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Project Finance 2023

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India: Law & Practice and Trends & Developments

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JSA

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 are also a source of financing. Given the broad horizon of investments, infrastructure debt funds and state-owned specialist institutions such as the National Investment and Infrastructure Fund and India Infrastructure Finance Company Limited have emerged as alternatives, supplementing the traditional financiers. The National Bank for Financing Infrastructure and Development has been set up and is in the process of being operationalised as an Indian development financial institution, to support the development of long-term infrastructure financing in India.

Certain development finance institutions, multilateral agencies, international banks and export credit agencies have been active in the project financing market. The Regulations in relation to External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency (which are applicable to foreign institutions lending in foreign currency and to Indian companies issuing foreign bonds outside India) permit 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 subject to certain restrictions on minimum average maturity, ceilings on interest, end use, etc.

Many such foreign lenders and foreign private credit funds have invested through their foreign portfolio investor (FPI) entities registered with the Securities and Exchange Board of India (SEBI), by subscribing to Indian rupee-denominated non-convertible debentures (NCDs) issued by project companies under the regular route and the voluntary retention route (VRR) in the Indian bonds market. Funds registered with SEBI as foreign venture capital investors (FVCIs) are also permitted to invest in debt securities if they have invested in equity shares or in equity-linked instruments such as optionally convertible debentures.

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.

Asset reconstruction companies are also gaining importance as aggregators for defaulted debt, for a comprehensive debt resolution.

1.2 Public-Private Partnership Transactions

A large number of PPPs in infrastructure projects have been rolled out, leading to faster implementation, reduced life-cycle costs, access to private sector finance and optimal risk allocation. Private management increases accountability and incentivises improved public service delivery through the maintenance of required service standards.

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 primarily overseen 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);
- incentivising obtaining financial support to make PPP infrastructure projects commercially viable through government schemes (such as the Viability Gap Funding scheme for up to 40% of the cost of the project); and
- supporting the development of a pipeline of bankable PPP projects through the India Infrastructure Project Development Fund (which provides a mechanism for project sponsoring authorities to source funding for PPP transaction costs, including appointment of transaction advisers) and the erstwhile Planning Commission (now known as NITI Aayog, India's public policy think tank).

These mechanisms help to mainstream PPPs through a multi-pronged approach towards 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 the central government is governed by comprehensive rules, such as the General Financial Rules, 2005 and the Delegation of Financial Powers Rules, 1978, and by government orders and guidelines that provide for instructions on public expenditure, record-keeping and financial controls. 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;
- operational risk;
- input or supply risk;
- environmental issues;
- land acquisition, 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 over-runs primarily during the construction phase). Certain smaller sponsors

are even required to provide corporate and personal guarantees for the financing to the lender.

Some of the foregoing issues and risks are mitigated by:

- procuring sponsor support for the project, cost over-runs 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 contracts, 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 attracting great interest due to the global focus on clean energy and the availability of capital for such uses.

In January 2023, the Union Cabinet, chaired by the Prime Minister of India, approved the National Green Hydrogen Mission with the goal of making India a green hydrogen hub and of producing five million tonnes of green hydrogen by 2030.

Both solar and wind power projects will continue to see vigorous interest in both domestic currency and foreign currency financings through bonds and loans. A number of large domestic business houses and foreign private equity-led sponsors have built up platforms for developing and owning such renewable energy assets. Recent amendments in the electricity laws focus on energy storage solutions and rehauling distribution licensing. The commercial and industrial (C&I) sector, which works on the basis of captive power plants and PPAs with corporates for which tariff is not regulated, has garnered a lot of interest and deal activity.

The government launched the National Logistics Policy in September 2022 to streamline the operations of businesses by introducing digitisation for seamless co-ordination and reducing overall logistics costs, and shifting the current over-dependence on roads to railways and waterways. The Ministry of Railways is developing hydrogen-powered trains to support its zero carbon goals, and it aims to run 35 hydrogen-powered trains in 2023–24.

Other sectors that can expect significant activity in the coming years include ports, logistics and the development of data centres. In October 2022, data centres and energy storage systems were included in a harmonised master list of infrastructure sub-sectors to boost financing in said sectors.

Along with the roll-out of 5G services, the Union Cabinet cleared the draft Indian Telecommunication Bill 2023 (the "Telecom Bill"). The Telecom Bill proposes that if a telecom company in possession of spectrum goes through bankruptcy

or insolvency, the assigned spectrum will revert to the control of the central government. However, the Telecom Bill is yet to be tabled before parliament.

There is also a lot of interest in electric mobility, in terms of electric vehicles and the charging infrastructure for them. It was announced by the Minister of Road Transport and Highways of India that the government of India has provisioned for and approved 137 electric vehicle (EV) charging stations to be installed at wayside facilities on national highway stretches. The government has sanctioned development of charging stations in 68 cities across 25 states and union territories under the "Faster Adoption and Manufacturing of (Hybrid and) Electric Vehicles in India" scheme.

Infrastructure investment trusts (InvITs) have now been well established as a mode of monetising operational infrastructure assets, especially transmission assets, road concessions and telecommunications towers, where sponsors are transferring such assets to an InvIT to create a platform whose units are listed and can be held by domestic and international institutional investors.

2. Guarantees and Security

2.1 Assets Available as Collateral to Lenders

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

Mortgages

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 (the "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. Such instrument 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 or mortgage by deposit of title deeds, 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 evidencing such intention. The lender or security trustee records the deposit of title deeds by way of memorandum of entry.

Pledges

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

Hypothecation

Movable property, such as receivables, plants and machinery, and accounts and stock, is usu-

ally 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. A separate power of attorney may also be issued by the security provider in favour of the lender or the security trustee, which allows the person in whose favour the security is created to deal with the hypothecated properties (including in the event of default), and to take other actions on behalf of the security provider.

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 charge under a hypothecation or pursuant to an assignment under a registered English mortgage or by way of an equitable assignment by way of a hypothecation and a power of attorney.

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 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.

In some states, an equitable mortgage needs to be registered with 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) by the charge holder. Certain provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the "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 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 is required to be filed by the company within a period of 30 days from the date of security creation. 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 is issued by the ROC, the charge holder's claim will not be recognised by the liquidator or other creditors of the 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 may require the prior consent of the lessor based on the terms of the lease deed.

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 must 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.

Certain documents, such as the power of attorney, are also required to be notarised by a notary public, at the time of their signing, for a nominal charge for availing an evidentiary presumption.

The costs of registering the charge with the relevant ROC, CERSAI and the depository must also 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 law. 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

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, 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 Reserve Bank of India (RBI) are not permitted to take pledges in excess of 30% of the paid-up share capital of a company or their own paid-up share capital and reserves, whichever is lesser, which may need to be documented in the share pledge agreement with a security trustee. 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:

- the relevant 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, 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.

For 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.

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

Relevant charge satisfaction forms must also be filed with the ROC, CERSAI and the relevant information utility under the IBC, if applicable, for discharging the perfection that was recorded with the ROC, CERSAI and the information utility.

3. Enforcement

3.1 Enforcement of Collateral by Secured Lender

A lender may generally enforce its security upon 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 noti-

fied 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 a 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, 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 law 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 (the "New York Convention") and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (the "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, 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 bonds 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.

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.

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 (these requirements have been exempted from 8 July 2022 and 31 October 2022).
- Investment by an FPI should not exceed 50% of the issue size of a corporate bond.
- The above-mentioned caps of 30% and 50% are 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.
- The proceeds of unlisted NCDs have certain end-use restrictions.

Unlike the general route, under 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 reten-

tion period will be applicable to 75% of the total amount allocated for investment to an FPI by the 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, prior consent from the authorised dealer bank is required for creating any security interest or for providing any guarantee in favour of an offshore lender.

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;
- that there is a security clause in the loan agreement as per the terms of which an ECB is availed; and
- that 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 consent. 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.

Security can be granted over shares of a foreign entity or over domestic assets held by an Indian entity, to secure domestic borrowings by the Indian entity from authorised dealer banks licensed in India, public financial institutions or overseas lenders (whether banks or non-banks), and also for non-convertible debentures.

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 FVCI under the venture capital route;
- as a holder of American depository receipts (ADRs) 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 or 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 ECB, the remittance of the above amounts is required to be made in accordance with the provisions of the ECB Guidelines (such as compliance with the 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 (the "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 India for the purpose of conducting normal business operations in the name of its office (trading or non-trading), 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 the 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 or other concessioning authorities, such as the National Highways Authority of India, mandate that project and financing documents be 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 for determining 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 such 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 – though provided that 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 the 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 the RBI (the “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 as 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 for dealing 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 INR10 million 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 recent judicial pronouncements, the dissenting financial creditors should be paid in priority and cannot be issued instruments unless they expressly agree thereto.

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. In addition, 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 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 compa-

nies 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. Insurance

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 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 thereof.

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, 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 for foreign currency ECB is capped at a rate equivalent to the aggregate of a benchmark rate of any widely accepted interbank rate or alternate reference rate of six-month tenor, applicable to the currency of borrowing, plus 550 basis points for existing ECB that are being changed to an alternative reference rate from the London Inter-Bank Offered Rate (LIBOR) or plus 500 basis points for new ECB. The all-in-cost ceiling for rupee-denominated ECB is the aggregate of a benchmark rate of prevailing yield of the government of India securities of corresponding maturity plus 450 basis points.

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.

Trends and Developments

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JSA

JSA was founded in 1991 and is one of the leading full-service national law firms in India, with over 480 legal professionals spread across its seven pan-India offices – Ahmedabad, Bengaluru, Chennai, Gurugram, Hyderabad, Mumbai and New Delhi. As the go-to firm for the new transformative and digital Indian economy, JSA is regularly involved in many first-to-market and complex transactions, and plays an integral role in advocacy and policy matters affecting the various sectors. For over 30 years, JSA has been at the forefront of providing dedicated legal services to many of the world's leading global and domestic corporations, state-owned enterprises, banks, financial institutions, funds, governmental and statutory authorities, and multilateral and bilateral institutions. JSA has built a reputation for its client-centric approach, quality of service, domain knowledge and sector insights, and for delivering innovative solutions to complex legal and commercial issues for the benefit of its clients. This has led to JSA being consistently recognised as a top-tier firm for its capabilities and expertise across practices and sectors by leading legal directories, league tables and industry journals.

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Introduction

The year of India's G20 presidency has been a major milestone in cementing the country's position as a global power. This year's G20 summit proposed several sustainability initiatives, embedded in the theme of the summit: "One Earth, One Family, One Future". Such initiatives included:

- financing Indian cities into "cities of tomorrow";
- reforms to multilateral development banks to facilitate green financing; and
- standards for green hydrogen and energy transition.

India has set a lofty goal of achieving net zero by 2070. The financing required for funding India's infrastructure development requirement has always been a key challenge.

Developments

Green-financing dry powder

India usually sees significant financing flows through multilateral development institutions such as the International Finance Corporation, Asian Development Bank and other sovereign wealth funds and development finance institutions from various countries, as well as the New Development Bank (formerly referred to as the BRICS Development Bank) and the Asian Infrastructure Investment Bank (AIIB).

The newly formed National Bank for Financing Infrastructure and Development (NaBFID), an Indian development financial institution (DFI), raised INR2.3 trillion in its maiden Indian rupee-denominated domestic corporate bond issuance to raise funds for its stated purpose of the development of long-term infrastructure financing in India.

The National Infrastructure Investment Fund (NIIF), India's sovereign wealth fund, has with Japan Bank for International Cooperation (JBIC) jointly launched a USD600 million India-Japan fund, with JBIC and the government of India as anchor investors.

The Reserve Bank of India (the central bank in India) has recently taken steps to relax the regulatory framework for infrastructure debt funds (IDFs), including:

- withdrawing the requirement of a sponsor;
- allowing access to external commercial borrowings; and
- directly financing toll-operate-transfer (TOT) projects.

IDFs are special funds for refinancing bank debts in operational infrastructure projects. While IDFs are at a nascent stage in India, with time these may become a key long-term financing mechanism and help free up bank credit for redeployment.

The Rural Electrification Corporation (REC) recently issued USD750 million in green bonds as part of its Global Medium-Term Notes (MTN) programme.

International banks following the environmental, social and governance (ESG) push have also been financing renewable energy or electric mobility-related projects. The government of India also introduced the Framework for Sovereign Green Bonds, wherein the proceeds from issuance of such bonds will be utilised for financing and/or refinancing expenditure for eligible green projects that help in reducing the carbon intensity of the economy.

The India Infrastructure Project Development Fund (IIPDF) was recently notified, and provides, inter alia, for financial support by the government of India to project sponsoring authorities who are looking to implement PPP projects. The IIPDF scheme aims to cover certain costs associated with public private partnership (PPP) projects, such as costs of consultancy and transaction advisers appointed by the project sponsoring authority.

Thrust for new-age green fuels

Energy transition has also increased the focus on certain other low-carbon technologies such as battery storage and green hydrogen, with the government introducing policies and measures to promote these. Electric vehicles, development of charging infrastructure for EVs and development of gas distribution networks for domestic fuel use have also been of key policy focus by the government.

The government approved the National Green Hydrogen Mission in January 2023 for creation of a thorough green hydrogen ecosystem, with a specified goal of making India a green hydrogen hub, and with a target production of five million tonnes of green hydrogen by 2030 and a fiscal outlay of INR197 billion. The policy intends to make India a leading producer and supplier of green hydrogen globally, with the following effects:

- creating export opportunities;
- reducing dependence on imported fossil fuels;
- developing indigenous manufacturing; and
- attracting investment and business opportunities.

The mission will focus on:

- boosting domestic production of electrolysers and reducing the cost of green hydrogen;
- setting up pilot projects in emerging end-use sectors and production pathways; and
- facilitating PPP projects in research and development, with projects being undertaken in a time-bound and goal-oriented manner.

Hydrogen is proposed to be categorised as “grey”, “blue” and “green” depending on the nature of the method of its extraction. The Ministry of New and Renewable Energy has also introduced Green Hydrogen Standards for India to delineate specific emission thresholds for categorising hydrogen production. Various state governments have also introduced policies for incentives and facilitation of green hydrogen production. A number of large corporate houses or energy companies have expressed interests in commencing projects in green hydrogen.

The Ministry of Railways is developing hydrogen-powered trains to support its zero-carbon goals, and it aims to run 35 hydrogen-powered trains in 2023–24.

Electrification of mobility

The government has also sanctioned a budgetary outlay of INR200 billion for:

- development of charging stations/infrastructure;
- electrification of public and shared transportation;
- a production-linked incentive (PLI) incentive scheme for the automotive sector; and
- reduction of various taxes on EVs and EV chargers under the Faster Adoption and Manufacturing of (Hybrid &) Electric Vehicles in India (FAME) scheme – Phase II.

Major projects are being developed to establish India as a global hub for manufacturing of electronic vehicles, with domestic banks financing parts of the project costs.

Captive power projects

With the decarbonisation push from large corporate houses, captive power projects have become very relevant. The Electricity Rules, 2023 (the "Electricity Rules"), which set out the rules governing the electricity sector in India, have recently been amended several times. These amendments affect the structures around captive projects due to the requirements for being treated as a captive power project and being exempt from certain charges. In Dakshin Gujarat Vij Company v Gayatri Shakti Paper and Board Limited and Another, the Supreme Court ruled on certain interpretative issues regarding requirements under the Electricity Rules that have a deep impact on the captive power project structures in the commerce and industry space.

Carbon credit trading

The amendments passed in 2022 to the Energy Conservation Act, 2001 introduced provisions and set the stage for a regulatory framework for carbon credit trading. Carbon credits are an important market incentive for greenhouse gas emission reduction. These carbon credits make up the nationally determined contributions (NDCs) under the Paris Agreement. India has been participating in the sale of carbon credits through the Clean Development Mechanism (CDM) under the United Nations Framework Convention on Climate Change (UNFCCC) route and in the private sector-driven voluntary carbon market.

In June 2023, the government issued a notification detailing a draft framework of the Indian carbon market under the Carbon Credit Trading Scheme 2023 (the "Carbon Credit Scheme"). Earlier, the draft Carbon Credit Scheme envisaged the establishment of the India Carbon Market Governing Board (ICMGB) as the central entity responsible for the oversight and regulation of the carbon credit market. The notified Carbon Credit Scheme constitutes a National Steering Committee, and the Bureau of Energy Efficiency will administer the carbon market. The Central Electricity Regulatory Commission (CERC) shall be the regulator for trading activities under the Indian carbon market. The Grid Controller of India would act as the registry.

The National Steering Committee shall develop the detailed procedure for operationalising the Indian carbon market, including:

- criteria and validity for issuance of carbon credit certificates;
- floor and forbearance price of carbon credit certificates; and
- requirements, formats and timelines for submissions, monitoring, reporting and verification.

Currently, India also has an energy savings-based market mechanism. The new Carbon Credit Scheme will enhance energy transition, and will also set out the GHG emissions intensity benchmark and targets in line with India's GHG emissions-reduction targets as per its climate goals. Further developments of a voluntary market for non-obligated sectors are also contemplated. The currently prevalent Perform, Achieve and Trade (PAT) scheme would transition into the new compliance market.

The Indian Energy Exchange has also set up a wholly owned subsidiary, International Carbon Exchange Private Limited, to explore business opportunities in the voluntary carbon market.

Energy storage systems

Energy storage systems, including dense charging infrastructure and grid-scale battery systems, have also been included in the harmonised list of infrastructure, which clarifies its classification as infrastructure and the access to external commercial borrowings for its financing.

Roads

Infrastructure investment trusts (InVITs) have become a popular platform for catalysing investment from retail investors, pension funds and other financial institutions by aggregating revenue-generating and completed assets. They have also proved useful for the National Highways Authority of India (NHAI) in monetising operational assets. The National Highways Infra Trust (ie, the InVIT set up by the NHAI), has already accessed the bond market and availed credit from banks and financial institutions for concluding multiple rounds of asset acquisitions.

The Securities and Exchange Board of India has permitted offer-for-sale for units of private listed InvITs through the stock exchange.

Digital infrastructure

NHAI has announced that it aims to develop around 10,000 km of optic-fibre cable (OFC) infrastructure across the country by financial year 2024–25. This project is proposed to be implemented by NHAI through its subsidiary, National Highways Logistics Management Limited. Currently, the proposal is to develop utility corridors along the highway stretches where the OFC can be laid down and established. With the creation of digital highways, the government of India hopes to implement telecommunications technologies such as 5G and 6G in remote parts of India and to fulfil the larger goal of digital transformation of the country. The government's plan is to lease out the OFC network as a fixed-price allotment mechanism on an "open for all" basis. The finer details of the policy for allotment will be decided by the Department of Telecommunications and the Telecom Regulatory Authority of India.

On the back of increased demand due to data-intensive generative artificial intelligence (AI) use cases, data localisation and 5G services rollouts, there is a lot of interest in data centres.

Adani ConneX, a joint venture between Adani Enterprises and US-based EdgeConnex, secured a USD213 million foreign currency facility from a consortium of international banks for two data centres aggregating to 67 MW.

Reliance Industries has acquired a 33.33% stake in a joint venture set up by Brookfield Infrastructure and Digital Realty for developing data centres in India.

Recent infrastructure-financing deal activity

While the foreign currency-borrowing market has been curtailed due to the SOFR being at a very high level and high hedge costs, the infrastructure space has seen some large financings being raised both in local currency and in foreign currency.

REC Limited has sanctioned an INR60.76 billion financing for a pumped storage project by Greenko. Vena Energy raised project financing from a consortium of international banks for a 300 MW project in Karnataka. Adani Energy Solutions Limited achieved financial closure of a USD1 billion project financing for a high-voltage direct current link project that will "green" the grid by injecting 1,000 MW of additional renewable power into the city of Mumbai.

Vibrant Energy has tied up project financing of 300 MW for billing wind-solar hybrid projects. The public sector enterprise, Power Finance Corporation (PFC), has sanctioned project financing for a greenfield airport project in Andhra Pradesh.

India Infrastructure Finance Corporation Limited (IIFC) sanctioned loans to six major airports in India, at Delhi, Mumbai, Hyderabad, Navi Mumbai, Noida (Jewar) and the newly developed Manohar International Airport at Mopa, Goa. GMR Airports has roped in NIIF to invest INR6.3 billion for the Mopa airport at Goa.

Ola Cell Technologies Private Limited has also achieved financial closure for its manufacturing facility regarding advanced chemistry cell (ACC) batteries for electrical vehicles.

Given the regulatory developments in green hydrogen, captive power projects and carbon credit trading, further financing for infrastructure projects or deal activity involving these aspects or sectors is expected.

Summary

The demand for quality infrastructure remains high in India. The government is taking several steps to broaden the credit market, as well as to mitigate many of the risks faced by project developers and financiers. The high demand, backed by these measures, leaves no doubt regarding the bright future of the Indian infrastructure sector.

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