for greenfield projects or access to site and additional land for augmentation in brownfield projects. Generally, in PPP concession agreements land for projects, access, right of way is required to be provided to be Authority. Further, majority portion and critical area of such land is required to be provided prior to Appointed Date. This is necessary so that the Concessionaire can adequately and timely plan the construction of the Project.

The clauses under this Article provide procedural methodology for procurement of site and right of way, timelines for same, nature of rights, damages for delay, obligations relating

to access etc. Locational details of such site viz. map, area, plot details - both of the already provided portion as well as that pending to be provided by Authority (as on the date of execution of agreement) – are captured as part of separate schedules to the agreement etc. The various critical elements included as part of this provision are as below:

- a. **Nature of Rights:** In maximum cases of PPP projects, lease and license rights are provided to the Concessionaire in respect of all the land along with any buildings, constructions or immovable assets. Under the Base MCAs/Signed CAs this is followed for roads, MMLP, ports, greenfield airports lease and license rights have been provided. In case of brownfield airports, however, lease rights are provided over existing assets and for the additional land has been included. Decision on this is based on guidance hereunder.
- b. **Thresholds:** Percentage of total identified site area/ right of way, committed to be provided unencumbered and upfront i.e. before Appointed Date, is seen to vary in a rangebound manner across concessions. Also, the timelines for provision of balance site area/ right of way varies. The broad variations are as provided here:

Percentage of Site Area provided upfront

- o For greenfield projects or those requiring upfront projects, percentage of total site area provided for the project prior to Appointed Date varies from 80-95%.
In case of projects such as MMLP additional land is required for Phase II for which largely similar stipulations are built-in for a later date; Similarly in case of airports when additional land is required for aeronautical or non-aeronautical assets it is provided by Authority under more or less similar conditions.
- o In case of brownfield projects such as TOT, OMT as well as in brownfield airports 100% of site access is provided upfront

Timeline for provision of balance land

- o Balance land is provided within a period of 90-180 days from Appointed Date pending which damages of Rs 1 per 10 square metre is applied.

- c. **Other Variations:** In some projects viz. airport development, railway stations etc additional real-estate for the purpose of ancillary facilities, city side development etc may also need to be provided by the Authority. *Clauses for same are accordingly included and the same have been discussed under Project Specific conditions under 11.5.*

²⁷Leasing of 6 brownfield airports undertaken in 2019

- d. **Procurement of land/ site by Concessionaire:** While usually not recommended in a traditional PPP project, land/site may need to be procured by the concessionaire in certain specific instances. *For instance, projects for food storage silo on DBFOO basis. In such instances differential/additional stipulations may be included viz. compensation for transfer of asset to the Authority etc²⁸.*
- e. In case of brownfield airports separate provision on lease rights, payment of property taxes etc has been seen to be included. Similarly, in case of MMLP separate clause for lease, sub-licensing rights of such sub-licensees and acceptance of site for project is also included.

Guidance: *Access to site and right of way should be provided by Authority ideally on leave and license basis. Only in cases where the property in question is not a subject matter of concession or where additional rights in a property are being specifically transferred to facilitate the project or to enhance viability should a lease be resorted to²⁹.*

Further access all critical and at least 90% of total site area should be provided prior to Appointed Date. Balance land should be provided within a period of 180 days from Appointed Date pending which it should either be excluded from the concession or be provided within a maximum permissible timeline together with damages.

In cases where augmentation or further phases may be required for projects, additional clauses for provision on similar principles as here should be included. Usually for Estate Development, separate plot of land is provided by the Authority. In such cases a separate clause on provision of such land, rights over it etc is included.

Article for Site and Right of Way includes a typical list of provisions with standard drafting – except for variations in value and thresholds as discussed above.

5.8. Utilities, Associated Roads & Trees

This article pertains to obligations for (i) maintenance of existing utilities (ii) shifting of obstructing utilities, if necessary (iii) installation and setting up of new utilities (iv) felling of tress etc. All such obligations are generally required to undertaken by the Concessionaire for the purpose of construction of project- and with assistance from Authority as necessary.

These clauses are generally included in all Base MCAs/signed CAs³⁰. However, financing mechanisms for shifting etc is seen to vary in certain Base MCAs/Signed CAs. For instance, in most cases, cost of shifting of obstructing utilities is borne by the Authority (or entity owning the utility). However, in case of MCA for MMLP, the same is allocated to the Concessionaire. Further, specific provision for felling of tress, shifting of obstructing utilities has not been specifically included under the MCA for Shipping.

²⁸Detailed pros and cons of land from private party on DBFOO basis have not been discussed under this Guidebook. The Guidebook recommends projects on DBFOT basis with land for same being provided by the Authority.

²⁹Based on inputs under Draft Reference Guide for Lease vs License of IFS,DEA. To be suitably reviewed.

³⁰Except in case of SBD for ISTS via TBCB – where the same is not included given the nature of the project. Needs to be reviewed

Guidance: As a standard practice, provisions for maintenance of existing infrastructure and utilities, shifting of obstructing utilities, construction of new utilities and roads where necessary, and felling of trees should be included in all MCAs (except where construction is not envisaged at any stage of the concession such as OMT). This helps to address any potential requirement in this regard at any time during the subsistence of the concession.

As for the cost of shifting of obstructing utilities, ideally the same needs to be borne by the owner of the utility. However, the modality for agreement on costs and receipt of same can be protracted – as has been seen in case of various projects - which may potentially lead to delays. Provisions for assistance and funding of same by Authority under a waterfall mechanism can hence be built in.

5.9. Monitoring of Construction³¹

Construction in PPP concession agreements are usually monitored through the Independent Engineer mechanism. This article stipulates Concessionaire obligations on submission of (i) monthly status reports, video recordings etc (ii) reporting delays during construction. It includes rights/ obligations of independent engineer for (a) inspection of works (b) tests for commissioning (c) suspension of unsafe construction works etc. These activities are meant for ensuring timely and quality completion of projects as per stipulated standards & specifications.

Periodic reports on progress of the construction works are submitted by the Concessionaire. Independently, on a monthly basis, inspections and test are undertaken by the independent engineer who makes a report of such inspection and submits the same to the Authority. This report is used for verification of the milestones and other purpose associated with the project. The Article provides methodology, periodicity, timelines and remedial actions for such processes. One of the sector-specific features under this Article is the basis on which the size or sample for tests on to be used by the independent engineer. The same is based on norms used by certified agencies in the sector or as recommended by the ministry.

Further, the Article provides for (i) proactive tracking of scheduled completion date by the independent engineer and require inputs from concessionaire for timely completion in case of potential delays (ii) suspension of part or all rights of the Concessionaire in case of issues around construction standards, breach of agreement, safety etc and remedial procedure with timelines for same.

Article for Monitoring of Construction includes standard steps and procedures for the activity based on a broadly similar formulation across all Base MCAs/signed CAs. The Article, however, is not included in case of brownfield projects where the scope is limited to O&M and no additional construction is required.

5.10 Completion Certificate³²

This Article provides the process for certifying readiness of use of infrastructure including

³¹Not included in case of projects where no construction is envisaged for instance TOT, OMT

³²Not included in case of projects where no construction is envisaged for instance TOT, OMT

the tests to be undertaken by independent engineer, issue of completion certificate

5.10.1. Tests & Completion Certificate

These clauses provide the mechanism for testing and issue of completion certificate. The timeline for undertaking the tests varies from 30-90 days prior to scheduled completion date. Further, in certain sectors issue of such completion certificate may be subject to approval of license of regulatory authority³³, as in case of airports where issue of completion certificate is subject to license from DGCA and other conditions. MCA/ CA for airports also list the broad parameters for testing for issue of completion certificate.

5.10.2. Provisional Certificate

In cases where project is substantially complete but some portion of it is remaining, and pending which the infrastructure can be safely operationalised, provision for a 'Provisional Certificate' is built in. While usually a standard formulation, the conditions under this clause may sometimes entail sector specific variations. For instance, in case of MCA for MMLP completion of at least 90% of initial phase of project has been mandated for obtention of provisional certificate. Similarly, in case of airports, provisional certificate is subject to applicable permits including receipt of DGCA license.

In cases where a provisional certificate is issued, a list of items to completed is created which is called the punch list. The timeline for completion of Punch List items, damages for delay in case of same and maximum timeline for completion of same are included as part of other clauses under this Article. These damages and timelines are usually similar across Base MCAs/Signed CAs as below:

- Damages for each day of delay until all items are completed, at the lower of (a) 0.1% of the Performance Security, and (b) 0.2% of the cost of completing such items as estimated by the Independent Engineer.

Items in punch list are required to be completed within a period of 90-120 days from the date of issue of provisional certificate

Clauses on Provisional Certificate, completion of punch list items, withholding of completion certificate etc generally entail a standard formulation.

5.11 Change of Scope

Scope of project – generally in terms of alignment or changes in size of facilities, capacity etc - may sometimes need to be changed post execution of Concession Agreement. This may either be due to requirement of the Authority or on request of the Concessionaire and may be owing to various factors viz. right of way issues, design constraints, public need etc.

³³In case of SBD for ISTS via TBCB the same is a condition precedent and therefore not required.

This article details the definition of such (i) change in scope and (ii) procedure for change in scope (iii) payment for change in scope (iii) restriction on certain works (iv) power of Government to undertake works (v) reduction in works. The intimation of change of scope may be done by either party. In case the same is initiated by the concessionaire details of same along with reasons, impact etc need to be submitted to the Authority which then approves on the criticality and merits of it.

The clauses on change in scope, procedure for issue of order, restriction on certain works and power of authority to undertake change in scope are based on a standard formulation.

It is not included in case of brownfield projects where the scope is limited to O&M and no additional construction is required.

Further, a clause of reduction in scope of work is also included in some MCAs, such as in the MCA for Hybrid-Annuity-Mode Road projects by MoRTH. The provision helps to eliminate non-critical portions of project without impacting the concession, where it becomes necessary due to unavoidable circumstances.

5.11.1. Payment for change in Scope

The mechanism of funding of change in scope varies on a case-to-case basis. In case of MCA for BOT(Toll) and MMLP, this is limited by minimum and maximum level of cost within which change in scope is funded by the Authority. This varies from 0.25% to 20% of project cost for BOT(Toll) and 0.25% to 10% of project cost for MMLP respectively. Below 0.25% of project cost, any change in scope in both cases is to be funded by the Concessionaire. Also, the extent of cumulative or single change of scope in a project must be limited to a certain percentage of the total project cost ~ usually varying between 5% to 25%. In case of airports projects, all costs (except those which are necessary for expansion of aeronautical and non-aeronautical asset in accordance with the provisions of agreement) are to be funded by the Concessionaire, except where the authority decides to undertake such works through an open bidding process. Since in case of airports, such change in scope funding may be submitted to regulator as part of tariff fixation process, adverse commercial implication of same on concessionaire may be contained. Further, where the authority funds the change in scope, but such expenditure is approved by AERA, refund of same is undertaken by the Concessionaire to the Authority. However, the criticality of such change in scope needs to be diligently reviewed by the authority and the pros and cons of such inclusion/exclusion as part of tariff determination needs to be prudentially reviewed by tariff regulator. Objective principles on same should ideally be contained in the MCA/CA. This is from the perspective of protecting both the concessionaire and the users/consumers in a fair and balanced manner.

Guidance: Need for change of scope has been seen to be a regular phenomenon in PPP projects – which potentially leads to time and cost overrun in projects and protracted disputes. This article should therefore be prudentially and comprehensively drafted – with due consideration for practical challenges in arriving at the decision. Where tariffs are pre-determined, such costs should ideally be

funded by Authority, capped to a particular limit. Where tariffs are market determined (i) the pros and cons of such incremental funding by either party and (ii) the impact of such change in scope cumulatively over the life of the concession needs to be thoroughly assessed and accordingly a sharing mechanism for same should be laid out under the concession. In case of regulated tariff, only critical and unavoidable works should be covered and a well-defined mechanism for inclusion/exclusion based on normative estimates may be included under the concession.

5.12. Operations & Maintenance

This Article includes the various rights & obligations pertaining to operations and maintenance of the Project. This is mix of Project Specific, Sector/Model Specific and Standard Provisions. Project Specific provisions are based on project scope, sectoral/regulatory requirements etc - which have been dealt under Section 10.9 & 8.3. Standard Provisions, pertaining to maintenance, damages for non-compliance, overriding powers of Authority have been listed here. Inclusion of following clauses in line with the standard formulation is generally followed in all prevalent MCAs/signed CAs.

1. Obligations for undertaking the maintenance of the project as per the agreed set of requirements i.e. Maintenance Requirements which is included as part of Schedule to the agreement and other relevant benchmarks such as ICAO in case of airports;
2. Preparation and approval of maintenance manual within 90 days of scheduled completion date and approval of Authority and/or any other regulatory authority in the sector on that; Submission of annual maintenance programme and timelines for same;
3. De-commissioning of a part of or entire Project in case of emergency; notice of same to the Authority and affected persons (if any); recommissioning as quickly as practicable;
4. Non-closure of any section, except for which maintenance programme has been submitted on a periodic basis and approved by the Authority/Independent engineer;
5. Excuse from performance of obligations in case of force majeure, unsafe conditions or for compliance of directions received from Authority or other Government Instrumentality;
6. Payment of damages in case of non-rectification of defects in maintenance. Applicable rate across concession agreements is (a) 0.5% of Average Daily Revenue, and (b) 0.1% of the cost of such repair or rectification as estimated by the Independent Engineer;
7. Further in case of non-compliance by concessionaire, the Authority on its own accord may decide to take remedial measures for safe and uninterrupted operations of the project - with payment of such expenses being funded from the Escrow account. Additional damages amounting to 20% of such costs are generally payable by the concessionaire;

These provisions entail a standard formulation.

5.13. Monitoring of Operations & Maintenance

The Article on Monitoring of operations and maintenance deals with Concessionaire obligations viz. (i) periodic status reports. (ii) reports of unusual occurrence (iii) remedial measures and that of Independent Engineer as (iv) O&M inspection etc. The provision ensures necessary oversight of Authority on O&M of the project for compliance with statutory, regulatory requirements, performance indicators, terms of concession agreement, safety pre-requisites, unforeseen circumstances and for facilitation & protection of public interest. The Article provides methodology, periodicity, timelines and remedial actions for such processes. On a periodic basis, usually monthly or quarterly, inspections are undertaken by the independent engineer who makes a report of such inspection and submits the same to the Authority. On basis of which, and in case of defects, or deficit in performance remedial measures are required to be taken by the concessionaire within pre-defined timelines.

The Article may sometimes, include sector specific stipulations viz. Airport Operator Database in case of airports, Monthly Fee Statement in case of roads etc. On the other hand, in case of ISTS through TBCB, given the nature and usage of the asset, no specific provisions for monitoring are included and the same is monitored through target availability.

The Article entails a standard formulation for typical set of clauses to be included for all infrastructure projects. Inclusion of other sector-specific provisions as highlighted under Section 8.3, may additionally be considered for compliant, safe and efficient operations, however only where necessary and critical from statutory, regulatory or public protection perspective.

5.14. Independent Engineer

Independent engineer (IE) is a third party - generally an engineering consulting firm or an individual - hired to ensure that construction work is undertaken timely, in accordance with specifications and is of high quality. It is responsible for reviewing project documents such as drawings, construction methodology, quality assurance procedures and project schedule, etc. It is also responsible for inspecting, or monitoring project activities, witnessing certain percent of sample tests on the asset and reporting status of compliance to KPIs and defects or deficiencies, if any, to the Authority.

Generally, IE's appointment varies from 3 years to 5 years (depending on the sector type) and its cost and expenses are equally borne by the authority and the concessionaire. Under the terms of the MCA/CA, fee and expenses of an IE are usually shared between the Concessionaire and Authority. Further, to enable both Authority and Concessionaire replace IE, in case of grievance/ dissatisfaction with performance, suitable clauses are built in under the concession.

The Article entails a standard formulation.

5.15. Key Performance Indicator

Unlike the normal practice of focussing on input specifications, the technical parameters proposed in a PPP Project are based mainly on output specifications. The CA/MCA, therefore, identifies the key performance indicators (KPI) relating to operation and maintenance of the project facility to achieve the requisite levels of performance. While the KPIs and damages for shortfall are sector specific clauses and have been discussed in Section 8.2, the clauses pertaining to ISO certification, monthly status reports etc. are standard clauses which entail a standard formulation. These are as below:

1. **Status reports:** This clause pertains to provision of periodic status reports on KPIs by the Concessionaire to the Authority – generally quarterly. The report includes details of shortfall and reasons for same.
2. **Certifications:** This clause pertains to necessary certifications of asset quality and performance viz. ISO etc and continued subsistence of same during the concession period. In case of non-availability, action plan for compliance of same along with damages for delay will be applicable.

List of KPIs, damages applicable and sector-specific provisions have been discussed under Section 8.2.

Standard Provisions under Part III: Financial Covenants

5.16. Financial Close

This Article includes obligations for tying up of necessary financial resources for upfront construction and implementation of the project (except where not relevant such as in case of OMT, TOT concessions). The same needs to be completed within a pre-specified days from the execution of concession agreement – failing which damages are stipulated usually at 0.05% of performance security per day of delay up to a maximum additional period of – after which termination clause kicks in. The variations in initial and maximum timelines for financial across various Base MCAs/Signed CAs are as provided below:

Original Time available to Concessionaire

- o In case of MoRTH projects (except TOT/OMT) original timeline is from 150 to 180 days.
- o In case of airport projects timeline for financial closure is 180 days.
- o In case Ports projects financial closure is conditions precedent fulfilment of which kicks in the appointed date of the project.

No condition of financial closure under MCA for OMT and TOT where in case of OMT no upfront investment is necessary or where all payments to the Authority have already been made. No condition for financial closure is also stipulated under SBD for ISTS via TBCB.

Maximum Extensions & Damages for Delay

- o In case of MoRTH projects (except TOT/OMT) extension in timeline is up to 150 to 200 days.
- o In case of airport projects extension in timeline is for another 180 days;
- o In both the above cases applicable damages is 0.05% of per day of delay.

Guidance: Usually the time-period for financial close is 180 days (with possibility of extension of up to 120-180 days) in most prevalent MCAs / signed CAs Damages for delay is as across all Base MCAs/Signed CAs at 0.05% of per day of delay.

The formulation is standard across prevalent Base MCAs/Signed CAs.

5.17. Escrow Account

Escrow Account is an interest-bearing account opened with a scheduled commercial bank (in most cases the lead lender or a senior lender of the project), exclusively, for the purpose of routing financial transactions related to the Project. The account is operationalised prior to declaration of Appointed Date and is necessary to ring-fence the cash flows of the project to be used dedicatedly for its construction, operations and other contingent scenarios. It is a prudential practice for all PPP Projects that indicates the waterfall of payments to be made from such Escrow Account in case of a 'business-as-usual' scenario and in case of 'termination'.

The Article for Escrow Account contains standard terms and conditions for opening and operation of account, deposits, withdrawals during concession period and that during the termination period. A standard multi-party agreement amongst Concessionaire, Senior Lenders, Escrow Bank and Authority lays down the terms and conditions for operation of Escrow Account *inter alia* deposits, withdrawals etc. from same which is included as Schedule to the Concession Agreement.

The formulation is standard across all Base MCAs/Signed CAs.

5.18. Insurance & Audit

The project facilities are required to be insured in accordance with good industry practices by the concessionaire as may be necessary for mitigating various risks. For each such insurance, the Concessioning Authority is required to be co-insured. This is necessary for protecting against financial loss due to unforeseen events and its adverse impact on the asset. Payments from such claims are used towards reduction of liabilities in case of force majeure, termination etc. The Article includes (i) Insurance (ii) Cover – mandatory covers required (iii) Notice to authority (iv) remedy for failure to insure (v) waiver of subrogation

(vi) Concessionaire's waiver and (vii) application of insurance proceeds.

The formulation is standard across all Base MCAs/Signed CAs.

5.19. Accounts & Audit

This article pertains to maintenance of books of accounts by the Concessionaire in accordance with Good Industry Practice, Applicable laws and Applicable Permits etc. Most PPP concessions include provision of appointment of statutory auditors from a panel of chartered accountants for the purpose of auditing financial indicators such as revenue etc. This ensures necessary oversight of Authority over the cash-flows from the project. Further, in cases where a grant is being provided multiple government agencies, a provision for concurrent auditor is included if needed to be exercised separately. The Article includes provisions for maintenance and submission of audited accounts, engagement of statutory auditors and furnishing of statements duly audited by its Statutory Auditors along with mechanism for set-off of claimed amounts and dispute resolution.

The formulation is standard across all Base MCAs/Signed CAs.

Standard Provisions under Part IV: Force Majeure & Termination

5.20. Force Majeure

The Article elaborates on obligations of both parties in the face of unforeseen events that arise through no fault of either party, cannot be prevented or overcome by exercise of diligence, but have the capability to inhibit any or both parties from fulfilling their duties and obligations under the agreement. *Given that the Article is aimed at addressing various possible eventualities and uncertainties during the course of the concession these need to be carefully and exhaustively defined while providing for compensation or redressal for same.*

5.20.1. Force Majeure, Non-Political, Indirect Political & Political Event

Under any MCA/ CA, Force Majeure events are categorised into Non-Political, Indirect Political and Political. This categorisation is based on the nature of such events (such as whether it is an act of god/ environmental disaster etc, a political event or is indirectly caused due to political risks etc.). The Article for Force Majeure entails a standard definition for 'Force Majeure', 'Affected Party' and a standard list and formulation of events entailing 'Non-Political Event', 'Political Event', 'Indirect Political Event'. Liabilities and obligations of respective parties in the face of such force majeure events also depend on such categorisation.

Further, the Article stipulates a standard procedural mechanism and formulation for reporting, termination notice, dispute resolution, excuse from and performance obligations.

The duty to report such events in terms of nature and extent, estimated duration etc on the concessionaire. In case the affected party is unable to perform its obligations due to such Force Majeure event, the extent and procedure for excuse from performance of obligations is provided as part of this Article.

The Clauses for (i) Force Majeure (ii) Political Event (iii) Non-Political Event (iv) Indirect Political Event (v) Duty to Report Force Majeure (vi) Termination Notice for Force Majeure (vii) Dispute Resolution and (viii) Excuse from Performance of Obligations entail a standard provision across all concession agreements.

Further, the CA for recent greenfield and brownfield airports and draft MCAs of erstwhile Planning Commission include a sub-article on ‘Relief for Unforeseen Events’ which deals with management of events not potentially covered under any of the other categories.

5.20.2. Effect of Force Majeure & Termination Payment

The concession agreement elaborates on the following points to deal with commercial impact of force majeure & termination payment:

i. Effect of force majeure event:

In terms of effects of force majeure, the pre COD impact and post COD impact is separately defined. Also such impacts varies across Base MAC/CAs as below:

Pre COD
<ul style="list-style-type: none"> o Is only applicable to concessions involving upfront construction; and is therefore not included in case of TOT, OMT etc. o In case of BOT, DBFOT, OMD, HAM etc for where an upfront construction with a scheduled milestone and completion timeline is provided, the timeline for completion of such events is increased by the amount of time for which such force majeure event subsists
After COD
<ul style="list-style-type: none"> o Is applicable to all concessions etc. o In case of BOT, DBFOT, OMD concessions of sector which involve a pre-determined or market determined fee, relief involves (i) extension of concession by period for which collection was suspended and (ii) pro-rata extension for period during which fee collection is below 90% of previous period average o In case of HAM and annuity based concessions, relief is linked to Annuity payments; In case of airports relief is determined by AERA;

Guidance: Relief for force majeure event in pre-COD scenario is extension of project milestones and completion date by an analogous period; except in cases where no construction is involved and accordingly such as scenario is not included.

For post COD scenario events, relief is (i) linked to pre-annuities/ stipulated payments in case of HAM, Annuity based projects (ii) addressed via extension of concession period where tariff is pre-specified or market determined (iii) determined by regulatory authority where tariff determination is regulated.

- ii. **Allocation of costs**– in each of the various categories of Force Majeure Event;

The principle adopted for allocation of costs is for Authority to absorb the costs on account of political force majeure and for concessionaire to absorb it on account of indirect political force majeure. In case of non-political event each party absorbs respective costs.

- iii. **Continuation & Termination:** Continuation of force majeure event for a sustained period of time or for multiple periods during a concession resulting in kick-in of termination event and payments on account of same

If Force Majeure extends beyond a certain period (as specified in the agreement – usually varies between 120 days to 180 days) within a continuous period of 365 days, the Parties may mutually decide to terminate or continue the Agreement on mutually agreed revised terms. Termination Payment applicable on account of these is as covered under Section 7.3.

These clauses include a standard drafting with principles for allocation of costs as indicated above and that for termination payment as provided under Section 7.3.

5.21. Compensation for Breach of Agreement

This Article relates to consequences of breach of agreement for default by the Concessionaire, default by the Authority. The compensation is linked to costs incurred by the Party on account of such default which is to be paid within 30 days from the date of demand. This enables recouping of commercial loss to either party due to breach of terms of agreement – during the subsistence of the concession as well as including in case of termination. The Article also includes provisions for extension in concession period in case of default by Authority – in most cases as an addition to the compensation stipulated above. Such extension is, however, not included in case of annuity projects.

The Article entails a standard provision across all MCA/CAs for compensation for default by either party and the same to be in addition. Compensation for competing facility is included/ excluded depending on whether an obligation pertaining to same has been built in under Authority obligations. Principles for same is as discussed under Chapter 9.

5.22. Suspension of Concessionaire Rights

In case of concessionaire default, the project can enter into a state of risk and suspension. As a security against this event, the concession agreement provides for the Authority to act on

behalf of the concessionaire so as to ensure continued operations. Conditions for revocation based on cure of default within 180 days is built in as part of this Article. This article addresses potential situations for suspension of concessionaire rights and alternative course of service provision in such situations. It includes standard formulation for (i) suspension for concessionaire default (ii) right of authority to collect fee and undertake operations & maintenance in such a situation (iii) timelines for revocation of such suspension pending which substitution or termination can be exercised (iv) provisions for exercising substitution. Also, a substitution clause³⁴ is included in the MCA/CA which bestows the right on lenders to substitute the concessionaire with a lender-nominated entity, in case of a financial or concessionaire default, subject to the approval of the Authority. For purpose of clarity, the Concession agreement must be accompanied by a draft substitution agreement, that is often tripartite in nature, among Authority, concessionaire and the Lenders.

The article entails a standard formulation. However, clauses pertaining to substitution are not included wherever such provisions are not built-in in the agreement

5.23. Termination

This article elaborates on the events of default, the cure period for such default, non-rectification of which leads to termination and consequences of such termination. Some standard events of default by concessionaire include non-completion of project as per milestones, non-replenishment of performance security, winding up or insolvency etc. Similarly some standard events of default by Authority include repudiation of agreement, non-payment as required under the concession agreement etc. In both the cases, a cure period is available, post which the right for termination is a potential alternative.

The cure period available for the authority and concessionaire is in almost all cases 60 days and 90 days respectively.

The intent of the article is to enable mutual agreement on terms of termination of concession – with provisions for transfer of asset back to Authority³⁵ and payment of suitably adjusted consideration against such transfer of asset so as to protect the investment by the private party. In cases where no upfront investment has been made or where transfer of asset does not occur, for instance OMT projects, termination payment is limited to revenue loss for a limited period viz. a year. Further, additional termination payment is available in cases where (i) Non-Core development is included as part of project and (ii) additional assets have been built in the later years of the project and which have therefore not been fully depreciated. Variations across Base MCAs/Signed CAs in this regard and most oft-followed provisions are as provided in Section 7.3.

³⁴Not included in case of TOT projects

³⁵This is the recommended scenario in case of all PPP projects involving public land and/or infrastructure assets i.e. which are immovable or involve high sunk costs or non-availability of which impacts public service obligations and which cannot be deployed to alternative use

The Article includes steps for invoking termination, payment to be made for same etc. Usually after termination, the authority takes possession and control of the entire project requiring the concessionaire to comply with divestment requirement. Further, in case of recent MoRTH MCAs an article on foreclosure has been included³⁶.

Provision for transfer and payment depend on the model employed for PPP Project and has been discussed under Section 7.3. However, the definitions of Termination for Concessionaire Default, Termination for Authority Default, Survival of rights, Other rights & obligations of the Authority, generally follow a standard formulation.

5.24. Divestment of Rights & Interest

This article pertains to divestment of rights and interest post the completion of concession period or in case of terminations. It entails standard formulation for (i) divestment requirements which include cure of project asset from all defects, along with relevant records, IP, licenses etc (ii) inspection and cure of Project assets from defects as certified by independent engineer (iii) cooperation and assistance on transfer of project by Concessionaire (iv) vesting certificate (v) divestment costs etc. In addition to the standard clauses, MCA for MMLP includes provision for rebidding of the project enabling re-engaging of a new private party for continued O&M of the project. Which also includes right of first refusal by the Concessionaire (subject to acceptance of conditions set thereunder).

The article entails a standard formulation.

5.25. Defect Liability & Termination

Once the project has been suspended or terminated, any defects or deficiencies arising out of the project construction or operation (i.e period before termination) needs to be rectified for a fixed period of time. Generally, the Concessionaire is made responsible for a period of 120 (One hundred and twenty) days after Termination, and has the obligation to repair or rectify, at its own cost, all defects and deficiencies observed by the Independent Engineer in the Project during the aforesaid period.

Standard formulation is employed for (i) liability after termination and (ii) retention in escrow account. However, the amount retained in the Escrow or provided as performance guarantee for covering such liabilities varies from case to case. It is linked to a percentage of concession fee, realisable fee, annual annuity payments etc – usually around 5%.

The article entails a standard formulation.

³⁶Such a provision is only to address circumstances caused due to unavoidable, external factors in which case no other provision under the agreement can suitably be applied to reach a mutually acceptable arrangement.

Standard Provisions under Part IV: Force Majeure & Termination

5.26. Assignment & Charges

This article pertains to standard provisions on restrictions on assignment and charges etc. These restrictions are not applicable on liens arising on account of operation of law, encumbrance on other than Project assets, assignment of rights in favour lenders etc. The clause provides for (i) possibility of assigning Concessionaire rights to an assignee by Authority (ii) exercise of substitution by lenders in case of default by concessionaire and mechanism for same. Further, in case of CA for airports, provision for step in rights of Authority in cases of emergency etc has been included to ensure seamless continuation of project irrespective of contingencies, rare events.

The article entails a standard formulation.

5.27. Change in Law^{37 38}

This clause provides for investment/ return protection (capped to a maximum limit) in case of change in statutory conditions at any time during the subsistence of the concession. Such provision is available both to the Concessionaire and the Authority for their respective cases of increase and reduction in cost. Further, such change in law provision kicks in when impact of change in law is beyond a stipulated threshold. This threshold usually is 1 crore or 0.5%-2% of project cost across Base MCAs/signed CAs.

Standard formulation for arriving at mutually agreeable amendment in agreement terms for redressal of same is provided under the MCA/CA. The basis for arriving at such as amendment is generally NPV protection based on financial model initially submitted by the Concessionaire. However, due to the difficulties in arriving at mutually-agreed NPV protection figures, other mechanisms may also be explored like compensating only for the financial impact due to that particular change of law.

The article entails a standard formulation.

5.28. Dispute Resolution

Dispute Resolution and Arbitration elaborates on issues arising out of a conflict between the Concessionaire and Concessioneing Authority and mechanism to address the same. Any

³⁷Potential modification in this article for simplification of estimates etc. has not been included here. The principles and formulation under this Guidebook are based on extant provisions under MCAs of MoRTH.

³⁸Under CA for brownfield airports (2019), change in law has been substituted with change in regulatory philosophy. This is in view of cost plus basis tariff determination in the sector and possible variations in same. Here to redress general statutory changes, AERA tariff determination is relied upon. And the included variation is to address change in such process of tariff determination altogether. However, as highlighted elsewhere, there must be clear and objectively defined principles (i) both for addressing change in regulatory philosophy as well as (ii) for the purpose of determination, adjustment. This is necessary to avoid disputes, adverse impact on stakeholders etc.

dispute of whatever nature arising under the Agreement is in the first instance, attempted to be resolved amicably in accordance with the conciliation procedure. This procedure is as per waterfall mechanism for dispute resolution provided under MoRTH MCAs:

- **Amicable Resolution:** Ideally, any dispute should be attempted to resolve amicably with mediation from independent expert as necessary.
- **Dispute Resolution Board (DRB):** In case of inability to solve such disputes amicably, reference of dispute to Dispute Resolution Board (DRB) is available, process for which is included a part of schedules to the agreement.
- **Conciliation Committee:** If the dispute is not resolved or resolution is not found satisfactory under the DRB process, provision for reference to Conciliation Committee of Independent Experts' is available. Such a committee is constituted by the Authority and decision of such committee, if acceptable, is binding on the parties.
- **Arbitration** -If still unresolved, the dispute is required to be settled through arbitration. For MoRTH and MoPSW projects Society for Affordable Resolution of Disputes (SAROD) is relied upon for arbitration and the process for same is included as part of the agreement.

5.29. Liability & Indemnity & Disclosure

Both these clauses aim to protect the Concessionaire and Authority from any financial or legal issue arising due to the actions of the other during the concession. The Indemnity clause, associated with causation, seeks to secure each party from a potential financial liability due to breach of contract or due to fulfilment of any obligations under the Agreement, or on account of any defect or deficiency in the provision of services by Concessionaire to the Authority, or form any negligence of the Concessionaire under the contract Standard formulation is employed for (i) General Indemnity (ii) Indemnity by the Concessionaire (iii) Notice and contest of claims (iv) Defence of claims (v) No consequential claims (vi) Survival on termination

These articles entail a standard formulation.

5.30. Redressal of Public Grievance

This article includes a standard formulation for complaints and redressal. Model/sector specific variation are included in terms of (i) eligible group of people to accessing the complaints register (ii) references to any specific act such for filing/ redressal. The recent MCAs include incremental facilitation mechanisms such as online portal in case of MCA for MMLP.

The formulation is standard across all Base MCAs/Signed CAs.

5.31. Miscellaneous

These articles include various standard provisions viz. Governing law and jurisdiction, Waiver of immunity, Depreciation and interest, Exclusion of implied warranties, Delayed Payments, Waiver, Liability for review for drawings and designs, Survival, Entire Agreement, Severability, Successors & Assigns, Third Parties, No partnership, Notices, Counterparts, Language. The Article entails a standard formulation.

Additional provision such as 'State Support Agreement' with a standard formulation are included under specific MCAs such as MCA for BOT(Toll)

The formulation is standard across all Base MCAs/Signed CAs.

6. Model Specific Provisions of MCA

6.1. What are Model Specific Provisions

Model specific provisions are those where the drafting is standard, however the thresholds (i) for liabilities or payment and the base parameter for same, or (ii) conditions that kick in the application of a pre-defined set of events etc. vary based on the kind of PPP model and/or the bid parameter adopted. These thresholds/ conditions are usually agnostic of the sector or project that they are adopted for. Further, these provisions generally pertain to commercial clauses under the contract viz. termination payment, performance security, change in ownership etc. Principles for variations across these clauses is as indicated in the sections below.

6.2. Entry into Commercial Service

Entry into Commercial Service pertains to the date from which the Concessionaire is eligible to exercise its rights – in specific pertaining to collection of fee or other similar charge for usage of facilities under the project, or receipt of annuity, sub-licensing and receipt of rentals etc. The milestone kicks in depending on the model adopted and scope of the project based on guidance as below:

Guidance: For greenfield projects, entailing upfront construction viz. BOT (Toll), DBFOT, HAM etc, entry into commercial service is linked to availability of completion certificate or certification for availability of infrastructure for use³⁹. Penalty for non-completion by scheduled COD is 0.1% of performance security for every day of delay which is further capped based on the maximum period of delay permitted under the concession.

In case of brownfield projects viz. OMT, TOT, OMDA etc. entry into commercial service is linked to fulfilment of conditions precedent by Concessionaire. And in case of non-fulfilment within a prespecified period – which is generally 180 days – termination occurs.

6.3. Termination Payment, its Limitations

A PPP project may need to be terminated due to non-performance or non-compliance of Concessionaire or Authority. In the event of such termination, the MCA provides for compensatory payments to the Concessionaire. Which is in lieu of the assets received by the Authority and as return of investments made but not fully recouped by the Concessionaire. This mitigates the risk for unforeseen circumstances or discretionary action by Authority and ensures bankability, investor appetite by compensating Concessionaire for protection of investments made, revenue forgone etc. The clause for termination payment provides for exhaustive scenarios of termination i.e. those during construction period or operations

³⁹As in case of SBD for ISTS via TBCB

period; then those due to Authority default, Concessionaire default, Force Majeure etc. The amount of termination payment varies depending on such scenarios. Termination payments under various Base MCAs/signed CAs are as below:

Table 5: Comparison: Termination payment across Base MCAs/signed CAs

MCA/CA	Pre COD	Post COD
MCA -BOT (Toll)		
Concessionaire Default, Non-Political FM	Nil	90% Debt Due less insurance cover
Authority Default, Political FM	100% Debt Due + 150% of Adjusted Equity (<i>at no time less than half year equivalent of Monthly Fee realised 12 months prior to Transfer Date</i>)	
Indirect Political FM	100% Debt Due less insurance cover + 110% of Adjusted Equity	
<i>Limit on Maximum Termination Payment, other liabilities: 100% of Total Project Cost</i>		
MCA - HAM		
Concessionaire Default,	Milestone linked payments: First: Nil Thereafter: Lower of 50-80% of Debt Due or 5.35%-32% of BPC (<i>with milestone-based benchmarks</i>)	65% of total value of Annuities remaining unpaid with interest thereon up to Transfer
Non-Political FM	Milestone linked payments: Lower of 90% of Debt Due or 1.35%-36.45% of BPC (<i>with milestone-based benchmarks</i>)	75% of total value of Annuities remaining unpaid with interest thereon up to Transfer
Authority Default, Political FM	Milestone linked payments: Lower of Debt Due or 1.5%-40.5% of BPC (<i>with milestone-based benchmarks</i>) + 150% of Adjusted Equity	Sum of Annuities remaining unpaid with interest thereon up to Transfer
Indirect Political FM	Milestone linked payments: Lower of Debt Due or 1.5%-40.5% of BPC (<i>with milestone-based benchmarks</i>) + 110% of Adjusted Equity	90% of Annuities remaining unpaid with interest thereon up to Transfer
<i>Limit on Maximum Termination Payment, other liabilities: 85% of Total Project Cost</i>		

MCA/CA	Pre COD	Post COD
MCA - TOT for NH		
Concessionaire Default, Non-Political FM	Not Applicable	80% of unexpired cash flow
Authority Default, Political FM		105% of unexpired cash flow
Indirect Political FM		80% of unexpired cash flow less insurance cover
<i>Limit on Maximum Termination Payment, other liabilities: Not applicable</i>		
MCA - MMLPs		
Concessionaire Default, Non-Political FM	Milestone linked payments: <i>Pre First Milestone: Nil Thereafter: Lower of 20-60% of Debt Due or 70% of value of work done (with milestone based benchmarks)</i>	90% Debt Due less insurance cover
Authority Default, Political FM	100% Debt Due less insurance cover + 150% of Adjusted Equity	
Indirect Political FM	100% Debt Due less insurance cover + 110% of Adjusted Equity	
<i>Limit on Maximum Termination Payment: 80% of total project cost.</i>		
MCA - PPP in Major Ports		
Concessionaire Default, Non-Political FM	<i>First 30% of TPC: Nil</i> 90% Debt Due + 70% of Additional Termination Payment <i>Further, that in case of Concessionaire default no amount is payable for initial 30% of construction cost</i>	
Authority Default, Political FM	100% Debt Due + 150% of Adjusted Equity	
Other FM	80% Debt Due + 110% of Adjusted Equity	
<i>Limit on Maximum Termination Payment: Not Applicable</i>		
Greenfield Airports		
Concessionaire Default, Non-Political FM	First 40% of TPC: Nil Thereafter: 90% Debt Due less insurance cover	90% Debt Due less insurance cover
Authority Default, Political FM	100% Debt Due + 150% of Adjusted Equity	
Indirect Political FM	100% Debt Due less insurance cover + 110% of Adjusted Equity	
<i>Limit on Maximum Termination Payment: Such that Debt Due for purpose of calculation is in all cases less than 70% of total project cost and equity is only remaining portion of total project cost.</i>		

MCA/CA	Pre COD	Post COD
Brownfield Airports⁴⁰		
Concessionaire Default, Non-Political FM	70% Stipulated Payment (<i>linked to (i) depreciated value of regulated asset base and (ii) actual investments in non-aeronautical assets and city side or valuation of same by approved valuer whichever is lower</i>) less insurance cover	
Authority Default, Political FM	120% Stipulated Payment (<i>linked to (i) depreciated value of regulated asset base and (ii) actual investments in non-aeronautical assets and city side or valuation of same by approved valuer whichever is lower</i>) less insurance cover	
Indirect Political FM	100% Stipulated Payment (<i>linked to (i) depreciated value of regulated asset base and (ii) actual investments in non-aeronautical assets and city side or valuation of same by approved valuer whichever is lower</i>) less insurance cover	
<i>Limit on Maximum Termination Payment, other liabilities: Not Applicable</i>		

It may thus be seen that various models have used different formulations for payment of termination. The project debt is usually fully protected by the Authority in the event of termination, except when termination occurs as a result of default by the Concessionaire or in the event of non-political force majeure. The underlying principle for termination payment is such that it ensures - proportionality to capital investment undertaken, adjusted for (i) revenues already received and (ii) partial absorption of loss by Concessionaire in case of its own default or non-political force majeure.

Guidance: Most PPP projects involve use of public land or public infrastructure asset i.e. assets which are immovable or involve high sunk costs or which cannot be deployed to alternative use. At the same time non-availability of such infrastructure impacts public service obligations. The concession agreement for such PPP projects is required to provide for compulsory buy-out by the Authority with provision of investment linked termination payment in lieu of same. Similar principles are adopted in other projects which provide for compulsory buy-out viz. storage for food-grains for captive use by Authority. In other concessions, which do not involve a compulsory buy-out or upfront investment, revenue forgone for a stipulated period of time is provided as termination payment. Formulations of termination payments based on scenario of termination and model adopted for the project⁴¹, as followed in most prevalent MCAs/signed Cas, are given below:

BOT (Toll), DBFOT: Greenfield projects with upfront construction		
Concessionaire Default, Non-Political FM	<i>First 40% of TPC: Nil; Thereafter: 90% Debt Due less insurance cover</i>	<i>90% Debt Due less insurance cover</i>

⁴⁰Six airports bid out in 2019.

⁴¹These exclude Additional Termination Payments which have been discussed separately

Authority Default, Political FM	<i>100% Debt Due + 150% of Adjusted Equity</i>
Indirect Political FM	<i>100% Debt Due less insurance cover + 110% of Adjusted Equity</i>
TOT: Brownfield projects with upfront payment no construction	
Concessionaire Default, Non-Political FM, Indirect Political FM	<i>Payments linked to unexpired cash flow (usually 80%) less insurance cover</i>
Authority Default, Political FM	<i>Payments linked to unexpired cash flow (usually 110%) less insurance cover</i>
Annuity: Greenfield projects with annuity linked payments	
Concessionaire Default, Non-Political FM	<i>Pre COD: Milestone linked payments at 60-80% of Debt Due Post COD: 70% of Annuities remaining unpaid with interest</i>
Authority Default, Political FM	<i>Pre COD: Milestone linked payments at 60-80% of Debt Due + Adjusted Equity Post COD: Sum of Annuities remaining unpaid with interest</i>
Indirect Political FM	<i>Pre COD: Milestone linked payments at 60-80% of Debt Due Post COD: 90% of Annuities remaining unpaid with interest</i>
OMDA: Brownfield projects with upfront payment & construction	
Concessionaire Default, Non-Political FM	<i>70% of depreciated value of original asset +new investment</i>
Authority Default, Political FM	<i>120% of depreciated value of original asset +new investment</i>
Indirect Political FM	<i>100% of depreciated value of original asset +new investment</i>
OMT: Brownfield projects with no upfront payment & construction	
Concessionaire Default, Non-Political FM	<i>Nil</i>
Authority Default, Political FM	<i>Revenue equivalent of 6 months</i>
Indirect Political FM	<i>Revenue equivalent of 3 months</i>
<i>Further in all cases the maximum available termination payment should be linked to total project cost. This may be kept at around 85-100% of total project cost -increasing with increasing risk assumed under the project.</i>	

6.3.1. Additional Termination Payment

Additional Termination Payment is applicable in scenarios (i) where Non-Core project facilities or estate development is included or (ii) where mid-life augmentation or other such major investments have been undertaken, which is in addition to the original project cost and in a recent past prior to the date of termination⁴². In both these cases, when assets against such additional investments are transferred to the Authority, an additional payment in lieu of same, (over and above what has already been discussed) is provided. Such additional termination payment is applicable in case of all DBFOT/BOT based MCA/CAs. However, this is not included in case of HAM and TOT where obligation or incentive for incremental investment is limited. Conditions across Base MCAs/Signed CAs is as provided below:

Table 6: Comparison: of Additional Termination Payment

MCA/CA	Amount
MCA -BOT (Toll), MCA - HAM, MCA - TOT	Not Applicable
MCA - Major Ports	<p>Definition of Additional Termination Payment: Payment for Specified Assets which are constructed from 5th year of COD to 20th year. It is limited to the lowest of:</p> <ol style="list-style-type: none"> Adjusted Depreciated Value thereof; the replacement value thereof, as assessed by an Approved Valuer, who shall be selected and 40% of Total Project Cost. <p>Payment: Varies from 80-115% of Additional Termination Payment depending on scenario of default</p>
CA: Airports	<p>Definition of Additional Termination Payment: Payment for (i) Specified Assets which are constructed from 5th year of COD to 30th year and (ii) City side. For both, it is limited to the lowest of respective:</p> <ol style="list-style-type: none"> Adjusted Depreciated Value thereof; the replacement value thereof, as assessed by an Approved Valuer, who shall be selected and 40% of Total Project Cost plus Equity Support <p>Definition of Additional Termination Payment for Augmentation: Lowest of:</p> <ol style="list-style-type: none"> Adjusted Depreciated Value thereof; Capital cost approved lenders and Actual cost of augmentation <p>Payment: Varies from 70-115% of Additional Termination Payment depending on scenario of default</p>

⁴²Usually 5 years.

Additional termination payment is usually linked to depreciated value of investments undertaken or replacement value of such assets as assessed by a registered valuer as below:

Additional Termination Payment: Specified Assets & Non-Core	
Concessionaire Default, Non-Political FM	<i>70% of Stipulated Value; where Stipulated Value is lowest of (i) adjusted depreciated value of asset (ii) replacement value assessed by registered valuer and (iii) 40-50 % of Total Project Cost;</i>
Authority Default, Political FM	<i>115% of Stipulated Value; where Stipulated Value is lowest of (i) adjusted depreciated value of asset (ii) replacement value assessed by registered valuer and</i>
Indirect Political FM	<i>100% of Stipulated Value; where Stipulated Value is lowest of (i) adjusted depreciated value of asset (ii) replacement value assessed by registered valuer and</i>
Additional Termination Payment: For augmented component	
<i>It should be linked to debt due and equity against such augmented component and based on the same principles as applicable to termination payment. Also, definition of cost for augmented component should be on the principle of lowest of estimated, actual etc as ordinarily applicable to total project cost.</i>	

6.4. Performance Security

The intent, broad terms and formulation of Performance Security have already been discussed in Section 6.6. This section discusses the variation in amount of performance security, base parameter used for determining same, time-period before release etc. The amount is generally decided based on the scope of project, financial commitments and the amount of risk involved in performance of project scope which needs to be mitigated. Further, the timelines for release are linked to completion of significant project obligations. Stipulations across various Base MCAs/CAs is as produced below:

Table 7: Comparison: Performance Security across Base MCAs/CAs

MCA/CA	Level	Base Parameter	Benchmark For Release
MCA -BOT (Toll)	5%	Total Project Cost	Completion of 20% Project
MCA - HAM	15%	Bid Project Cost	One year from Appointed Date or Expenditure of 30% of Bid Project Cost, whichever is earlier
MCA - TOT for NH	10%	Threshold O&M Capacity ⁴³	For entire Concession Period
MCA - MMLPs	3%	Total Project Cost	6 months post COD

⁴³Defined as NPV of total O&M requirement over a period of 5 years such that it includes first year of major maintenance

MCA/CA	Level	Base Parameter	Benchmark For Release
MCA - PPP in Major Ports	3-10%	Total Project Cost	6 months post COD
SBD for ISTS through TBCB	3-5%	Total Project Cost	3 months post COD
PPP in Silos	5%	Total Project Cost	Completion of 20% Project
CA for Greenfield Airports ⁴⁴	2.5-5%	Total Project Cost	2 to 7 years post COD ⁴⁵

Performance Security for projects on BOT/DBFOT model is stipulated in the range of 2-10% of total estimated project cost. It is retained up till a few months post COD or up till completion of a pre-specified stage under project construction. The latter practice is followed in case of MCA for BOT & HAM of MoRTH, as also in case of Draft MCAs of Planning Commission. Where there is provision for the performance guarantee to be released prior to COD and after completion of Stage II/ III of project construction. such a practice enables cost and compliance savings to concessionaire – while at the same time ensuring availability of committed investment to the Authority.

In case of brownfield and annuity models this is linked to a percentage of annuity payment, threshold O&M capacity or annual estimated revenues. This is usually 10-15%. In such cases this is usually retained for the entire concession period. Where brownfield projects with upfront augmentation are concerned, it is combination of aforementioned practices i.e it is linked to a percentage of cost of initial phases – the same being released post completion of Phase I. And thereafter it is seen to be replaced with an annual percentage of gross revenues.

Guidance: As a principle, performance security in case of non-annuity based models, entailing upfront construction viz. BOT (Toll), DBFOT, OMDA etc, should be linked to total estimated project cost. Amount of performance security to be provided should be set at 3-10% of total estimated project cost. This threshold should be fixed in a manner that it sufficiently covers for risk of non-performance but at the same time enables cost efficiency for the Concessionaire. Differential thresholds for large and small value projects may therefore be considered – with the same being consistently adopted for all projects in the sector. This performance security may be released upon achievement of a construction milestone –generally 40-50% of total project cost – being thereafter replaced with deemed performance security equivalent 2-5% of total project cost.

In case of annuity-based projects and O&M based models viz. OMT, TOT etc, the same should be linked to annuity due or annual cost or revenue benchmarks. Threshold for same should be 10-15% and the same should be retained till a reasonable portion of concession period is expired.

⁴⁴Performance Security of Brownfield Airports has not been included here. The same is linked initially to completion of Phase I and thereafter to annual concession fee to be paid by concessionaire.

⁴⁵100 Crs performance guarantee for Navi Mumbai & Jewar valid till 7 and 2 years respectively post COD

6.5. Brownfield Model Specific Provisions

In addition to the common articles for PPP projects listed in *Table 4* above, CA/ MCA may also include standard model specific clauses i.e. clauses which are restricted only to a specific model, however, irrespective of the sector and project structure usually entail a standard drafting formulation. A few instances of such model-specific Articles or clauses within a broader Article along with description is as provided here.

It may be noted that this is not an exhaustive listing of clauses. The effort is only to provide an understanding on the types of provisions which may become critical depending on the type of asset being dealt with and the scope under the project for same.

6.5.1. Maintenance Obligations prior to AD/ COD

This is a standard Authority Obligation under all concessions dealing with an existing asset irrespective of the sector or scope. This pertains to obligations of Authority for maintaining the assets and facilities at its own cost and expense so as to retain it in a safe and working condition up till the complete hand-over to the Concessionaire. Depending on timelines under a concession when such handover happens, this may either be up till the Appointed Date (as in case of TOT) or the COD (as in case of brownfield airports) etc. Further, in cases of deterioration, repair works need to be undertaken at the cost of Authority either directly or to be undertaken by Concessionaire and thereafter refunded by Authority.

6.5.2. Other Authority Obligations under brownfield projects

In addition to above, multi-facility projects such as airports, logistic facilities, stations etc which deal with several ongoing contracts at a time or may need hand-holding support from Authority for successful transitioning entail following obligations under Authority obligations.

Table 8: Authority obligations under brownfield PPP projects

Article Head	Category	Description
Obligations of Authority	Obligations in respect of Existing Contracts	This clause pertains to ongoing contracts for operations, upgradation or maintenance of brownfield project assets. It provides for novation of contracts in favour of Concessionaire or for Concessionaire to act on behalf of Authority – by way of a power of attorney etc. in case of non-novated contracts. It lists the obligation of the Authority for compliance with the terms of existing contracts etc and for Concessionaire to undertake the same at its own cost and expense post AD.

Article Head	Category	Description
	Authority's Employees	This clause pertains to rights and obligations of Authority employees during transitional period or for the subsistence of concession, as the case may be. In certain instances, such as airports, there is provision for Authority employees to continue to be deployed at the project location after AD and thereafter provision continue on deputation with the concessionaire or relieved. It also enables the Concessionaire to repatriate select employees after a certain period of time under the concession

6.5.3. Other Standard Articles/ provisions under Brownfield PPP Projects

In addition to above, following articles/ provisions may be included on a case-to-case basis.

Table 9: Standard provisions under brownfield PPP projects

Article Head	Category	Description
Capacity Augmentation <i>(included in case of TOT, airport etc)</i>	Capacity Augmentation	This clause pertains to mid-life augmentation of capacity of project - due to congestion or otherwise on request of Authority. Depending on the model being adopted i.e. OMT or TOT vs OMDA etc the augmentation may be funded through Authority's resources or through Concessionaire's resources (with corresponding extension in concession period)
Site, Access & RoW	Additional Land for Augmentation <i>(included in case of airport etc)</i>	This clause pertains to provision of suitably located, sufficiently sized unencumbered land for mid-life augmentation of asset by the Authority to the Concessionaire.
Transitional Arrangement <i>(included in case of airport, stations etc)</i>	Transfer of Finances	These clauses pertain to transfer of all core and Non-Core assets included as part of project, along with the revenues, receipts, financial arrangement etc to the Concessionaire and joint management of such assets for a pre-specified period i.e. 60-90 days post COD.
	Transfer of Project Assets	
	Obligations of Authority during joint management	
	Obligations prior to COD	This clause provides for observations and inspection of assets by concessionaire for a pre-specified duration say 30 days prior to COD.

7. Sector Specific Provisions of MCA

7.1. What are Sector Specific Provisions

Sector specific provisions are those that vary based on statutory/regulatory requirements or operational/ market practices in a sector/ sub-sector. These include instances where:

- i. the parameters or methodology under a standard clause vary based on sectoral requirements such as in case of key performance indicators (KPI), user fee etc; or
- ii. where in some instances the inclusion of provision itself viz. reserved services in case of airports, is dependent on the sector/sub-sector for which the CA/MCA is being drafted.

The former category of provisions, i.e. *standard clause with sector-specific terms/ parameters*, is included in all CA/MCAs. The specific values/parameters are included based on sector/ sub-sector under consideration. As for the latter category, i.e. *sector specific clause*, these are only included in CA/MCA of that particular sector, although irrespective of the model and project structure and usually with a standard formulation.

7.2. Standard Clause with Sector-specific terms/parameters

7.2.1. Key Performance Indicators

Objective of Key Performance Indicators (KPIs) and the standard provisions thereunder have already been discussed under Section 6.15. This section deals with the sector/ sub-sector specific clauses, parameters for O&M performance and damages for shortfall thereof.

Since PPP projects are output based contracts, only the primary design criteria in terms of overall capacity, list of core project facilities etc is stipulated⁴⁶. All other aspects related to appropriateness & optimality of design, sufficiency of number/ capacity of individual project facilities, ease of use etc. as also the day-to-day service standards viz. processing time, availability etc is assessed in terms of performance criteria enumerated under the KPI provision. These parameters vary based on the sub-sector or facility being put up. Further, there may be variations based on criticality of usage i.e. whether the same is for exclusive usage by the Authority or for its agencies, a handful of large public/private sector agencies or public at large etc. The damages for shortfall may be pre-stipulated or be regulatory decided based on sector-specific regulations. The KPIs indicated across sectors and damages for shortfall, cure period is as provided below:

⁴⁶In some cases broad master plan may also be provided. The same has been discussed in Section [.]

Table 10: Comparison: Key Performance Security across Base MCAs/CAs

Sub-Sector/ Facility	Performance Indicators	Damages, Cure Period
MMLP	<ol style="list-style-type: none"> 1. Total turn-around time of freight/vessel 2. Crane rate, Elapsed crane time 3. Average Vehicle service time 4. Operational KPIs such as Warehouse space utilization, storage productivity and efficiency, Inventory accuracy etc 	<p><i>Damages:</i> 0.1% of total revenue in respective 6-month period for every shortfall of 10% in each KPI⁴⁷</p> <p><i>Cure period:</i> 90 days</p>
Ports	<ol style="list-style-type: none"> 1. Gross Berth Output 2. Transit Storage Dwell Time 3. Turn-around time for receipt/delivery operation 4. Availability of Cranes 	<p><i>Damages:</i> 0.5% of Royalty of respective quarter for every shortfall of 10% KPI; Overall shortfall in average performance assessed as aggregate of weighted shortfalls</p> <p><i>Cure period:</i> 90 days</p>
Power Transmission	<ol style="list-style-type: none"> 1. Availability 2. Reliability 3. Transmission Losses 	<p>Payment of transmission charges based on actual availability; <i>Show cause notice in case continuous shortfall for 6 months</i></p>
Airports	<ol style="list-style-type: none"> 1. Waiting time at check-in, immigration, security check etc for 95% of the time; 2. Time taken from aircraft to kerbside 3. Number of aircraft incursions 4. Response time to aircraft rescue and firefighting incidents 5. Availability of flight information display system, aerobridge, baggage delivery, baggage trolleys and percentage of passengers using aerobridge, time taken for baggage delivery; 6. Availability of parking bay, time taken at parking; 	<p>As guided under tariff determination guidelines of Airports Economic Regulatory Authority (AERA) i.e determined & adjusted on a periodic basis for tariff determination of major airports.</p> <p><i>Cure period:</i> 90 days</p>

⁴⁷MCA for Major Ports by MoPSW also provides for possibility of KPIs for Concession Authority. This may be a good practice for projects where Authority is the primary/captive user or where O&M of project facilities requires consistent support and intervention from the Authority.

Sub-Sector/ Facility	Performance Indicators	Damages, Cure Period
Storage of Food grains	1. Availability of storage capacity at pre-determined normative levels; 2. Losses of food grains	Cure period: 90 days

Also as part of the Article or as part of Schedules under the agreement, definition of parameters, methodology for measurement and thresholds to be met are provided. Other variations across Base MCAs/Signed CAs are as provided below:

1. Road MCAs: Road projects do not specify separate KPIs and the same is covered as part of maintenance specifications viz. roughness etc. and rectification time for potholes etc – with entailing provisions for damages in case of non-rectification in time.
2. Airports: Airport MCA/CA include conditions for operation of (i) terminal (ii) aeronautical assets (iii) cargo facilities pertaining to cleanliness, ambient conditions etc. It also includes a clause on target rating and user survey for customer feedback on experience and comparison of same with internationally accepted standards’
3. Passenger/ User Charter: CA/MCA of facilities such as airports, MMLP etc - which provide facilitation and experience-based services to a large or diversified set of individual or corporate customers – provide for a passenger/ user charter providing for principles of ease of use, convenience etc. The Concessionaire is required to adhere to such charter during the operations period and any shortfall may be suitably reported.

Guidance: Key Performance Indicators help to protect the public/ users of project from poor asset, service quality. Critical performance aspects – which impact the cost and time efficiency of service should therefore be included as part of such KPIs along with provision for damages in case of performance shortfall. Both the indicator for performance as well as threshold value for monitoring performance on same should be based on industry benchmarks along with inputs from experts, technical consultants. Periodicity of monitoring should generally be quarterly or half-yearly. Damages for shortfall should be linked to periodic payments which should be additionally levied or reduced from such payments, as the case may be. This is usually 0.1-0.5% of periodic payments for a period of observation.

Further, standard provisions for availability of equipment, cleanliness, hygiene etc. should be included along with provisions for complaints, monitoring and penalties for non-compliance. The objective should be to stipulate all, but only, critical and necessary KPIs – so as to ensure targeted asset and service quality but without burdening the Concessionaire with unnecessary/ impracticable compliances.

7.3. Sector-specific Articles /Clause

In addition to the common articles for PPP projects listed under Table 4 above, CA/ MCA

may also include standard sector specific clauses or articles i.e. those which are restricted only to a specific sub-sector/sector; and irrespective of the model and project structure usually entail a standard drafting formulation. A few instances of such sector-specific Articles or clauses within a broader Article along with description is as provided here.

It may be noted that this is not an exhaustive listing of sectors or the clauses therein. The effort is only to provide an understanding on the types of provisions which are critical and/or are usually followed for safe, compliant and efficient construction and operations of projects. Or those which may sometimes be necessary as a guidance based on which the Concessionaire can undertake the project without adversely impacting unrelated aspects.

7.3.1. Sector Specific Articles for O&M

These are the independent Articles included in sector-specific MCA/signed CAa – for the purpose of critical and specialised requirements thereunder. These usually entail a standard formulation

Table 11: Sector Specific Articles for O&M

Article Head	Category	Description
Airports	Reserved Services	This Article pertains to services forming part of integrated airport operations which, however, are to be undertaken by the Authority pertaining to CNS/ ATM, security, customs etc This Article lists out the provisions for effective management of these services and co-ordination between Authority and Concessionaire for seamless operation, upgradation etc as necessary.
	Operation of Aeronautical Assets	This Article pertains to obligations for operation of Aeronautical Assets in accordance with the Specifications and Standards. These include specific provisions for ground handling services, aircraft fuelling etc.
	Operation of Terminal, Cargo Facilities etc	This Article pertains to obligations for operation of terminal and cargo facilities which are critical elements of airports projects.
MMLP	Security ⁴⁸	This clause lists the obligation for security of MMLP from terrorism, hazard etc at the cost and expense of Concessionaire. This is necessary in absence of any regulatory practice or Authority obligations for provision of same.

⁴⁸This is a specific clause for Security in MMLP projects where a regulated structure for security of such large-scale facility is not available. Nevertheless in view of the same being of critical importance it is included with clearly spelt out requirements in regard to same. The MCA for MMLP also includes an Article on Technological Upgradations and modification required on same. However, it is not a sector specific clause and can be a standard requirement in various sectors. For which standard provisions should be applied or modified as necessary.

7.3.2. Sector Specific Clauses for Concessionaire Obligations

These are the sector specific clauses included within the standard Article for Concessionaire Obligations under an MCA/CA. These usually entail a standard formulation.

Table 12: Sector Specific Concessionaire Obligations under PPP projects

Article Head	Category	Description
Roads	Facilities for physically challenged and elderly persons	This clause mandates a barrier free environment for the physically or visually challenged and for elderly persons using the highway.
	Medical Aid & Police Assistance	These pertain to mandatory provisions for medical aid and police assistance on highways and obligations of Concessionaire for same.
Airports	DGCA License	This clause stipulates obtention of necessary licenses and permits for operation of aeronautical services and compliance with conditions on a continuous basis throughout the concession period. This also enables support from the Authority after the airport is constructed (or if it operational) and is the concessionaire complies with necessary statutory and regulatory conditions
	Non-Discriminatory Access	This clause stipulates mandatory provision of non-discriminatory access to airlines, users, ancillary service providers etc.
	Security Clearance	This clause stipulates obtention of security clearances for contractor, sub-contractors etc by designated government agency.
	Slot Allocation Guidelines	This clause stipulates compliance with ministry's guidelines for slot allocation (2011) to air services on a non-discriminatory basis.
	Aesthetic Quality & Noise Control	This clause stipulates necessary obligations for controlling and mitigating the impact of noise on surrounding areas, integration of design with surrounding landscape, sensitive management of visible elements, engagement of professional architects etc.

7.3.3. Sector-Specific Clauses for Authority Obligations

These are the sector specific clauses included within the standard Article for Authority Obligations under an MCA/CA. These usually entail a standard formulation.

Table 13: Sector Specific Authority Obligations under PPP projects

Article Head	Category	Description
Roads	Connectivity to Rail, Road and port/ airport	This clause stipulates Authority obligations for providing traffic worthy 4 lane road, railway siding and any other necessary connectivity infrastructure within a stipulated period from Appointed Date for facilitating construction and operations of project by concessionaire.
Airports	Reserved Services	This clause pertains to Authority rights and obligations for provision of reserved aeronautical services, navigation, security etc at the airport.

8. Provisions Based on Combination of Sector and Model

8.1. Change in Ownership

Restriction on change in ownership is included as part of Concessionaire obligations and representations under the terms of the agreement. Despite using a standard drafting format across both the Articles in all Base MCAs/Signed CAs (*as discussed under Chapter 6*) Lock-in Period under the clause is seen to vary across Base MCA/CAs.

Lock-in Period is the period for which minimum ownership of 51% paid-up equity share capital of the Concessionaire is stipulated to be with the selected bidder: along with compliance of certain other conditions constituting the Change in Ownership as discussed in Section 9.1.1. This is important for ensuring continued availability of necessary technical capability and financial resources - on the basis of which the project was originally awarded and - which is critical to timely and quality completion of project. However, the period for such lock-in needs to be prudentially decided considering various aspects such as (i) availability of sufficient time for demonstrating of asset quality and performance considering the seasonality and cyclicity in O&M (ii) flexibility to the Concessionaire for speedier exit from completed project so as to invest in other infrastructure projects etc. Lock-in-period in various Base MCAs/Signed CAs is as provided below:

Table 14: Comparison: Lock-in Period across Base MCAs/CAs

MCA/CA	Lock-In Period ⁴⁹
MCA -BOT (Toll)	2 years Post COD
MCA - HAM	2 years Post COD
MCA - TOT for NH	2 years from Appointed Date
MCA - MMLPs	6 months Post COD
MCA - PPP in Major Ports	1 year Post COD
SBD for ISTS through TBCB	2 years Post COD
CA for Brownfield Airports	5 years Post COD ⁵⁰
CA for Greenfield Airports	7 years Post COD ⁵¹

⁴⁹As captured under representation and warranties, definitions, based on terms and conditions under the RFQ

⁵⁰Brownfield concessions of 6 airports recently bid out in 2019

⁵¹Navi Mumbai & Jewar airport

Guidance: Lock-in period has been significantly reduced in recent years to ensure easier exit norms and enhanced flexibility in investor participation. In cases of projects involving upfront construction or augmentation such lock-in period is stipulated from the date of commissioning i.e. COD. In other projects involving only operations & maintenance such as OMT, TOT or those involving augmentation at a later date such lock-in is from the date of successful handover of the project to the Concessionaire (COD/ Appointed Date).

A lock-in period of one year post COD may be considered suitable for models with lower construction or financing risk such as annuity, hybrid annuity, operate maintain transfer, toll operate transfer⁵². Further, this may be considered suitable in BOT/ DBFOT/OMD models of simpler and mature sectors such as roads or where standard norms for assessing quality of asset and for enforcing compliance exist. For other newer sectors or complex projects, where exhaustive norms for quality & maintenance of asset are unavailable or subject to a multitude of factors, lock-in period of two years post COD may be ideal.

8.1.1. Additional Conditions for Change in Ownership

In addition to the majority ownership or 51% rule, additional conditions constituting Change in Ownership may be included under a concession agreement. These include (i) minimum shareholding in the Concessionaire by participating consortium members who have been evaluated for the purpose of bid process (ii) acquisition of an aggregate percentage of paid-up share capital by an acquirer directly/indirectly etc.

Inclusion of minimum shareholding by participating consortium members is based on whether the same was stipulated as part of bid documents and is therefore a condition of award or in cases where a specific expertise for the project is provided by the participating consortium member - which was also evaluated for the purpose of award - and is therefore a pre-requisite for successful performance under the project.

Stipulation pertaining to 15/25% aggregate acquisition by a single acquirer directly/indirectly is relevant from the perspective of non-monopolistic practices, security, foreign investment norms etc and is stipulated accordingly.

Guidance: From the perspective of security, competition etc, minimum change of 25% aggregate equity holding may suitably be considered as the trigger for change in ownership under PPP MCAs. Further, continued participation of a consortium member up till lock-in period should only be stipulated where technical or financial expertise of such member is critical for the project and has accordingly been stipulated under the tender process.

8.2. Conditions Precedent

Key pre-conditions to be satisfied by respective parties for declaration of appointed date i.e. Conditions Precedent have been introduced in this Guidebook under Section 6.2. Fulfilment of respective conditions, by the Authority and Concessionaire, is critical for applicability of rights and obligations under this agreement. Listing of these

⁵²Without entailing augmentation etc.

conditions under an MCA/CA can broadly be determined based on a combination of factors primarily the model and sector under consideration. Variation across Base MCAs/Signed CAs is as below:

Table 15: Conditions Precedent under Base MCAs/CAs

Authority CPs	
Standard CPs	
1. Right of Way to the Site	
Model specific CPs	
Applicable in case of DBFOT & HAM	Applicable Permits relating to environmental protection, forest clearance etc. for [90%] of land
Sector Specific CPs under DBFOT	
Roads	1. Approval of railways and other statutory authorities for general arrangement drawing/alignment 2. Issuance of fee notification
Ports, Airport, MMLP	1. Access to [85-90%] of encumbrance free land required for Project 2. License of Project Site and any existing assets (<i>if applicable</i>)
Sector Specific CPs under TOT, HAM	
Ports, Airport, MMLP	1. License / lease of existing assets 2. Novation of existing contracts along with power of attorney (<i>if applicable</i>)
Concessionaire CPs	
Standard CPs	
1. Provision of Performance Security 2. Execution of Escrow Agreement 3. Receipt and/or validity of permits which are attributable to the concessionaire 4. Confirmation of Representations and Warranties 5. Legal Opinion on execution of CA	
Model specific CPs	
Applicable in case of DBFOT & HAM	1. Execution of Financing Agreements ⁵³ 2. Execution of substitution agreement
Applicable for TOT, OMT	Execution and provision of O&M agreement

⁵³MCA for TOT includes execution of financing agreements as a CP whereas that of HAM does not include. Given the issues in financial closure of HAM projects in last few years it may be appropriate to include the same as CP. On the other hand, payments in TOT are upfronted and linking to debt etc is not done. Therefore need for financing agreements may not be as necessary thereunder.

Critical project specific CPs – whether for fulfilment by Authority or by the Concessionaire – are also included in MCAs on a case-to-case basis. For instance, change of land use has been included as CP by Authority in MCA for MMLP and execution of CNS-ATM agreement has been included as CP under agreement for PPP in brownfield airports.

Guidance: Standard CPs based on above guidance may be suitably included in the project. Additional project specific CPs may also be included, where non-availability of same obstructs smooth initiation/implementation of project. However, a fine balance between critical stipulations for bankability, off-take etc vs manageability and timely roll-out is ensured. Further, for both standard as well as projects specific CPs it must be ensured that these are appropriately mapped to the party who is best suited to absorb such risk.

8.3. Obligations for Competing Facility

In case of core infrastructure sectors such as public transportation projects etc. where (i) exclusive usage of a proposed facility under PPP cannot be undertaken/mandated by the Authority (statutorily, regulatorily or otherwise) and (ii) the model being used allocates partial/full traffic risk to the Concessionaire, obligations related to competing facility are built-in. The provision mandates non-commissioning of a new similar facility by the Authority within a defined catchment area and a for a defined period of time. This ensures protection of financial and economic viability of the concession. For the various Base MCAs/CAs concerned provision for competing facility has been included in:

Table 16: Competing Facility under Base MCAs/CAs

MCA/CA	Tenure for which restriction is applicable	Penalty for breach
MCA -BOT (Toll)	Up till 10 th year of concession or any year when traffic is more than 90% traffic	Difference between average daily fee and projected daily fee till the breach is cured
MCA - TOT for NH	During the tenure of the concession or 3 consecutive years of more than 90% traffic	Difference between average daily fee and projected daily fee till the breach is cured
MCA - MMLPs	Up till 10 th year of concession and within a distance of 100 km	Extension of concession period to make good the loss
MCA - PPP in Major Ports	Up till 5 th year of concession or 2 consecutive years of more than 70% traffic	NA

The provision has not been included in case of projects (i) based on Annuity mode such as HAM, ISTS based on TBCB etc or (ii) where mandated off-take is guaranteed by the Authority as in case of PPP for storage of food grains or (iii) where such restrictions are regulatorily imposed and/or tariff is regulatorily determined as in case of airports.

Guidance: *Obligation for no competing facility helps to partially mitigate market/ traffic risk in a project, thereby enabling higher investor appetite, bankability etc. This provision should ideally be included in case of infrastructure projects satisfying following conditions:*

- (i) involving upfront investment for construction. augmentation*
- (ii) projects based on non-annuity models; and*
- (iii) where the risk of traffic or revenue has not been addressed through an alternative mechanism such as regulatory restriction, cost plus tariff determination, guaranteed off take by Authority etc.*

Damages in such cases can be suitably linked to difference between average daily fee and projected daily fee till the breach is cured

9. Project Specific Provisions of MCA

9.1. What are Project Specific Provisions

Project Specific Provisions are those that vary based on scope, commercial terms, bid parameters etc of the project. These are the *foundational elements of project definition and structure* – in turn decided based on asset and service objective of the project, sectoral or regulatory principles, risk-sharing mechanism, commercial terms viz. costs, revenue, payments to Authority/private party, principles for windfall or traffic shortfall and others.

A project structure is only as robust as well formulated under the terms of the concession agreement. Project Specific provisions are the core of the project structure. And hence need to be laid out clearly, based on well-defined terms and objective parameters, comprehensively discussing various potential scenarios that may emerge from exercise of rights and obligations under the concession agreement. However, given the variety of project structures possible, coupled with the sectoral/ asset-based variation within same, standardisation of these provisions or detailed formulation guidance is impractical. The following chapter therefore lists out the objective, principles and possible decision factors for such provisions.

9.2. Scope of the Project

The Article defines the scope of activities and primary deliverables under the concession. Where applicable, it also includes the scope for additional/Non-Core facilities or refers to articles detailing such provisions.

- For projects requiring both construction and operations viz. those under DBFOT, BOT (Annuity)/ HAM, OMD etc, this provision stipulates construction/ augmentation, procurement and O&M of specified core infrastructure/facility with details thereof. Provision of other related core services are stipulated along with (where necessary). In other models requiring only O&M such as TOT, OMT etc operations and maintenance of specified core infrastructure/facility is included.
- Development and operations of other non-core/ancillary facilities such as city side, port-estate, agro-estate, special economic zone etc. are also included as part of this Article in projects where the same is envisaged. Principles for inclusion of such Non-Core facilities as part of project structure and prudential aspects for formulation of clauses for same is discussed in Section 10.3.
- In some cases development of core infrastructure/ facility may be allowed in phases such as in case of ports, airports etc. In such cases, the provision for phased development is included as part of the scope and detailed phase-wise development with timelines is captured as part of Schedules. Similarly for Non-Core development,

broad terms for phase-wise expansion (where necessary) are included as part of this Article and detailed terms are included a spart of Schedule.

- As a practice, basic details such as capacity, location etc are included as part of provisions under the Article. However, detailed list of project facilities, respective specifications and standards and other integral aspects of project description are included as part of separate schedules. It may therefore be noted that clarity, comprehensiveness and specificity of Schedules is as important as the primary Article itself.

9.3. Non-Core Development

Inclusion of Non-Core or estate development in PPP projects is considered primarily from two perspectives. The first is need for synergistic, larger scale development of the area under consideration, especially where the off-take or traffic of the core PPP project will be impacted by availability of such non-core facilities viz. city side in case of airports or railways stations. The other factor is potential for incremental revenue generation from such non-core development – in turn enhancing the overall viability or reducing risk perception of the project. The decision to club such development within the PPP project design – and thereafter the scope, rights, obligations etc. thereunder - should hence vary based on:

1. **Nature of the project:** For instance, if it is a hub transportation or logistics facility which aggregates traffic from multiple areas, it may benefit from facilitating Non-Core services viz. hotels for tourists, office space for logistic providers etc. Non-Core/ estate development in such cases is usually included. On the other hand, for an end-to-end utility facility such as power transmission or water pipelines etc. scenario or non-core Non-Core facilities is less apparent.
2. **Cross-subsidisation:** Off-take of non-core development may emerge from both core facility users as well as from external users. It therefore has the potential to smoothen traffic and revenue uncertainty of core facility. Also, the charges for use of non-core development will in most cases be market determined and not regulated. It, hence, provides scope for cross-subsidisation - in turn enhanced viability or reduced risk perception. However, the need and extent for such risk mitigation or cross-subsidisation will vary from project to project or case to case and should be decided accordingly. For instance, projects which suffer from higher traffic uncertainty such as airports in Tier II cities may benefit more from cross-subsidisation through such city side development and can include scope and rights accordingly. On the other hand, airports in regional metropolitan cities may be commercially sustainable from a traffic perspective but will warrant inclusion from facilitation perspective (as in # 1 above).

9.3.1. Prudential terms for inclusion of Non-Core Development

Certain non-core services viz. retail outlets etc may also be included as part of master plan for primary infrastructure such as in case of railway stations, airports etc.

However, these are different from Non-Core Development (as captured under this Section and separately defined under the provisions of CA/MCA) in the sense that there are no separately defined obligations or rights for same. Non-Core Development have specifically defined rights and obligations – and may also be exempted from compliance of certain stipulations under concession agreement viz. security clearance restrictions under MCA for airports, MMLP.

1. Non-Core Development is usually undertaken on a separately identifiable area or plot of land – which is included as part of overall land for the project. Land for same is provided by the Authority including ROW stipulations etc.
2. Restrictions in terms of overall built-up area, land etc (as percentage of that of core infrastructure) is stipulated; Indicative list of facilities that are envisaged as part of such development is provided. However, development is primarily restricted through a negative list (where necessary).
3. Sub-licensing/sub-leasing rights are provided subject to conditions on overall term of such sub-license etc;
4. Eligible set of users and pricing mechanisms for such non-core development are generally based on industry standards and market principles. Restrictions are, however, included to prevent lop-sided benefits from such development – which do not de-risk or cross-subsidise the primary project. These restrictions will be in terms of eligible modes or phasing of payment, sale rights etc.

***Guidance:** City side or estate development should ideally be included in projects where it is synergistic with the primary project component. The extent of area, commercialisation etc. depends on both the extent of viability support required and consistency with the project objects. Where included, a fine balance between regulated end-use and revenue maximization potential must be ensured. Revenues from such development should be captured in a manner that it appropriately and robustly cross-subsidises the primary project -while at the same time enables sharing of windfall profits with the Authority. At end of concession or termination, these assets should ideally be handed back to the Authority with payments in form of Additional Termination Payment.*

9.4. Grant of Concession

The Article for ‘Grant of Concession’ lists out the overall rights and obligations of the Concessionaire under the project along with the (i) primary tenure of such rights (ii) conditions, period of renewal or extension, if any (iii) rights for Non-Core Development and primary conditions for same (iv) obligations for augmentation during the tenure of the concession, conditions for waiver etc. Key project elements included in this article are (i) concession period (ii) extension and (iii) augmentation obligations. These are discussed hereunder. The aspect of Non-Core Development has already been discussed as part of Section 10.3.

9.4.1. Concession Period

The concession period is the period starting on/ from the appointed date and ending on the date of transfer of the asset to the Authority. It includes the construction period wherever construction/procurement or augmentation of facility is required and thereafter the operations and service period. Broadly it is the tenure for which the rights under a concession are available to the private party for exercise (subject to fulfilments of terms and conditions thereunder).

While generally 20 years or longer, there is no fixed norm for concession period of infrastructure projects. It is combinedly derived on the basis (i) economic life of existing or proposed infrastructure facility (ii) upfront as well as periodic investments required under the project and thereby the minimum period for ensuring viability or return on investments. Concession period across Base MCAs/CAs is as below:

Table 17: Concession Period across Base MCAs/CAs

MCA/CA	Concession Period
MCA -BOT (Toll)	20 years
MCA - HAM	16.5 years
MCA - TOT for NH	30 years
MCA - MMLPs	45 years
MCA - PPP in Major Ports	30 years ~ single-phase investment; 45 years ~ multi-phase investment
SBD for ISTS through TBCB	35 years
PPP in Storage of Food grains	25 years
CA for Brownfield Airports	30-50 ⁵⁴ years
CA for Greenfield Airports	30-40 ⁵⁵ years

Guidance: A good principle for arriving at concession period would be that the concession should get just enough time that would justify a natural business case for the asset and there is adequate time for commercial recovery of the project. Where no upfront investment is required for the project such as OMT or TOT of Highways etc – it should ideally be linked to the balance economic life of the project.

Aspects such as cross-subsidisation using real estate, or unexpected price or market fluctuation may necessitate relatively longer concession periods for smoothing out such fluctuations. These should however be considered, subject to technical/ regulatory feasibility and a mandatory provision for capturing windfall gains – as and when they occur.

⁵⁴Based on OMDA concessions for Delhi, Mumbai and six airports bid out in 2019

⁵⁵Based on concessions for Bengaluru, Hyderabad, Navi Mumbai, MOPA, Bhogapuram, Jewar

9.4.2. Extension of Concession Period

Extension of concession period is a fixed, pre-specified increase in original tenure of concession⁵⁶, which where applicable, is to be mandatorily specified under the terms of concession including the terms and conditions applicable for same. Decision to include/ exclude such provision depends on obligation for incremental capital investment (usually over 20-25% of original project cost) during later stages of a project – whether on account of augmentation requirements or otherwise. However, inclusion of such extensions may be less useful and more cumbersome in models such as annuity/ hybrid annuity etc. where a clear payment structure based on upfront investments has already been indicated and rights for revenue collection are either not available with the private party or are structured as per a watertight schedule.

The tenure of such extension will be based on the timing and extent of capital investment required to ensure a reasonable time period for recouping of investments made. In most cases, it is for an additional period of 10-15 years⁵⁷. Where such extension is built-in without linking the same with incremental investment, it must provide for a bid-process to discover the value of such additional rights with a right of first refusal (ROFR) to existing concessionaire⁵⁸. Further, such extension is subject to no default, compliance with KPIs as required; and in some cases such as airports third party certification for a minimum level performance. Terms of extension across Base MCAs/CAs is as below:

Table 18: Concession Period Extension across Base MCAs/CAs

MCA/CA	Concession Period
MCA -BOT (Toll)	Not Applicable (No augmentation)
MCA - HAM	Not Applicable (No augmentation)
MCA - TOT for NH	Not Applicable (No augmentation)
MCA - PPP in Major Ports	Applicable (<i>Maximum period is not pre-specified and is subject to an international competitive bid process</i>)
SBD for ISTS through TBCB	Not Applicable (No augmentation)
PPP in Storage of Food grains	10 years (<i>Linked to augmentation</i>)
CA for Brownfield Airports	30 years (<i>In case of Delhi & Mumbai, Nil in six airports bid out in 2019</i>)
CA for Greenfield Airports	10-30 years (<i>Linked to augmentation and/ or bid process & ROFR</i>)

⁵⁶This extension is different from extension in regular course of concession due to delays, variation in traffic etc which has been discussed separately; MMLP MCA has a provision for extension of concession period by 10 years which is a general capping of extensions due to delays, Authority default in providing rail connectivity, revenue loss etc.

⁵⁷Over an original concession period of 30-45 years

⁵⁸In case of MCA for Major Ports, where extension has been granted without an additional investment/ augmentation, the same is subject to a bid-process with ROFR to existing concessionaire.

9.4.3. Overall cap for extension related to defaults delays etc

Some MCAs, such as the MCA on MMLP, stipulate an overall cap on various possible extensions in concession period which are available as a respite against defaults, delays attributable to Authority or other contingencies. Such time limit helps to keep the end to end concession period in control, and is especially handy when such extensions can impeded critical timelines for augmentation etc. Although the ideal first step is to avoid defaults and delays but to cater to unforeseen circumstances, an overall cap on such extension may be included where considered prudential. The maximum time limit will be based on various possible scenarios of such extensions allowed and time-limits thereunder. It should, however, be more than 10-15% of overall concession period.

***Guidance:** Provision for extension of concession period⁵⁹ is usually included under BOT/DBFOT based models where augmentation is mandated or expected. This is to allow for recouping of incremental capital investments during later stages of project. Where such extension is required to be built-in without any mandate for augmentation or linkage with incremental investment, it must provide for a bid-process to discover the value of such additional rights, which in turn should be backed by an ROFR to existing concessionaire.*

Tenure of such extension should be pre-fixed, linked to quantum of incremental capital investments mandated. Extensions – without incremental obligations – should ideally be avoided and be used only where such provisions are necessary due to sectoral constraints or as interim measures. Conditions and terms of extension should be clearly specified as part of this Article.

9.5. Augmentation

Ideally, the original concession period in a project is decided based on expected life of planned capacity for the project. However, given the uncertainty in traffic patterns, need for expansion or augmentation may arise prior to the end of such concession. In such a case, augmentation may need to be undertaken by the Concessionaire under the existing terms of the concession - backed by an elongation in concession period. For exercise of such provisions, the Concessionaire is required to evaluate the need or possibility of expansion and, if interested, submit its willingness to Authority for undertaking the same under the existing terms of concession. This is to be undertaken at a pre-stipulated time before the end of the concession i.e Scheduled Augmentation Date (usually when 70-80% of the concession life has elapsed).

In alternative cases, where such increase in traffic is likely before the end of the concession period, start of augmentation is mandated to be undertaken by Scheduled Augmentation Date with a pre-stipulated extension in concession period. However, if the Concessionaire decides not to undertake the same, it may communicate the same to the Authority. In which case the mandatory requirement for augmentation can be waived off by the Authority, however, subject to a reduced concession period.

⁵⁹Excluding those in regular course of concession due to defaults, variation in traffic etc.

Flexibility for undertaking such augmentation should therefore be built into concession to avoid unforeseen saturation of capacity prior to completion of concession.

9.6. Obligations of Concessionaire

The obligations of the Concessionaire under a MCA/CA are a mix of standard, sector-specific and project-specific conditions.

9.6.1. Project-specific obligations of Concessionaire:

Project specific obligations are the core asset and service-related obligations. These include

- A. Standard conditions for fulfilling project scope which are usually consistent across all MCA/CAs such as:
 - (i) Design, engineering, construction of project assets (wherever stipulated) and operations & maintenance, provision of core services at Concessionaire's own cost and expense;
 - (ii) (a) Procurement of Applicable Permits (b) compliance with applicable laws & permits by Concessionaire as well as its contractor/sub-contractors (c) procurement of proprietary licenses, compliance with regulatory and statutory conditions (d) compliance with terms of financing agreements, project agreements etc and to extent applicable tendering conditions (e) pay all taxes, levies, duties, cesses and all other statutory charges, dues, assessments⁶⁰ (f) following of good industry practices, harmonious relationships (g) transfer of assets back to the authority etc.
- B. Specific conditions related to the asset/ service under consideration – which may vary from project to project - such as:
 - (i) procurement of utilities viz. power, water etc. during operations period and where mandated during development period as well;
 - (ii) provision of non-discriminatory access to all category of users in case of non-captive infrastructure/facility;
 - (iii) augmentation and expansion of core facilities inside the project⁶¹, alterations to building, upgradation of equipment etc as necessary from time to time; support and assistance to Authority where it undertakes augmentations at its own cost as per the provisions of the MCA/CA;
 - (iv) maintenance of connecting infrastructure (if included, whether provided by the Authority or otherwise) etc at its own cost by the concessionaire such as rail connectivity and terminal in case of MMLP projects;

⁶⁰This is not included where the core infrastructure and/or service is exempt cess, taxes etc under extant

⁶¹Applicable in case of projects such as airports, stations, or logistic parks where some augmentation or expansion happens on a recurrent basis – generally without increase in overall project capacity;

- (v) receipt of security clearance; provision of security arrangements in cases where facility is a specialised building/structure; provision of medical aid etc; noise control etc

9.6.2. Sector specific obligations of Concessionaire

In addition to project specific obligations, there are critical sector specific obligations which are included under all MCA/CA dealing with a particular sector. These sector specific clauses usually entail a standard formulation. Instances of these include (i) obligations relating to non-discriminatory access in most infrastructure meant for public use (ii) sector specific licenses/permits e.g. DGCA license for airports etc. (iii) commitment on benchmark availability, reliability as in case of transmission projects or normative availability as in case ports and silos projects (iv) support to Authority or government agencies for provision of restricted or reserved services as in case of airports (v) obligations pertaining to Authority employees in case of brownfield projects where some Authority employees are deputed for supporting the concessionaire in its performance of obligations - either for an interim period or for elongated duration – such as in case of brownfield airports (vi) obligations for aesthetic quality where the project involves buildings/structures/complexes and/or involve public facing infrastructure (vii) facilities for elderly persons under MCAs for transportation projects such as highways, airports etc. Some of these provisions have already been discussed under Section 8.3.

In case of MCA for MMLP project, obligation relating to competition has also been included wherein the concessionaire undertakes not to exercise more than 25% market share in the business in a catchment area (within a radius of 100 kms) directly or through associates and group concerns. Ideally, such issues should be addressed through sectoral/ regulatory policy. However, where such regulatory restrictions appear infeasible inclusion of such a clause can be considered on a project specific basis⁶².

9.6.3. Standard contractual obligations across all Base MCAs/CAs:

Other obligations included as part of this Article are standard contractual obligations pertaining to procurement, manpower management, project agreements etc which are common across all Base MCAs/Signed CAs. These include

1. Obligations related to Change in Ownership
2. Obligations related to Project Agreements
3. Sole purpose of Concessionaire
4. Obligations related to engagement of foreign nationals and trained personnel,
5. Obligation relating to procurement of equipment and/or goods, services⁶³
6. Branding etc

⁶²Principle for inclusion of such a clause need to be deliberated and suitably modified

⁶³Not included in MCAs for roads

These have already been discussed in chapters above.

In addition to these, recent MCAs have included a few standard provisions on sustainability, rainwater harvesting use of solar energy etc. The same can be included, however, without being too prescriptive or intrusive⁶⁴.

***Guidance:** Stipulations under the article must ensure a fine balance between exhaustiveness of checks by the Authority and manageability of the contract for the Concessionaire. Non-critical stipulations which have already been covered elsewhere in the agreement or those which do not serve a defined statutory, regulatory, public objective must be avoided. At the same time, critical project and sector specific obligations, non-compliance of which may adversely impact the performance of the asset, service quality, user experience or result in statutory/regulatory violations must be explicitly covered as part of this Article.*

9.7. Obligations of Authority

The obligations of the Authority are a mix of project-specific, model-specific, sector-specific and standard conditions.

9.7.1. Project specific Obligations of Authority

Project specific obligations are those that pertain to core asset and service or otherwise to integrated functioning of overall project. These include

- A. Standard obligations for fulfilling project scope which are usually consistent across all MCA/CAs such as:
 - (i) provision of right of way, access to site and encumbrance free land (wherever applicable) (ii) support in procurement of Applicable Permits, environmental protection and forest clearance in compliance with applicable laws where applicable⁶⁵ (iii) reasonable assistance in obtaining access to necessary infrastructure facilities and utilities (iv) support in implementation and operation of project including no barriers, no local toll tax be imposed maintenance of security at project site etc.
- B. Project specific obligations which vary from case to case such as:
 - (i) Payment of property tax (ii) Conversion of land use in case of projects for MMLP

9.7.2. Sector specific obligations of Authority

In addition to project specific obligations, there are sector specific obligations which are included under all MCA/CA dealing with a particular sector. These sector specific clauses usually entail a standard formulation. Instances of these include (i) Obligations relating to reserved services in case of CA for airports and (ii) connectivity infrastructure provision such as connectivity to rail, road, port, airport etc under MCA for MMLP or

⁶⁴Included in MCA for MMLP

⁶⁵Environmental and forest clearance is not included as an Authority obligation where the same is provided as CP by the Authority or where the same is not required since no additional construction is envisaged as in case of TOT. It is included where design, construction etc are within the domain of the Concessionaire as in case of airports etc and depending on such master plan, support is provided by Authority for environmental and forest clearance.

transmission infrastructure in case of power generation projects (iii) provision of as-is built drawings of airports, nomination of concessionaire as beneficiary in ongoing procurement and maintenance contracts for equipment etc. in case of brownfield airports. Some of these provisions have already been discussed under Section 8.3.

9.7.3. Standard Authority obligations in case of brownfield projects

1. In case of brownfield models such as TOT, OMDA, OMT etc which involve an existing project, as also in case of road projects which involve four-laning or six-laning (i.e. a road already exists), maintenance obligations prior to appointed date are included. This provision has been discussed under Section 7.5.1.
2. Similarly in case of brownfield projects which involve assets with multiple ongoing operations and expansion contracts or works in progress such as airports, railway stations etc. Authority obligations for novation of same in favour of the Concessionaire and related aspects are included. This provision has broadly been discussed under Section 7.5.1.
3. In case of brownfield assets where some Authority employees are deputed for supporting the concessionaire in its performance of obligations - either for an interim period or for elongated duration - such as in case of brownfield airports - Authority obligations pertaining to same are also included. This provision has broadly been discussed under Section 7.5.1.

9.7.4. Standard contractual Obligations across Base MCAs/CAs

Other obligations included as part of this Article are standard contractual obligations pertaining to competing facility and refinancing etc which are common across all Base MCAs/Signed CAs. These include:

1. Obligations related to Competent Facility
2. Obligations related to Refinancing

These have already been discussed in chapters above.

***Guidance:** Authority Obligations should include standard project specific and contractual provisions. In addition to these, specific support required from the Authority (if any) – whether pertaining to the sector under consideration, the project or the model - should be explicitly laid out. The extent of support available from the authority and procedural mechanism should also be provided. The cost and liability obligations for each party pertaining to such support should be indicated.*

9.8. Construction of Project

The stipulations under the Article for Construction of Project are mostly project-specific provisions. These include:

1. Obligations prior to start of construction: Which include submission of detailed conceptual plan, layout plan,, detailed design, etc, appointment of representatives

- etc. This Clause is found across all Base MCA/CAs, however with sector and project specific variations.
2. Master Plan: Which provides the process for preparation and approval of master plan by Authority and thereafter compliance with such plan at all times for the purpose of construction and expansion. It also stipulates review of master plan on periodic basis etc. This Clause is found in multi-facility projects such as airports, MMLP, railway stations etc which are developed based on a broad master plan approved by the Authority;
 3. Drawings: Which stipulates submission of detailed drawings, layouts etc for construction of project in accordance with the master plan. These are prepared by the Concessionaire and are submitted to the Authority/Independent Engineer for review and modifications as necessary. This Clause is found across all Base MCA/CAs, however with sector and project specific variations.
 4. Construction of Project: This Clause includes more or less similar provisions mandating construction of project in accordance with specifications and standards, approved master plan, drawings, Applicable Laws, Permits etc. It stipulates completion of respective milestones in accordance with the timelines under the agreement and damages in case of non-compliance for same. The clause indicates the Scheduled Completion Date for the project and extensions available (if any) on same with or without damages. This Clause is found across all Base MCA/CAs, however with sector and project specific variations.
 5. Other Project- Specific Clauses: In addition to above, various other sector and project specific clauses are found under this Article such as (i) construction of terminal, car park, cargo facilities and expansion under airport projects (ii) Sublicensing, licensing rights, advertising rights in case of MMLP projects (iii) construction of station, car park, parcel facilities etc under railway station projects etc

9.9. Operations & Maintenance

The stipulations under the Article are a mix of project-specific, model-specific, sector-specific and standard conditions.

9.9.1. Project Specific O&M provisions

Project specific obligations are those that pertain to core asset and service or otherwise to integrated functioning of overall project. These include

- A. Standard obligations for fulfilling project scope which are usually consistent across all MCA/CAs such as:
 - (i) Maintenance of project and all related facilities as per the agreement, good industry practices (ii) collection and appropriation of fee (as applicable) (iii) compliance of

all Applicable Laws, Applicable permits etc (iv) validity of all permits, licenses etc (v) regular, major and preventive maintenance of assets (vi) surveillance and safety (vii) handing over of project assets on transfer date and various others.

- B. Project specific obligations which vary from case to case such as:
- (i) Operating and maintaining aeronautical assets, runways etc in accordance with the ICAO standards in case of airports (ii) minimising disruption to traffic in the event of accidents or other incidents affecting the safety of highway in case of roads (ii) Maintenance of railway line in case of for MCA for MMLP etc

9.9.2. Sector & Model specific O&M provisions

In addition to project-specific provisions, there are sector specific provisions which are included under the article of Operations & Maintenance for all MCA/CA dealing with a particular sector. These sector specific clauses usually entail a standard formulation. Instances of these include (i) Use of airport by defence services and during other exigencies, aeronautical assets, ground handling services, aircraft fuelling services, cargo services, check-in services etc in case of airports (ii) Electricity, water and other utilities in case of multi-facility infrastructure (iii) Parking etc.

9.9.3. Sector Specific Articles

In addition to this, certain sector-specific provisions are critical and detailed enough to warrant a standalone article such as Reserved services in case of CA for airports. Some of these provisions have already been discussed under Section 8.3.

Further, there are certain Articles which are included in case of brownfield assets such as Transition Arrangements in case of brownfield multi-facility infrastructure such as airports and railway stations etc. Some of these provisions have been discussed under Section 7.5.

9.9.4. Standard provisions under Operation & Maintenance

Other obligations included as part of this Article are standard contractual obligations which are common across most Base MCAs/Signed CAs. These include:

- a. De-commissioning due to Emergency
- b. Section closure
- c. Damages for maintenance obligations breach
- d. Authority's right to take remedial measures
- e. Overriding powers of the Authority
- f. Excuse from performance of obligations
- g. Restoration of Loss or Damage
- h. Modification to the [Infrastructure] etc

These have already been discussed in chapters above.

9.10. Key Financial Covenants

The commercial terms of a project i.e. terms of financing, user charge or other revenue generation mechanism, payments to the Authority, grant or annuity from Authority to Concessionaire and the sharing of upside/downside depending on actual performance of the project are the ultimate determinants of viability and investor appetite. These terms are collectively elaborated under the Articles for (i) User Fee (ii) Concession Fee and (iii) Grant/Premium.

The following section discusses each of these articles, one by one, thereafter followed by the relationship amongst these various terms and principles for commercial structuring of projects based on same.

9.10.1. User Fee

User Fee is the payment for usage of infrastructure/ facility by the user. Such user charge may either be statutorily levied as in case of highways, airports; or be contractually built-in under concessions to provide for commercial sustainability as in case of storage of food grains; or be levied purely as per market principles for commercial infrastructure/ facilities such as in case of MMLP. Further, the mechanism for determination/stipulation of same under a concession is decided

- (i) firstly based on statutory norms, regulatory principles or sectoral policies; and
- (ii) thereafter the specific requirements of project under consideration;

Where such use fee is statutorily or regulatorily determined, it is accordingly captured in the concession - such as the provision for fee notification by MoRTH under highway concessions or for regulatory determination of aeronautical tariffs by AERA in case of airports. In certain other sectors, where the authority or ministry is empowered to decide on such user charges (as in case of railways), these are decided based on extant principles of determination and accordingly pre-specified under the concession. In certain other sectors where such user charge can be decided based on market principles these can (i) either be quoted upfront by the developer and pre-specified in the concession accordingly or (ii) be allowed to vary on a periodic/real-time basis based on market supply and demand. Such methodology for determination or stipulation of User Fee is captured under this Article. additional levies, penalties or exemptions, if any.

Further, in certain models such as Annuity etc, user fee may not altogether be levied; or if statutorily levied, right of collection for same may not be provided to the Concessionaire. Variation across Base MCAs/Signed CAs, in terms of mechanism for determination and availability of rights with the concessionaire is as tabulated below:

Table 19: Comparison: User Fee across Base MCAs/CAs

MCA/CA	Right of Levy	Determination Mechanism
(i) MCA -BOT (Toll) (ii) MCA - TOT for NH	Yes	Statutorily determined via Fee Notifications
(i) MCA- MMLP (ii) MCA - PPP in Major Ports	Yes	Market determined
(i) CA for Brownfield Airports (ii) CA for Greenfield Airports	Yes	Fixed Regulatorily by AERA for 5-year period
(i) MCA - BOT (Annuity) (ii) MCA - HAM (ii) SBD for ISTS through TBCB	No; Annuity based model ⁶⁶	

Further, in cases of captive use of project by Authority viz. storage of food grains, the user fee is pre-determined based and may be structured based on the requirements of the project.

Where the fee is predetermined, the CA/MCA also provides for indexation of user fee thereof linked to CPI and/or WPI. This is to neutralise the impact of inflation on the Concessionaire's operating costs. The quantum of indexation needs to be optimally set so that the Concessionaire is compensated for inflation yet at the same it does not require the users to pay more for an aging infrastructure/ declining level of service when they should be receiving the benefit of a depreciated fee.

Guidance: Levy of user fee by Concessionaire is stipulated in all non-annuity based models. Fixation of such user fee is based on statutory/ regulatory policy in the sector, as being (i) notified or pre-stipulated with annual indexation (ii) regulatorily determined (iii) market determined.

Where pre-stipulated, it should be decided based on fair market principles ensuring a fine balance between viability for Concessionaire and affordability to users.

Where regulatorily determined, robust and clear guidelines for determination of same should be adopted so as to protect Concessionaire from viability loss, Authority from leakages and public from uncertainty or unaffordability of charges. Such principles should either be notified or consistently included in all concession agreement so as to avoid disputes on determination. Also, periodic review and prudential application of such principles is necessary to avoid potential gaps or unfair advantage to either party/ stakeholders.

9.10.2. Grant

Some of the infrastructure projects may not be taken up through PPP route due to insufficiency of cash flows generated via user charges or other revenue generation mechanisms. Financial viability in such projects can partially be improved through an upfront capital grant or a combination of upfront capital and O&M grant. These grants can

⁶⁶Fee may still be levied on the user by the central agency or the ministry; Such as in case of NHAI projects. However since the same is not discussed under the concession or available to the concessionaire determination mechanism has not been indicated.

be provided to infrastructure sector under the 'Guidelines for Financial Assistance to Public Private Partnership in Infrastructure Sectors – Viability Gap Funding Scheme⁶⁷'. Also, other schemes of Central and State Government can be availed to enhance the viability of such projects in infrastructure/ non-infrastructure sector.

However, not all projects/sectors/models, may merit or may effectively be intervened using grant based mechanisms.

Usually projects that involve upfront capital investment for construction/augmentation which are funded through non-annuity sources and involve a low/insufficient pre-stipulated fee are potential candidates.

In some cases such commercial disparity may be cross-subsidised through alternative sources of revenue generation and grant may not be necessarily required. However, the potential for alternative sources of revenue generation will vary from project to project or location to location. In some cases it may not be sufficient or may entail a longer gestation period (as in case of real estate), in turn necessitating a grant to bridge deficit during initial years.

Instances of projects that can be supported through grant include (i) BOT (Toll) in National/ State Highways (ii) augmentation of hospitals on DBFOT basis (ii) creation of augmentation school education infrastructure on DBFOT basis. On the other hand, projects based on a cost-plus regulatory tariff⁶⁸ or market determined tariffs and/or with sufficient alternative sources of revenue generation may manage to be self-sustainable without a grant support. Variation as seen across Base MCAs/Signed CAs is as below

Table 20: Comparison: Grant across Base MCAs/CAs

MCA/CA	Grant	Maximum
MCA -BOT (Toll)	Yes	40%
MCA - BOT (Annuity), MCA - HAM, MCA - TOT for NH, SBD for ISTS through TBCB	No since the model is annuity based or zero upfront investment for construction/augmentation.	
MCA - MMLPs, MCA - PPP in Major Ports	No, since tariff market determined	
CA for Brownfield Airports, CA for Greenfield Airports	No, since tariff is regulatorily determined on cost plus basis	

⁶⁷<https://dea.gov.in/sites/default/files/Scan%20of%20Revamped%20VGF%20Guidelines%20alongwith%20all%20Annexures-compressed.pdf>

⁶⁸With purchasing capacity of the off-taker at the cost-plus prices or willingness to pay of consumer at such prices.

9.10.2.1. Conditions for Grant provision:

1. Grants (capital and operational combined) can only be limited to a percentage of total capital investments in the project. This is necessary to ensure financial and operational benefits of engaging a private party in a project. Hence it is important that the total revenues generated from the project – by way of fee and alternative sources of revenue generation (where applicable) – are sufficient to meet the total operational expenditure and a part of capital expenditure for the project.

Where it is not possible, annuity-based models may be more suited for application instead of grant based BOT/DBFOT models.

2. The decision to bifurcate the grant into capital or operations grant is itself dependent on cost characteristics of the project. Although in present value terms, the impact of the grant will invariably be higher if it is upfronted i.e provided during construction period; however effective and prudential utilisation can only be ensured by structuring it on the basis of capital and operational cost break-up. Generally, in projects where upfront investment is the primary cost disparity, maximum contribution to the capital component of grant should be made. On the other hand, in cases where operational expenditure is an equal/higher cost deterrent, a balanced bifurcation between capital and operational component of grant can be more beneficial.
3. The other principles for provision of grant are as captured under ‘Guidelines for Financial Assistance to Public Private Partnership in Infrastructure Sectors – Viability Gap Funding Scheme’ – critical ones of which have been reproduced below and should ideally be ensured whenever a grant is being made available to a PPP project – irrespective of the scheme through which funds are being used:
 - a. Provision of long term asset/ service against payment of a pre-determined user charge; or on such terms that the commercial benefits under the contract cannot be altered at a later date so as to benefit either party⁶⁹;
 - b. Selection of private party on a transparent competitive bidding process⁷⁰.
 - c. The maximum grant available to a project should be decided based on cost and viability estimates of authority. Ideally it should not be higher than 40% in case of economic infrastructure projects and 60% in case of social infrastructure projects⁷¹.

⁶⁹In cases where tariffs are determined regulatorily but the entire cost cannot be passed on to consumers due to affordability constraints, grants may be considered, however, it should be subject to detailed guidelines for tariff determination being included as part of concession, normative costs being stipulated, and any grant provided being adjusted for the purpose of regulatory tariff determination; Ideal bidding parameter in such cases would be ‘Bid Project Cost’ (To be deliberated)

⁷⁰Which anyways is a pre-condition for award of any PPP project; This is being reiterated for clarity sake.

⁷¹Under the extant Guidelines for Financial Assistance to Public Private Partnership in Infrastructure Sectors – Viability Gap Funding Scheme maximum 40% grant is made available to economic infrastructure projects (20% by MoF and 20% by state government or any other agency); maximum 60% grant is made available to social sector projects in water supply, waste water treatment, solid waste management, health and education (30% by MoF and 30% by state government or any other agency);

***Guidance:** Grant should be used as an enabler in PPP models where minimum upfront investments are mandated by the Authority and viability risk for same is being borne by the Concessionaire i.e. DBFOT, BOT(Toll) etc; Further, in such situations tariffs must be pre-determined; so as to ensure certainty of terms of concession and continued justification for provision of grant by Authority. The maximum grant available to a project should be decided based on cost and viability estimates of authority. Ideally it should not be higher than 40% in case of economic infrastructure projects and 60% in case of social infrastructure projects.*

The decision to bifurcate the grant into capital or operations grant should be based on capital and operating cost break up of project Generally, in projects where upfront investment is the primary cost disparity, maximum contribution to the capital component of grant should be made. On the other hand, in cases where operational expenditure is an equal/higher cost deterrent, a balanced bifurcation between capital and operational component of grant can be more beneficial.

9.11. Payments under the Concession

The overall financial viability of a project is determined based on the traffic volumes, user fee, capital & operational costs, alternative sources of revenue generation, grant etc. A concession structure may be of varied types as below:

- (i) One which transfers the traffic and revenue risk to the concessionaire – however, ensuring requisite support factors for a viable project structure, either in form of grant from the authority or alternative sources of revenue generation and/or market linked fares etc;
- (ii) One which Authority shares traffic risk with the concessionaire – in turn earning by way of share in incremental revenue generation, share in or other such means;
- (iii) One in which traffic risk is completely absorbed by the Authority as in case of annuity models; OR by way of guaranteed traffic as in case of storage of food grains model;

The design of the project structure depends on the combined nature of model, sector and project specifications such as cost, traffic etc. Which in turn is decided based on factors covered Section 10.2, 10.3, 10.4 and this Section 10.9 among others.

9.11.1. Bid Parameter

Selection of private party for a project is based on a transparent competitive bidding process where a detailed requirements for eligibility and selection is listed and selection is based on a financial bid parameter. This financial bid parameter is a single number that encapsulates the commercial efficiency of a private player in delivering the project as per its terms and conditions. While primarily determined and discussed under tendering documents, financial bid parameter is a key consideration in formulation of financial covenants under the MCA/CA. This is since the nature of this financial bid parameter, the mechanism to most robustly capture the intent of it and its impact on the other financial covenants of the concession, practically decides the inclusion/

exclusion of financial covenants under an MCA/CA. The financial bid parameter across various Base MCAs/CAs is as provided below:

Table 21: Bid Parameter under Base MCAs/CAs

MCA/CA	Financial Bid Parameter
MCA BOT (Toll)	Percentage of realisable fee ⁷² (to be shared with Authority)
MCA - HAM	NPV of Bid Project Cost & O&M payments
MCA - TOT for NH	Upfront Payment (in lieu of assets/rights received)
MCA - MMLPs	Share of Gross Revenue (to be shared with Authority)
MCA - PPP in Major Ports	Royalty per Month (paid to the Authority subject to minimum guaranteed cargo)
SBD for ISTS via TBCB	Annual fixed Cost (to be paid by the Authority)
MCA - Food Grain (Silo)	Annual Storage Charges (to be paid by the Authority)
CA for Greenfield Airports	<ol style="list-style-type: none"> 1. Share of Gross Revenue (to be shared with Authority under Bengaluru, Hyderabad, Navi Mumbai, MoPA) 2. Per Passenger Fee (to be shared with Authority under Jewar & Bhogapuram)
CA for Brownfield Airports	<ol style="list-style-type: none"> 1. 1. Share of Gross Revenue (to be shared with Authority under Bengaluru, Hyderabad, Navi Mumbai, MoPA) 2. Per Passenger Fee (to be shared with Authority under Jewar & Bhogapuram)

As can be seen above, currently most MCAs/CAs are based on traffic sharing structures (except those which are annuity or zero upfront investment models). This is since it alleviates traffic risk for the concessionaire, self-adjusts in many ways over the life of the concession thereby ensuring investor attractiveness for the project. Such structures are clearly more amenable in economic infrastructure projects where the user ability or willingness to pay is relatively higher and excludability based on such payments is feasible. In case of social infrastructure projects where demand is generally a lesser concern compared to affordability or need for universal coverage, alternative bid structures based on grant, annuity etc may prove to be mutually beneficial to authority and concessionaire. Also, to additionally cover for demand risk in some of these projects Authority may consider providing full/ partial demand guarantee given the nature of these projects.

Payment of above-mentioned revenues/costs – to or by the Authority – are covered as part of Article for Concession Fee or Annuity under the MCA/CA. Depending on the bid parameter the terms of the payment and the structuring of these provisions changes from concession to concession.

⁷²Under the previous version of MCA (2016) the bid parameter was a fixed concession fee. This has however, been changed in 2020 to percentage of realizable fee to ensure sharing of traffic risk by the Authority and in turn better bankability and investor appetite.

Guidance: The Concession Fee for the project should be structured such that it suitably captures all potential risks and benefits of the project. At the same time it should be based on a single numerical or graded parameter on the basis of which selection and award can be undertaken.

9.11.2. Payments under Annuity Based Concessions

For Annuity based concession, the only Article included under the MCA/CA is that on Annuity. Articles for Grant, Concession Fee, Premium and User Fee are not included there under. Where annual payments are based on project cost (capital and operations), model adopted by HAM for national highways can be followed. Where such annual charges are linked to availability of infrastructure, model adopted by transmission or storage of food grains can be followed.

A. Cost based Model

Under this model, the provisions under Annuity will elaborate on the following:

1. The Bid Project Cost – its amount, definition and inclusions and the purposes towards which the cost is proposed to be utilised. Additional costs (if any say on account of price variation, taxes etc) which are allowed to be additionally paid to the Concessionaire are included.
2. Year on Year variation in Bid Project Cost – which is allowed to be adjusted (if applicable) and the maximum cap on same (if any). It is the most prevalent adjustment, included to avoid unforeseen cost risk/advantage to the Concessionaire in turn resulting in disputes.
3. Quantum of upfront payment i.e. percentage of Bid Project Cost provided during the construction is included as part of this Article. Principles for bifurcation of annuities into construction and operation period is based on the same principles as that for provision of upfront and operations grant as covered in Section 10.9.2. Ideally, such quantum may vary from zero to forty percent in case of economic infrastructure projects and up to sixty percent in case of social infrastructure projects. The Article also includes the milestone-based break-up of such upfront annuity component.
4. Balance component is staggered over the years the life of concession post COD. Structuring of such annual payments should be based on estimated cost structure over the life of the concession i.e. year on year expenditure towards depreciation and regular maintenance and operations. Such amount is payable on price adjusted Bid Project Cost including the interest cost (linked to pre-specified benchmark) for same.
5. In case of HAM project for highways, a separate component for maintenance flexible perpetual pavements and rigid pavements is specified, which is prefixed linked to the time elapsed since COD.

In cases where a separate bid for O&M is sought/ needed – the bid parameter for Project is combined NPV of Bid Capital Cost and Bid O&M Cost⁷³. Structuring of annuities into upfront and O&M component, as well as the year on payments of annuities (both for upfront as well as O&M component) will need to be cognizant of such inclusions and ensure adjustments accordingly.

B. Availability based Model

Under this model, the Article for Annuity will elaborate on the following:

1. Periodic charges to be paid based on volumes handled which are quoted by the Concessionaire as part of bid parameter, along with inclusions for same, periodicity of payment. Periodicity of charges may be monthly, quarterly or annual depending on the sector. Usually monthly or quarterly payments are followed to ensure lower working capital requirement.
2. Elements not covered as part of charges (if any) and basis for payment of same are separately identified. Penalties or incentives to be adjusted – which are covered in detail under Article for key performance indicators (Section 6.15 and Section 8.2 in this Guidebook) are reiterated.
3. Year on Year variation in charges – on account of inflation etc (if applicable) and the maximum cap on same (if any) is provided. Where projects entail a significant component of operating costs, such clauses should be built in to avoid unforeseen cost risk/ advantage to the Concessionaire in turn resulting in disputes.

Guidance: *Annuity based concessions do not include a clause for Grant, User Fee, Concession Fee and Premium. Where the annuity is linked to cost of project it may be further bifurcated into upfront annuity and O&M phases annuities. Principles for bifurcation in such cases is based on the same principles as discussed in Section 10.9.2. Ideally, such quantum should vary from zero to forty percent in case of economic infrastructure projects and up to sixty percent in case of social infrastructure projects – depending on the extent and nature of cost disparity. Further, in case of availability based annuity model, a minimum supply by the Concessionaire and a minimum off-take by the Authority is guaranteed so as to ensure certainty of payments received year on year.*

9.11.3. Concession Fee & Premium

In non-annuity based concessions, there exists a mechanism for payment to the Authority by the concessionaire. While primarily intended as payment of fair consideration to the Authority in lieu of rights received under concession, the Article is reasonably nuanced to capture and share risks and returns in the project. This is by way of a combination of mandatory and optional payments by the Concessionaire to Authority during the life of concession which may include following (amongst others):

⁷³This structure was adopted in the erstwhile HAM projects from 2016 to 2022.

- (i) those which are determined based on the bid;
- (ii) those which are pre-stipulated; and
- (iii) those which are contingent based on the pattern of cash flows in a project.

The primary concession fee under the concession agreement is determined based on competitive bidding process *via* the financial bid parameter. The objective of this payment is to maximise the commercial benefits available to the Authority or, in cases where projects are not remunerative enough, minimize the obligations of the Authority. This concession fee may be a fixed payment, a revenue or a revenue share or traffic linked number viz. royalty, per passenger fee etc (as applicable across different sectors). The nature of this will in turn be determined by a variety of factors such as model and structure of project, mechanism of fee determination, need for grant in the project etc.

Further, depending on the nature of such bid parameter/concession fee, additional stipulations are included under this Article to share risk and upside with the concessionaire. These can take the form of (i) adjustments to bided payments under the project based on indexation, milestones etc (ii) incremental revenue share to capture the volume and revenue upside during later stages or linked to a traffic/revenue benchmark (iii) pre-fixed – flat or milestone linked or bid parameter linked income from Non-Core components of the project etc

Except in cases where such payment is a one-time upfront payment (as in case of TOT) the first year concession fee is escalated based on Price Index Multiple or a prespecified nominal increase in percentage terms year on year. Such increase is to ensure lower payment commitments in the initial years and to gradually escalate it over time as the core project as well its non-core component matures. In cases where the bid parameter is not a revenue linked parameter, it also enables traffic growth or price growth over years.

Structure of Financial Covenant across various Base MCAs/CAs

The structure of concession fee under various Base MCAs/Signed CAs is as highlighted below:

Table 22: Bid Parameter under Base MCAs/CAs

MCA/CA	Concession Fee
MCA BOT (Toll)	<ul style="list-style-type: none"> • Collection of fee by Concessionaire with percentage of realisable fee based on bid to be paid to the Authority from the second anniversary. This is increased by an additional 100 bps every year till end of concession • Appropriation of excess fee during any year <p><i>Along with Grant payment up to 40% of total project cost if sought;</i></p>

MCA/CA	Concession Fee
MCA - HAM	<ul style="list-style-type: none"> • 40% upfront + balance bid project cost in form equal semi-annual payments over the life of concession; with price indexation • No other payment or right over fee
MCA - TOT for NH	Upfront One-time Payment backed by fee collection rights; <i>No incremental rights or obligations;</i>
MCA - MMLPs	<ul style="list-style-type: none"> • Collection of revenue form MMLP (including commercial zone) by the Concessionaire with percentage of gross revenue to be paid to the Authority from the third anniversary. This is determined on the basis of bid. • Further, cumulative percentage payment on NPV basis will be compared with minimum share guarantee by end of very period; In case of deficit damages shall apply
SBD for ISTS <i>via</i> TBCB	<ul style="list-style-type: none"> • Annual fixed Cost (to be paid by the Authority) • No other payment or right over fee
CA for Greenfield Airports	<ol style="list-style-type: none"> 1. Payment of a per passenger fee –from 7th year of project - based on actual yearly domestic and international passengers at the airport; PPF is determined based on bid received and is increased annually linked to an escalation factor 2. Annual license fee at 3% of land value 3. Receipt of regulatory determined aeronautical and market linked non-aeronautical charges;
CA for Brownfield Airports	Annual Storage Charges (<i>to be paid by the Authority</i>)
CA for Greenfield Airports	<ol style="list-style-type: none"> 1. Payment of Deemed initial RAB; 2. Payment of a per passenger fee –from first year of project - based on actual yearly domestic and international passengers at the airport; PPF is determined based on bid received and is increased annually linked to an escalation factor 3. Receipt of regulatory determined aeronautical and market linked non-aeronautical charges; 3. Termination in case of more than 20% fall in traffic for consecutive 2 years

As above, a variety of structures for payment of concession fee and premium on projects are possible. The Guidebook therefore restricts itself to providing broad guidance on principles for structuring these payments as below:

- Selection of a concession fee or bid parameter that most holistically captures the various benefits from the project; taking into consideration the mechanism of tariff determination, Non-Core or city side rights available in the project etc
- Where bid parameter has been holistically identified covering all revenue streams no additional payments in form of license fee, land fee etc should be stipulated;
- However, where the concession fee does not cover all components of revenue generation, additional payments based on value or potential of missed out assets may be stipulated
- Incremental mechanisms to share upside in a project through traffic or revenue linked payments which are over and above the concession fee and which kick in based on project milestone or benchmark traffic etc
- Indexation of concession fee; Provision for adjustments to concession fee based on traffic volumes etc- especially where the concession fee is a fixed value and does not reasonably share traffic risk
- Where projects involve regulatory tariff determination, payments to Authority should be excluded from costs; And for the process of regulatory tariff determination, concessions should stipulate the ceiling or trend in such tariffs

Appendix I – Typical Schedules to Concession Agreement

Schedule	Description
Site of the Project	<ul style="list-style-type: none"> ◆ Provides the map, area, coordinates, layout etc of Site for project, ◆ Segregation or separate site Non-core Development etc and the eligible use for it ◆ Inventory of site pending for access prior to AD
Project Facilities	<ul style="list-style-type: none"> ◆ List of facilities mandatory as part of Project with description, size (if applicable) etc; ◆ Facilities additionally allowed/ prohibited as part of Project; ◆ Eligible facilities in non-core area
Specifications & Standards	<ul style="list-style-type: none"> ◆ Specifications & Standards for Core Facility ◆ Guiding factors for Non-Core Development (if any)
Master Plan & Drawings	<ul style="list-style-type: none"> ◆ Master Plan of project (if applicable) ◆ Architectural drawings of Core Facility ◆ Master Plan of Non-Core Development if applicable)
Applicable Permits	List of applicable permits, clearances etc
Completion Schedule	Milestone wise dates for physical completion of Project
Tests	List of tests to be conducted for commissioning
Performance Security	Format for performance security
Completion certificate	Format for completion certificate Format for provisional certificate
Safety & Maintenance	Safety and maintenance requisites of projects Maintenance Manual Safety Manual
Revenue from other business	Statement format for Revenue from other business
Escrow Agreement	Standard format for Escrow Agreement
Substitution Agreement	Standard format for Substitution Agreement
Vesting Certificate	Standard format for Vesting Certificate
Independent Engineer	Terms of reference for independent engineer.
Statutory Auditor	Terms of reference for statutory auditor
Fee	Statement format for monthly fee (such as in Highways) OR Formula, calculation and escalation methodology for User Fee (in Ports, Airports, Transmission etc)

Appendix II: Typical List of Terms under Case Specific Definitions

In models where Termination Payment is linked to Debt Due & Adjusted Equity

Debt Due

means the aggregate of the following sums expressed in Indian Rupees outstanding on the Transfer Date:

- (a) the principal amount of the debt provided by the Senior Lenders under the Financing Agreements for financing the Total Project Cost (the “principal”) but excluding any part of the principal that had fallen due for repayment two years prior to the Transfer Date;
- (b) all accrued interest, financing fees and charges payable under the Financing Agreements on, or in respect of, the debt referred to in Sub-clause (a) above until the Transfer Date but excluding (i) any interest, fees or charges that had fallen due one year prior to the Transfer Date, (ii) any penal interest or charges payable under the Financing Agreements to any Senior Lender, and (iii) any pre-payment charges in relation to accelerated repayment of debt except where such charges have arisen due to Authority Default; and
- (c) any Subordinated Debt which is included in the Financial Package and disbursed by lenders for financing the Total Project Cost;

provided that if all or any part of the Debt Due is convertible into Equity at the option of Senior Lenders and/or the Concessionaire, it shall for the purposes of this Agreement be deemed to be Debt Due even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

provided further that the Debt Due, on or after COD, shall in no case exceed 85% (eighty-five per cent) of the Total Project Cost;

Adjusted Equity

means the Equity funded in Indian Rupees and adjusted on the first day of the current month (the “Reference Date”), in the manner set forth below, to reflect the change in its value on account of depreciation and variations in Price Index, and for any Reference Date occurring:

- (a) on or before COD, the Adjusted Equity shall be a sum equal to the Equity funded in Indian Rupees and expended on the Project, revised to the extent of one half of the variation in Price Index occurring between the first day of the month of Appointed Date and the Reference Date;
- (b) from COD and until the 4th (fourth) anniversary thereof, an amount equal to the Adjusted Equity as on COD shall be deemed to be the base (the “Base Adjusted Equity”) and the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, revised at the commencement of each month following COD to the extent of variation in Price Index occurring between COD and the Reference Date;

- (c) after the 4th (fourth) anniversary of COD, the Adjusted Equity hereunder shall be a sum equal to the Base Adjusted Equity, reduced by [.]⁷⁴ thereof at the commencement of each month following the 4th (fourth) anniversary of COD and the amount so arrived at shall be revised to the extent of variation in Price Index occurring between COD and the Reference Date;

[and the aforesaid shall apply, mutatis mutandis, to the Equity funded in Indian Rupees and expended for augmentation]. For the avoidance of doubt, the Adjusted Equity shall, in the event of Termination, be computed as on the Reference Date immediately preceding the Transfer Date; provided that no reduction in the Adjusted Equity shall be made for a period equal to the duration, if any, for which the Concession Period is extended, but the revision on account of Price Index shall continue to be made;

Subordinate Debt

means the aggregate of the following sums expressed in Indian Rupees or in the currency of debt, as the case may be, outstanding as on the Transfer Date:

- (a) the principal amount of debt provided by lenders or the Concessionaire's shareholders for meeting the Total Project Cost and subordinated to the financial assistance provided by the Senior Lenders; and
- (b) all accrued interest on the debt referred to in Sub-clause (a) above but restricted to the lesser of actual interest rate and a rate equal to 5% (five per cent) above the Bank Rate in case of loans expressed in Indian Rupees and lesser of the actual interest rate and 6 (six)-month LIBOR (London Inter Bank Offer Rate) plus 2% (two per cent) in case of loans expressed in foreign currency, but does not include any interest that had fallen due 1 (one) year prior to the Transfer Date;

provided that if all or any part of the Subordinated Debt is convertible into Equity at the option of the lenders and/or the Concessionaire's shareholders, it shall for the purposes of this Agreement be deemed to be Subordinated Debt even after such conversion and the principal thereof shall be dealt with as if such conversion had not been undertaken;

⁷⁴This number shall be substituted in each case by the figure arrived at upon dividing 80 by the number of months comprising the Concession Period. For example, the figure for a 20 year Concession Period shall be $80/240 = 0.333$ rounded off to two decimal points i.e. 0.33.

In cases where Gross Revenue is a benchmark for payments

Gross Revenue

means all pre-tax gross revenues earned by the Concessionaire under or pursuant to this Agreement, at any time from the date of the execution of this Agreement upto the Transfer Date, and shall include any monies received from sub-licensees and other persons, by the Concessionaire as deposits (refundable or otherwise) but shall exclude only the following:

- a) any insurance proceeds received by the Concessionaire relating to (i) third party liability insurance paid or to be paid to the person whose claim(s) constitute(s) the risk or liability insured against; and (ii) any form of physical damage of assets, and the Concessionaire has incurred or will incur an expenditure greater than or equal to such proceeds received for repair, reinstatement or otherwise replacement, promptly and diligently of such assets;
- b) any monies received by the Concessionaire, for or on behalf of any Government Instrumentality (as defined in the Concession Agreement), as an authorized agent of such Government Instrumentality.; and
- c) any deposit amounts refunded to the relevant sub-licensee or any other person authorized by the Authority in a particular Concession Year provided these pertain to past deposits on which Premium has been paid to the Authority.
- d) any revenue recognized for construction or upgrade services under the provisions of Appendix A (Service Concession Arrangements) of the Indian Accounting Standards (Ind-AS) 11, Construction Contracts and references therein, including subsequent amendments thereof in relation to the recognition of revenues/consideration for construction or upgrade services under Ind-AS, as per Applicable Laws

It is expressly clarified that:

- a) insurance proceeds referred to in exclusion (a) above, shall not include any exclusion of insurance proceeds received for loss of revenues and/or business interruption; monies referred to in exclusion (b) above, shall be excluded only if the same has been credited or will be credited by the Concessionaire to the relevant Government Instrumentality promptly and diligently and any fine, penalty or other amounts of similar nature that may accrue as a result of non-payment or delayed payment of such monies under the Applicable Laws, will not be excluded;
- b) Gross Revenue will be computed on an annual basis for Accounting Year, in accordance with the Indian Accounting Standards, as applicable on the date of the issuance of the RFP; and
- c) Gross Revenue will be computed on an annual basis for an Accounting Year, in accordance with the Indian Accounting Standards (Ind-AS) as specified under the Companies (Indian Accounting Standards) Rules, 2015 including amendments thereof from time to time as per Applicable Laws, except the specific provisions in respect of inclusion and exclusion of deposits (refundable or otherwise) referred to in the definition of Gross Revenue above.

- d) in case of any dispute, discrepancy, ambiguity, doubt or otherwise, relating to the computation and/or meaning of Gross Revenue, the decision of the Authority, at its sole discretion, shall be final.

When additional facilities (beyond primary infrastructure) are envisaged as part of scope*

Additional Facilities

means the facilities such as **** which the Concessionaire may, in its discretion and subject to Applicable Laws, provide or procure for the benefit of the Users, and which are in addition to the Project Facilities, and not situated on the Site;

Additional Termination Payment

means the amount payable upon Termination in respect of Specified Assets, if any, as further limited by the provisions of Clause *

When Project Scope includes Construction*

1. Construction Period
2. Construction Works
3. Drawings
4. EPC Contract
5. Project Completion Schedule
6. Specifications and Standards
7. Tests

In models where financing & closure is envisaged*

8. Financial Close
9. Financial Model
10. Financial Package
11. Financing Agreements

**Some of the commonly used terms, along with definitions, have been provided above. For all others, MCA for BOT (Toll), HAM and TOT of MoRTH may be referred.*



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भारत सरकार

GOVERNMENT OF INDIA

**Infrastructure Finance Secretariat
Department of Economic Affairs
Ministry of Finance
Government of India**