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Project Finance 2021

India: Law & Practice

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INDIA

Law and Practice

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1. PROJECT FINANCE PANORAMA

1.1 Sponsors and Lenders

Scheduled commercial banks – both state-owned and private – have dominated the infrastructure financing space for a long time. Non-banking financial companies have also emerged as a major financing source, particularly in the roads and renewable energy sectors. Given the long horizon of investments, infrastructure debt funds and state-owned specialist institutions such as the National Investment and Infrastructure Fund (NIIF) and India Infrastructure Finance Company Limited (IIFCL) have emerged as alternatives, supplementing the traditional financiers.

Certain development finance institutions, multilateral agencies, international banks and export credit agencies (ECAs) have been active in the project financing market. The Master Direction on External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers – dated 26 March 2019, as updated from time to time (ECB Guidelines), which are applicable to these foreign institutions, has been significantly liberalised to encourage multilateral and regional financial institutions, as well as overseas lenders from jurisdictions that are compliant with the Financial Action Task Force (FATF) or the International Organization of Securities Commissions (IOSCO) to extend financing. Many such foreign lenders have invested through their Securities and Exchange Board of India (SEBI) registered foreign portfolio investor (FPI) entities by subscribing to non-convertible debentures (NCDs) issued by project companies under the regular route and the voluntary retention route (VRR) (which was introduced by the Reserve Bank of India (RBI) to encourage long-term foreign investments) in the Indian bonds market.

Under the public-private partnership (PPP) framework, the Indian private sector continues to be the sponsor for the majority of Indian infrastructure projects. However, newer breeds of sponsors have emerged of late, such as overseas sovereign funds, pension funds and private equity funds.

Infrastructure investment trusts have gained currency in India for managing income-generating infrastructure assets, offering investors regular yields.

1.2 Public-Private Partnership Transactions

PPP projects are leading to faster implementation, reduced life-cycle costs, access to private sector finance and optimal risk allocation. Private management increases accountability and incentivises the performance and maintenance of required service standards. Finally, PPPs are resulting in improved delivery of public services and the promotion of public sector reforms.

PPP contractual arrangements in India have evolved on the basis of policy initiatives of the central and state governments, state laws and regulations, and model concession agreements. The Department of Economic Affairs (DEA) of the Ministry of Finance (MOF) has been primarily overseeing the development of the central public infrastructure through the PPP model across the country. It has established institutional mechanisms for streamlining and speeding up the appraisal of PPP infrastructure projects (setting up the PPP Appraisal Committee), and for incentivising obtaining financial support to make PPP infrastructure projects commercially viable by direct financial support through government schemes (such as the Scheme for Financial Support to PPPs in Infrastructure-Viability Gap Funding) and supporting the development of a pipeline of bankable PPP projects through the India Infrastructure Project Development Fund

and the efforts of the DEA and the erstwhile Planning Commission to mainstream PPPs through a multi-pronged approach to the standardisation of documents (adaptable to individual projects) to enable easy adoption, capacity building and financial support schemes.

A comprehensive bid document is issued, inviting tenders, and the contract is ordinarily awarded to the lowest evaluated bidder whose bid is found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document. The MOF has issued guidelines for the pre-qualification of bidders for PPP projects, which provide for a two-stage bidding process, and are applicable to all ministries and departments of the central government as well as all central public sector undertakings.

Public procurement by central government is governed by comprehensive rules such as the General Financial Rules, 2005 and the Delegation of Financial Powers Rules, and by government orders and guidelines. There are also sectoral laws and policies, various government department public procurement systems and certain state laws for public procurement.

In India, the basic principle of public procurement is that every authority delegated with financial powers to procure goods in the public interest has the responsibility and accountability to ensure efficiency, economy and transparency, the fair and equitable treatment of suppliers and the promotion of competition in public procurement.

1.3 Structuring the Deal

The main issues that need to be considered in project financing transactions in India can be broadly classified as follows:

- construction or completion of the project;
- revenue risk;
- operation risk;
- input or supply risk;
- environmental issues;
- land acquisition and resettlement and rehabilitation issues; and
- force majeure risk.

While it may not be possible to mitigate all risks in their entirety, the project finance lenders endeavour to ensure that all risks are well allocated between the parties so that the lenders are protected. Non-recourse financings are very rare in the Indian market; Indian project financings are typically limited recourse (with sponsor support for cost overruns primarily during the construction phase).

Some of the foregoing issues and risks are mitigated by:

- procuring sponsor support for the project, cost overruns and completion risk;
- ensuring adequate insurance cover for the project;
- implementing substitution rights for the lenders (which invariably require consent from the government or the concessioning authority);
- requiring project developers to enter into fixed-time and fixed-price turnkey project contracts;
- procuring performance bonds, warranties and guarantees, as applicable, from the project sponsors and the contractors, respectively;
- monitoring project cash flows through a trust and retention account mechanism and ensuring that such cash flows are utilised in accordance with the prescribed waterfall;
- seeking detailed reports during the construction, development and operation of the project;
- requiring the execution of long-term supply contracts or “take or pay” offtake con-

tracts, or through adequate payment security mechanisms; and
- linking disbursements to project completion and land acquisition milestones.

1.4 Active Industries and Sectors

The renewable energy sector is expected to attract great interest due to the global focus on clean energy and the availability of capital for such. Both solar and wind power projects will continue to see vigorous interest in both domestic currency and foreign currency financings through bonds and loans.

The Airport Authority of India (AAI) has completed the competitive bidding for appointing an operator for six new airports at tier-2 cities. Multiple other airport projects have also been announced, with the project financing thereof being expected to attract interest from financiers. The AAI has also announced that it will be selling its stakes in the existing PPP airports in the main metropolis cities.

The Ministry of Railways has announced plans to monetise assets, including a dedicated freight corridor after commissioning the induction of 150 modern rakes, and station redevelopment through PPPs. The introduction of private train operators is expected to revolutionise the Indian domestic railways, which have been in existence since the colonial era. There would be opportunities for financing these new PPP projects.

Other sectors that can expect significant activity in the coming years include roads and highways, the development of data centres, and warehousing and logistics.

2. GUARANTEES AND SECURITY

2.1 Assets Available as Collateral to Lenders

Typically, project companies can offer the following assets as collateral.

Security over immovable property such as land and buildings (whether freehold or leasehold) is created in the form of a mortgage. The Transfer of Property Act, 1882 (TOP Act) primarily governs the creation of mortgages. The common forms of mortgage are an English Mortgage (a registered mortgage) and an Equitable Mortgage (a mortgage created by depositing the title deeds with the lender or security trustee).

The TOP Act provides that a mortgage (other than an Equitable Mortgage) for the repayment of money exceeding INR100 must be created by way of a registered instrument. The instrument creating the mortgage is required to be signed by the mortgagor and registered with the land registry where the mortgaged immovable property is situated.

For an Equitable Mortgage, the authorised representative of the mortgagor deposits the title deeds in relation to the immovable property with the lender or security trustee with an intention to create a mortgage, and provides a declaration at the time of the deposit. The lender or security trustee records the deposit of title deeds by way of memorandum of entry. In some states, an Equitable Mortgage needs to be registered or notified to the land registry.

Security over shares and other securities is typically created by way of a pledge. A pledge agreement or deed is entered into between the pledgor and the pledgee to create and record the pledge. A separate power of attorney is also issued by the pledgor in favour of the pledg-

ee, which allows the pledgee to deal with the pledged shares/securities in the case of an event of default and to take other actions on behalf of the pledgor.

Movable property, such as receivables, plant and machinery, accounts and stock, is usually secured by way of hypothecation. Under Indian law, hypothecation generally means a charge over any movable property. The charge created by way of hypothecation may be a fixed charge over identifiable assets or fixed assets, and is usually a floating charge over current assets and stock-in-trade. The security provider executes a deed of hypothecation in favour of the lender or security trustee.

Intangible assets such as the rights of a project company under the project documents, insurance policies, licences and approvals, intellectual property, receivables and other intangible properties can be secured either by way of hypothecation or pursuant to a registered English Mortgage.

Furthermore, in PPP projects, the concessioning authorities usually grant the project lenders the right to seek substitution of the project company with another concessionaire under a concession agreement in the event of a default by the project company.

Additionally, while not in the nature of a security interest, lenders may also require corporate or personal guarantees from various entities or individuals to secure the loans.

Formalities and Perfection Requirements

An indenture of mortgage executed for an English Mortgage is required to be registered with the local sub-registrar of assurances.

For an Equitable Mortgage, the mortgagor is required to record the creation of an Equitable Mortgage by providing a declaration at the time of the deposit of title deeds. That deposit is also recorded by the mortgagee by way of a memorandum of entry. In some states, an Equitable Mortgage needs to be registered or notified to the land registry.

In addition, any mortgage or hypothecation should be registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) upon the payment of fees by the borrower. Certain provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act) have been implemented, which restrict a secured creditor (as defined under the SARFAESI Act) from exercising enforcement rights on a security interest if such security interest is not registered with the CERSAI.

Any company creating a security interest on its assets must register the charge created on its assets with the relevant registrar of companies (ROC). The form can be filed electronically and requires the digital signature of both the company and the charge holder. The ROC will issue a certificate of registration. Unless the charge is registered and the registration certificate issued by the ROC, the charge-holder's claim will not be recognised by the liquidator or other creditors of the borrower company.

For a pledge over dematerialised shares or other dematerialised securities, the requisite forms must be filed with the depository recording the pledge created in favour of the lender or security trustee. Additionally, in the assignment of intellectual property, specific authorities may be required to be informed (for example, for trade mark assignment, notice must be given to the trade mark registry).

Any security interest created in terms of the security documentation is also required to be filed by the lenders or the trustee (acting for the lenders) in whose favour the security has been created under the security documentation, with the information utilities in terms of the Insolvency and Bankruptcy Code (IBC).

While a leasehold interest in an immovable property can also be mortgaged, such mortgage usually requires the prior consent of the lessor.

Furthermore, it may be necessary to obtain prior permission from the income tax authorities before creating an encumbrance on specified fixed assets. If the immovable property is leased from government or regulatory bodies, the consent of the lessor for the creation of a mortgage will be required.

2.2 Charges or Interest over All Present and Future Assets of a Company

Indian law recognises a floating charge over all present and future movable assets. Usually, such charge is in the nature of hypothecation and created under a deed of hypothecation. A floating charge can be taken over present and future movable assets, receivables, rights under contracts and any other movable properties, whether tangible or intangible. The floating charge automatically crystallises into a fixed charge upon the occurrence of an event of default.

A charge can only be created over present and identified immovable properties; immovable properties to be acquired in the future cannot be offered as security prior to their acquisition.

2.3 Registering Collateral Security Interests

Generally, applicable stamp duty on the agreements, deeds or instruments executed between parties is required to be paid in order for such documents to be admissible as evidence in a court of law. Stamp duty rates are determined based on the nature of the instrument, and differ from state to state.

Registration fees are also required to be paid for registering mortgages with the sub-registrar/registrar of assurances, depending on the state in which the property is located. The borrower will also incur the cost for registering the security with the relevant ROC.

The costs of registering the charge with the relevant ROC, CERSAI and the depository are also to be paid, but these costs are not significant; they are typically borne by the borrower.

2.4 Granting a Valid Security Interest

A generic description of the movable assets proposed to be secured, such as their nature or location, which will help with the identification of such assets, should be sufficient for creating a valid charge thereon under Indian laws. However, immovable properties and financial securities need to be specifically identified in the security document and the registration forms for the creation of a valid charge thereon.

2.5 Restrictions on the Grant of Security or Guarantees

A shareholders' approval by way of special resolution (75%) is required under the Companies Act, 2013 for an Indian company to provide any guarantee or security if certain prescribed thresholds (in terms of paid-up capital, free reserves and securities premium) are exceeded. However, this approval is not required if the guarantee or security is being provided for a financing to be utilised by the company's wholly owned subsidiary or joint venture, for its principal business, provided that the company discloses the details of such guarantee or security in its financial statement.

As per the Companies Act, a company (lending company) cannot give loans, provide security nor extend any guarantee to or on behalf of any other company in which the directors of the lending company are interested or control a certain percentage of voting rights, unless such loan, guarantee or security falls within the exemptions prescribed under the Companies Act. There are certain relevant exceptions to this rule, as follows:

- loans made by a holding company to its wholly owned subsidiary company or any guarantee given, or security provided, by a holding company in respect of any loan made to its wholly owned subsidiary company, if the loans are utilised by the wholly owned subsidiary for its principal business activities;
- a guarantee given or security provided by a holding company in respect of loans made by any bank or financial institution to its subsidiary company, if the loans are utilised by the wholly owned subsidiary for its principal business activities;
- if the lending company, in the ordinary course of its business, provides loans or guarantees or security for the due repayment of any loan and interest is charged in respect of those loans at a rate not less than that specified under the Companies Act; or
- if the lending company obtains the approval of at least 75% of its shareholders for any guarantee given or security provided, and the loans availed by the borrower are utilised by it for its principal business activities.

Indian and foreign banks licensed by the RBI are not permitted to take pledges in excess of 30% of the paid-up share capital of a company or its own paid-up share capital and reserves, whichever is lesser. This may be mitigated in the case of a consortium of lenders with a beneficial interest of less than 30%.

2.6 Absence of Other Liens

A lender can ascertain if there are any previous charges on the assets to be secured, by conducting searches of or with the following:

- ROC, for charges filed by the company prior to the date of security creation;
- land revenue records, for mortgages created on immovable properties;
- security interests filed by Indian banks and financial institutions with CERSAI;
- records of the depository, with respect to pledges of securities that are in dematerialised form; and
- the register of charges maintained by a company in accordance with the Companies Act.

2.7 Releasing Forms of Security

The procedure for the release of security depends on the type of security being released.

In the case of an English Mortgage, a deed of re-conveyance or deed of release is executed between the mortgagor and mortgagee. It must be registered with the relevant sub-registrar of assurances where the mortgage deed was originally registered.

In the case of an Equitable Mortgage, the title deeds that were delivered to the lender are returned to the security provider. If the Equitable Mortgage is registered, then a deed of release is executed between the mortgagor and the mortgagee, and is registered with the relevant land revenue authority.

For a charge created over intangible assets such as intellectual property, release deeds are required to be executed and filed with the relevant offices in order to terminate the security interest.

With respect to a pledge of shares where the shares are in physical form, the share certificates

along with any undated signed transfer forms are required to be returned to the pledgor. If the shares are in dematerialised form, the necessary forms should be filed with the depository participant for release.

Additionally, the power of attorney issued under the pledge agreement, or the deed of hypothecation, is also required to be returned or cancelled.

3. ENFORCEMENT

3.1 Enforcement of Collateral by Secured Lender

A lender may generally enforce its security upon the occurrence of an event of default. The process to be followed for enforcement of the security is set out briefly below.

Immovable Property

If the mortgage is an English Mortgage, the mortgagee has the power to sell the mortgaged property without the intervention of the court, subject to certain notification requirements. Where the mortgage is an Equitable Mortgage, the mortgagor must apply to the court for a decree to sell the mortgaged property in order to recover the debt.

Secured creditors such as Indian banks, certain notified financial institutions and debenture trustees for listed and secured NCDs can enforce security under the SARFAESI Act, which provides for a quicker mode of enforcing security. Powers of obtaining possession, taking over the management of the borrower and other enforcement actions are typically set out in the contract between the parties. Furthermore, the Supreme Court of India has held that the enforcement of a mortgage is not an arbitrable dispute and should only be tried by a judicial forum, and not by an arbitral tribunal.

Movable Property

The rights and remedies of a hypothecatee are entirely regulated by the terms of the deed of hypothecation between the hypothecator (the security provider) and hypothecatee (the lender). A deed of hypothecation can be enforced either by appointing a receiver and selling the charged assets or by obtaining a decree for the sale of the movable property. Indian banks, certain notified financial institutions and debenture trustees for NCDs can enforce hypothecation under the SARFAESI Act, which provides for a quicker mode of enforcing security.

Pledge over Shares

A pledgee may enforce a pledge by giving reasonable notice of enforcement to the pledgor. The pledgee does not need to obtain a court order to sell the pledged shares. If the pledged shares are held in physical form, the pledgee must submit the executed share transfer forms it holds to the company whose shares are being pledged. The company will then need to approve the transfer of shares in the name of the lender or third-party transferee at its board meeting. If the company refuses to approve the transfer of shares, the lender or third-party transferee will need to approach the competent courts and tribunals to challenge such refusal.

Typically, all concession agreements stipulate that consent is required from the concessioning authority prior to effecting a change in control of the project company. If a pledge enforcement results in a change of control, prior consent of the concessioning authority will also be required for enforcement of the pledge.

Substitution under Concession Agreement

Upon the occurrence of payment defaults, the lenders usually have the right to seek substitution of the concessionaire with a person selected by the lenders, as per the terms of the relevant concession agreement. The lenders' selectee

needs to be a person who is approved by the concessioning authority.

Enforcement Restrictions under the IBC

If a company is admitted to a corporate insolvency resolution process (CIRP) under the IBC, no security can be enforced due to the moratorium imposed under the IBC. Where the company is to be liquidated under the IBC, a secured creditor will have an option to realise its security and receive proceeds from the sale of the secured assets as first priority. In addition, in the case of any shortfall in recovery, the secured creditors will rank junior to the unsecured creditors to the extent of the shortfall.

The ability to cause a transfer of assets and rights (under any concession, lease or licence) of a stressed project developer, pursuant to an insolvency resolution process, is yet to be judicially tested.

3.2 Foreign Law

Indian courts uphold the contractual choice of law and jurisdiction, subject to such choice being bona fide and having a real connection with the subject matter of the contract. Therefore, cross-border financing contracts are typically governed by English law. However, if the parties to a transaction are Indian residents and the secured assets are located in India, the transaction documents are governed by Indian law.

Under the Code of Civil Procedure, 1908 (CPC), certain jurisdictions are notified as a "reciprocating territory", and a civil decree issued by a competent court in such jurisdictions will be enforced by Indian courts without retrying the case on its merits, provided that the order being enforced is not contrary to Indian laws or public policy. However, in order for a decree to be directly enforceable in India, the following conditions must be met:

- it must be a money decree;
- it must be passed by a superior court of the reciprocating territory;
- a certified copy of the decree must be filed with a district court in India; and
- it must be held to be conclusive and not be set aside on any of the grounds mentioned above.

If the decree passed by a court of a reciprocating territory is not a money decree (such as an injunction), a fresh suit is required to be filed in a competent Indian court, where the foreign judgment will be admitted only as evidence. A foreign judgment must be brought into India for enforcement within three years of the date such foreign judgment is rendered, failing which the enforcement may be barred by the Indian laws of limitation. Accordingly, the choice of foreign law as governing law and submission to foreign jurisdiction will be upheld in India.

3.3 Judgments of Foreign Courts

As mentioned in **3.2 Foreign Law**, a decree by a foreign court of a reciprocating territory is enforceable in India, subject to certain conditions.

India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (Geneva Convention). If a party receives a binding arbitral award from a country that is a signatory to the New York Convention or the Geneva Convention, and the arbitral award is made in a territory that has been notified as a convention country by India, such arbitral award would then be enforceable in India. As per the Arbitration and Conciliation Act, 1996 (Arbitration Act), the following documents are required to be produced before Indian courts at the time of applying for the enforcement of a foreign arbitral award:

- the original award or a duly authenticated copy thereof;
- the original arbitration agreement or a duly certified copy thereof; and
- any evidence required to establish that the award is a foreign award, as applicable.

However, a foreign arbitration award cannot be enforced in India in some of the following instances:

- if the parties to the agreement were under some incapacity;
- if the foreign arbitral award is beyond the scope of the agreement or the submission to arbitration;
- if the composition of the arbitral authority or the arbitral procedure is beyond the scope of the agreement; or
- if enforcement of the foreign arbitral award would be contrary to the public policy of India.

3.4 A Foreign Lender's Ability to Enforce

Remittance outside India of any proceeds of a judgment may require the permission of the RBI from the perspective of exchange control laws, even if a lender has a valid claim against an Indian party and successfully establishes it in court. However, this is not applicable to the enforcement proceeds of securities, for which specific permission is available.

Litigation can be a tedious and expensive process in India. Courts in India are heavily backlogged with multiple matters, which makes litigation long, drawn out and inconvenient.

The IBC offers a much swifter, time-bound and predictable insolvency resolution mechanism to foreign and domestic lenders alike. A foreign lender usually faces no issue in pursuing its remedies under the IBC.

4. FOREIGN INVESTMENT

4.1 Restrictions on Foreign Lenders Granting Loans

Any loans or credit facilities provided by a foreign lender to an Indian borrower are governed by the Foreign Exchange Management Act, 1999, as amended (FEMA), and by the rules and regulations issued thereunder, including the ECB Guidelines.

The ECB Guidelines provide for two forms of external commercial borrowings (ECB): foreign currency-denominated ECB, and rupee-denominated ECB.

Foreign lenders with the following characteristics are eligible under the ECB Guidelines:

- residents of an FATF or IOSCO-compliant country;
- multilateral and regional financial institutions where India is a member country;
- individuals who are foreign equity holders of a company can extend facilities to such subject company; or
- foreign branches or subsidiaries of Indian banks are permitted as recognised lenders only for foreign currency ECB (except foreign currency convertible bond and foreign currency exchangeable bonds).

An eligible foreign lender providing an ECB to an Indian borrower is not required to obtain any consent or licence in India to lend to an eligible Indian borrower or to enforce its rights under any loan agreement.

Restrictions under FPI Regulations

Under Indian law, entities registered with SEBI as FPI are permitted to subscribe to NCDs issued by Indian companies. There are two routes in which an FPI may subscribe to NCDs issued by an Indian company: the general route and VRR.

General Route

Under the general route, an FPI may subscribe to NCDs issued by an Indian company subject to the following conditions:

- an FPI may subscribe to corporate bonds with minimum residual maturity of above one year only – however, an FPI may invest in securities with residual maturity of up to one year if such investment does not exceed 30% of the total investment of such FPI in corporate bonds on an end-of-day basis;
- investment by an FPI should not exceed 50% of the issue size of a corporate bond;
- the above-mentioned cap of 30% and 50% is not applicable for investments by FPI in:
  - (a) security receipts and debt instruments issued by asset reconstruction companies;
  - (b) debt instruments issued by an entity under CIRP as per the resolution plan approved by the National Company Law Tribunal (NCLT) under the IBC; and
  - (c) NCDs that are under default; and
- the proceeds of unlisted NCDs have certain end-use restrictions.

VRR

Unlike the general route, under the VRR there is no minimum residual maturity prescribed for subscribing to NCDs by an FPI. Furthermore, there are no limits to subscribing to corporate bonds by FPIs – ie, an FPI may subscribe to 100% of the corporate bonds. The minimum retention period is set at three years for investments made in debt securities by FPIs under VRR. This retention period will be applicable to 75% of the total amount allocated for investment to an FPI by RBI instead of a particular investment in debt security by an FPI.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

In the case of an ECB, consent from the authorised dealer bank is required for creating any security interest or for providing any guarantee.

The authorised dealer bank needs to ensure compliance with the following conditions prior to granting its consent:

- the underlying ECB should comply with the extant ECB Guidelines;
- there is a security clause in the loan agreement as per the terms of which an ECB is availed; and
- a no-objection certificate from the existing lenders for the creation of a charge, if applicable, is to be obtained.

The creation of a security interest on Indian assets for the benefit of FPIs holding NCDs of Indian companies does not require any regulatory consents. Such security is usually legally held by a debenture trustee, for the benefit of the NCD holders.

Foreign lenders are not permitted to assume ownership of immovable properties in India; they can only cause a sale of secured immovable properties to domestic entities and seek a repatriation of the enforcement proceeds. Any sale of pledged shares/securities by a foreign lender also needs to be made in compliance with the extant foreign investment control laws.

4.3 Foreign Investment Regime

India is still a capital-controlled economy. However, the policy framework on foreign investment in India is transparent, predictable and easily comprehensible.

A non-resident entity may invest or participate in India in the following ways:

- through foreign direct investment – the government of India has progressively liberalised this regime by bringing most sectors under the automatic investment route;
- through debt financing under the ECB route;
- as a registered FPI under the Portfolio Investment Scheme;
- as a registered foreign venture capital investor (FVCI) under the venture capital route;
- as a holder of US global depository receipts (ADR) and global depository receipts (GDRs) under the ADR/GDR Scheme; and
- as a non-resident Indian (NRI), overseas citizen of India (OCI), or a company, trust and partnership firm incorporated outside India and owned and controlled by NRIs or OCIs, on a non-repatriable basis.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

Returns on foreign investments in India are repatriable (net of applicable taxes) except in the following circumstances:

- where foreign investment has been in certain specific sectors that have a minimum lock-in period;
- where the investment has been made by NRIs into specific non-repatriable schemes; and
- where dividend payments are permitted through a designated authorised dealer bank, subject to the payment of the dividend distribution tax.

The payment of principal, interest or premiums on loans or debt securities held by parties in other jurisdictions must be carried out through an authorised dealer bank. In the case of ECBs, the remittance of the above amounts is required to be made in accordance with the provisions of the ECB Guidelines (such as compliance with minimum average maturity period). An authorised dealer bank may impose agency fees, commitment charges and structuring fees for remittance, but such charges are not statutory.

As per the SEBI (Foreign Portfolio Investors) Regulations, 2019, an FPI is required to appoint a branch of a bank authorised by the RBI to open a foreign currency-denominated account and special non-resident rupee account before making any investment in India.

4.5 Offshore Foreign Currency Accounts

An Indian project company may maintain an offshore foreign currency account as per the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations, 2015 (FEM Account Regulations), which state that an Indian company or a body corporate that is registered or incorporated in India is permitted to open, hold and maintain a foreign currency account with a bank outside of India for the purpose of normal business operations in the name of its office (trading or non-trading) or its branch set up outside India or its representative stationed outside India. The account is to be used for normal business operations of the account holder, subject to a remittance limit. The account is not permitted to be operational for more than six months from the date of the opening of such account. The opening of such accounts is also subject to the terms and conditions of the current RBI regulations.

5. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

5.1 Registering or Filing Financing of Project Agreements

As mentioned in **2.3 Registering Collateral Security Interests**, the applicable stamp duty on

the agreements, deeds or instruments executed between parties is typically required to be paid in order for such document to be admissible as evidence in a court of law. Stamp duty rates are determined based on the nature of instrument and differ from state to state.

Any document that creates or purports to create any security interest in immovable properties in India must be registered with the relevant sub-registrar of assurances (a revenue authority) within whose jurisdiction the immovable property is situated. Accordingly, registration fees are required to be paid for registering mortgages with such sub-registrar of assurances, depending on the state in which the property is located.

Certain sectoral regulators, such as the National Highways Authority of India, mandate that project and financing documents are filed with it, in order to ensure the compliance of these documents with the terms of the concessions granted by such authority to the project company.

5.2 Licence Requirements

Non-residents are not permitted to own land in India. While Indian companies generally have full authority to own land, certain restrictions are imposed by governmental authorities regarding special categories of land – for example, agricultural land or land situated in sensitive geographical areas.

The ownership of natural resources (eg, coal) vests with the government, and the right to use such natural resources will be subject to the terms of licences granted by the government. Each governmental department concerned applies its own procedures and criteria to determine the terms of award of such licence. Tribunals in India have taken a view that spectrum is a natural resource, and the government is holding the same as cestui que trust.

Such licences with respect to natural resources cannot be held directly by a foreign entity, but may be held by an Indian entity that is owned or controlled by a foreign entity, subject to applicable law.

5.3 Agent and Trust Concepts

The concepts of agency and trust are recognised and widely developed in India. In a typical financing transaction involving a consortium of lenders, for ease of security creation and enforcement the usual practice in India is to create the security interest in the name of a trustee, who holds the security for the benefit of the consortium of lenders. Generally, such a trustee company specialises in providing trusteeship services. The terms of the appointment of a trustee are captured in a security trustee agreement.

In a typical financing arrangement in India involving a consortium of lenders, a facility agent is also appointed for the lenders as per mutually agreed terms, and is responsible for co-ordinating the loan disbursement and administration process.

5.4 Competing Security Interests

Debts may be raised by a borrower by way of secured loan or unsecured loan. In the absence of any contract to the contrary, the debts due to secured lenders would be paid first (unless such secured creditor has enforced their security outside liquidation), followed by the debts due to unsecured lenders; security that is created prior in time will rank in priority to security that is created later. Where a security agreement is required to be registered under the Registration Act, 1908, if multiple securities are created pursuant to different agreements on the same asset, the agreement that is entered into prior in time will have priority over the security interest over the assets, even if such prior agreement is registered later, but as long as such prior agreement is validly registered.

Moreover, a first ranking charge will have priority over a second ranking charge at the time of enforcement of security.

Contractual subordination is also seen in the Indian loan market, where lenders contractually agree among themselves whose debts would be paid in priority over others. Contractual subordination may take place either through a subordination deed or through intercreditor agreements. Contractual subordination is also common between lenders and promoters/group companies, where promoters/group companies have provided debt (by way of either unsecured loans, debentures or preference shares) to the borrower entity.

5.5 Local Law Requirements

In general, the development of projects requires the project company to be incorporated in India. The most preferred legal form is a limited liability private company. Given the imperative of bankruptcy remoteness of the project company, such project companies are usually organised as special purpose vehicles incorporated for the sole purpose of developing a particular project.

6. BANKRUPTCY AND INSOLVENCY

6.1 Company Reorganisation Procedures

The Companies Act sets out detailed provisions for arrangements and reorganisations for companies, between the company and its members and/or creditors and/or any class(es) of them. The process is administered by the NCLT, and adoption/implementation of a scheme of reorganisation requires the consent of at least three-quarters (75%) by value of the class of creditors and/or members concerned. Usually, the NCLT is mandated with ensuring procedural propriety and does not interfere in the commercial terms of a restructuring plan, unless a scheme is prejudicial or inequitable.

A company that has defaulted on payments to banks and certain other specified lenders can be reorganised or restructured under the Prudential Framework for Resolution of Stressed Assets Directions dated 7 June 2019 by RBI (RBI Directions). The RBI Directions give the lenders absolute discretion to determine and implement any resolution plan, including restructuring by way of change of control, sale of exposure or regularisation. The RBI Directions also state that any decision agreed by lenders representing 75% by value of total outstanding credit facilities (fund-based as well non-fund-based) and 60% of lenders by number shall be binding on the dissenting minority. Dissenting lenders are required to be paid a minimum of liquidation value. The lenders have the option to refer the company to insolvency if restructuring fails under the RBI Directions.

6.2 Impact of Insolvency Process

The IBC provides a single comprehensive insolvency framework to deal with insolvency and bankruptcy processes related to companies. Under the provisions of the IBC, an insolvency resolution process of a company can be commenced by filing an insolvency application before the NCLT, when a corporate debtor has committed a default in relation to the payment of a debt of at least INR100,000 (Rupees one lakh) owed to a creditor.

Once an application filed before the NCLT is admitted, a moratorium is declared on all enforcement or recovery proceedings against the borrower and its assets until the completion of the insolvency resolution process.

However, this moratorium does not prohibit the lenders from seeking remedies against third-party guarantors or third-party security providers.

6.3 Priority of Creditors

The IBC provides for an order of payment of debts in cases of debt resolution pursuant to a resolution plan as well as during the liquidation of a company.

The IBC provides that the non-financial creditors are to be paid the higher of the following:

- the amount such operational creditors would have received in the event of a liquidation of the corporate debtor as per Section 53 of the IBC; or
- the amount such operational creditors would have received if the amount distributed under the resolution plan was distributed in accordance with the priority specified as per the liquidation waterfall under Section 53 of the IBC.

The IBC further provides that payments to dissenting financial creditors will be determined in accordance with regulations framed by the Insolvency and Bankruptcy Board of India, but will not be less than the amount that would have been paid to such creditors in the event of the liquidation of the corporate debtor. As per the IBC, operational creditors are to be paid in priority to financial creditors, and the dissenting financial creditors are to be paid in priority to the assenting financial creditors. Additionally, as per the IBC, such payments made to operational creditors as well as dissenting financial creditors under the resolution plan should be "fair and equitable" to such creditors.

If the corporate debtor goes into liquidation, the following order of priority is followed for the distribution of proceeds arising out of the liquidation estate:

- insolvency resolution process costs and liquidation costs;
- workmen's dues for a period of 24 months preceding the liquidation commencement date and debts owed to secured creditors (who choose to relinquish their security enforcement rights), both of which rank equally between them;
- wages and unpaid dues of employees (other than workers) for a period of 12 months preceding the liquidation commencement date;
- financial debts owed to unsecured creditors;
- amounts due to the central and state governments for a period of 24 months preceding the liquidation commencement date and the debts of secured creditors (to the extent they remain unpaid after separately enforcing security on assets secured in their favour), both of which rank equally between them;
- remaining debts and dues;
- dues of preference shareholders; and
- dues of equity shareholders (for a company) or partners (for a limited liability partnership).

6.4 Risk Areas for Lenders

As discussed above in **3.1 Enforcement of Collateral by Secured Lender**, a moratorium is imposed on the borrower and its assets once such borrower is admitted into a CIRP. All financial creditors thereafter are mandatorily required to participate in the CIRP, in accordance with the provisions of the IBC.

All significant decision-making in a CIRP, including approving a resolution plan, requires the consent of at least 66% by value of the financial creditors, which is binding on all the stakeholders. Accordingly, lenders without any significant voting share may remain subject to the decisions taken by the specified majority.

6.5 Entities Excluded from Bankruptcy Proceedings

When the IBC was enacted, financial service providers such as banks and non-banking financial companies were excluded from its purview. However, in November 2019, the IBC was made applicable to financial service providers that are

in the nature of non-banking financial companies with a specified asset size, by virtue of rules enacted in this regard.

Furthermore, Part III of the IBC governs insolvency resolutions and bankruptcy for individuals and partnership firms. The provisions of this part have not yet been fully implemented. However, pursuant to a notification in November 2019, certain provisions of part III of the IBC have been brought into effect to the extent they relate to insolvency resolution and bankruptcy of individuals (who have provided personal guarantees for corporate debtors).

7. INSURANCES

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Only Indian insurance companies registered with the Insurance Regulatory and Development Authority of India (IRDAI) are permitted to undertake insurance business in India and provide risk covers for assets located in India. Investment by foreign insurance companies is subject to regulatory restrictions on ownership by foreign players. Goods and services tax will be applicable on such policies, based on the nature and quantum thereof.

A lender (including a foreign lender) can be named as the beneficiary of an insurance policy and, consequently, the proceeds of an insurance claim may be credited (after meeting the cost of repairs, damages and losses sustained) to a foreign lender for the prepayment of the foreign currency loans granted by it to the borrower. However, any remittance of insurance proceeds outside India is subject to the extant foreign exchange regulations of the RBI.

7.2 Foreign Creditors

As detailed in **4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders**, the creation of security in the case of an ECB requires prior approval of the authorised dealer bank. As part of the enforcement proceedings that may be undertaken by or on behalf of the foreign creditors, the foreign creditors may enforce the security created over the insurance policies and obtain the benefit of the same.

8. TAX

8.1 Withholding Tax

The applicable rate of withholding tax on interest payable by an Indian company to a non-resident lender (situated outside India) on ECB and rupee-denominated bonds issued overseas is currently 5% (plus applicable surcharge and cess), subject to the satisfaction of certain conditions and the provision of prescribed documents. This tax is withheld from the interest payable to the lender and deposited on the lender's behalf with the government. The tax withholding rate of 5% is not applicable if the lender is the branch of a foreign bank located in India.

Foreign banks that have a branch in India have the option of applying for and obtaining a certificate allowing the borrower to deduct tax at a lower appropriate rate, having regard to the overall tax liability of the Indian branch of the foreign bank. Upon the sharing of such a certificate with the borrower, the borrower can withhold tax at the rate prescribed therein.

The act of withholding the tax is an obligation of the borrower, who is also required to issue a certificate evidencing this. The lender can take the credit of the tax withheld on interest to meet its tax liabilities in India as well as in the country of residence.

8.2 Other Taxes, Duties, Charges

Under Indian law, stamp duty is required to be paid on loan agreements, guarantee deeds and security documents. The stamp duty payable on the documents varies from state to state. Typically, the obligation to pay the stamp duty is on the borrower, guarantor or security provider (as the case may be). If inadequate stamp duty has been paid on a document, the document would be inadmissible as evidence in court unless the deficient stamp duty with any penalty thereon has been paid on such document.

Normally, stamp duty is paid prior to or at the time of executing a document in India. The payment of stamp duty is often a determinative factor in choosing the location of executing documents. However, if a document is stamped in one state but the original or a copy of it is brought into another state that levies a higher stamp duty, the differential stamp duty may need to be paid in this other state, depending on the nature of the document and the stamp law in this other state.

Furthermore, no stamp duty is required to be paid prior to execution on a document executed outside India, under Indian law. However, if the document or copy thereof is received in India, then stamp duty may be payable on such document depending on the state where the document is received and the nature of the document.

8.3 Limits to the Amount of Interest Charged

For rupee loans by Indian banks or financial institutions, there is no ceiling on the amount of interest that can be charged. However, the interest rate is linked to the cost of funds of such institution. The RBI mandates absolute transparency by banks and institutions in determination of their interest rates.

The all-in-cost ceiling in case of foreign currency ECB is capped at a six-month London Inter-bank Offered Rate (LIBOR) plus 450 basis points. The benchmark rate in the case of rupee-denominated ECB is the prevailing yield of the government of India securities of corresponding maturity. While the RBI has encouraged and signalled the need to use alternative benchmark reference rates for new loans, it has not yet issued any clear guidelines on using other reference rates with respect to ECB. The ECB guidelines still only recognise LIBOR as the benchmark.

There is no all-in-cost ceiling in the issuance of NCDs by an Indian entity to a domestic entity or an FPI.

9. APPLICABLE LAW

9.1 Project Agreements

Project agreements are typically governed by Indian law in cases where the parties are Indian residents. In the case of one or more foreign counterparties – for example, in the case of export contracts – project agreements may be governed by foreign law.

9.2 Financing Agreements

Financing agreements are typically governed by Indian law in cases where the borrower avails a loan from a domestic lender. However, in the case of borrowings from a foreign lender, English law is usually preferred as the governing law. For a subscription of NCDs by a domestic entity or an FPI, the debenture trust deed is typically governed by Indian law.

9.3 Domestic Laws

The creation and enforcement of security interests on assets situated in India are typically governed by Indian law.

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JSA is a leading national law firm in India, with more than 350 professionals operating out of seven offices located in Ahmedabad, Bengaluru, Chennai, Gurugram, Hyderabad, Mumbai and New Delhi. For over 25 years, the firm has provided legal representation, advice and services to leading international and domestic businesses, banks, financial services providers, funds, governmental and statutory authorities, and multilateral and bilateral institutions. JSA has a distinguished and market-leading banking and finance practice in India, which has been involved in several project and project finance assignments for banks, financial institutions, funds, sponsors and corporates in different sectors, including roads, ports, railways, airports, oil and gas, power and renewable energy. With a team of more than 35 attorneys, the banking and financing practice has the necessary expertise and resources to provide comprehensive, commercially oriented and practical advice and solutions to clients.

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