

Project Finance 2022

Contributing editor
Aled Davies



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between June and July 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021

No photocopying without a CLA licence.

First published 2008

Fifteenth edition

ISBN 978-1-83862-705-8

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Project Finance 2022

Contributing editor

Aled Davies

Milbank LLP

Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Project Finance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and Taiwan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Aled Davies of Milbank LLP, for his continued assistance with this volume.



London

July 2021

Reproduced with permission from Law Business Research Ltd

This article was first published in August 2021

For further information please contact editorial@gettingthedealthrough.com

Contents

Global overview	3	Japan	73
Aled Davis Milbank LLP		Naoaki Eguchi, Pierre Chiasson and Kosuke Suzuki Baker McKenzie	
Covid-19: force majeure provisions in project contracts	6	Myanmar	81
Aled Davies and Justen Fleming Milbank LLP		Khin Cho Kyi, Takeshi Mukawa and Nirmalan Amirthanesan Myanmar Legal MHM Limited	
Angola	9	Nepal	89
Irina Neves Ferreira, João Francisco Cunha and Frederico de Távora Pedro ALC Advogados		Anjan Neupane Neupane Law Associates	
Australia	17	Portugal	96
Ben Farnsworth and Michael Ryan Allens		Teresa Empis Falcão and Ana Luís de Sousa VdA	
China	25	South Korea	103
Charles Wu Gao Kai Law Firm		Michael Chang, Sang-Hyun Lee, Na Yu and Christina Gee Shin & Kim	
Cyprus	35	Switzerland	112
Stella Strati and Stylianos Trillides Patrikios Pavlou & Associates LLC		Thiemo Sturny and Roger Ammann Walder Wyss Ltd	
Dominican Republic	42	Taiwan	119
Fabio J Guzmán Saladín, Alfredo A Guzmán Saladín and Alberto Reyes Báez Guzmán Ariza		James C C Huang, Maggie Huang and Colin C L Wu Lee and Li Attorneys at Law	
India	51	Thailand	126
Santosh Janakiram and Ruchira Shroff Cyril Amarchand Mangaldas		Jessada Sawatdipong, Sarunporn Chaianant and Suphachok Saengarun Chandler MHM Limited	
Indonesia	59	United Kingdom	136
Emir Nurmansyah, Ammalia P Putri and Serafina Muryanti Hayu P ABNR		Mark Richards, Tom Eldridge and Alexander Hadrill Bryan Cave Leighton Paisner LLP	
Italy	66	United States	152
Giovanni Scirocco Legance - Avvocati Associati		Armando Rivera Jacobo White & Case LLP	

India

Santosh Janakiram and Ruchira Shroff*

Cyril Amarchand Mangaldas

CREATING COLLATERAL SECURITY PACKAGES

Types of collateral

1 | What types of collateral and security interests are available?

Indian laws generally recognise the creation of security interests in respect of various kinds of property, including the following:

- Immovable property such as land, mortgageable interest on land such as leasehold rights, buildings, some forms of plant and machinery that fall within the meaning of 'immovable property', etc. Security interest over immovable property is created under a mortgage. The most commonly used forms of mortgages in India are an English mortgage under a registered deed and an equitable mortgage, which is done by deposit of title deeds. However, the creation of a mortgage upfront on immovable property that is acquired subsequently is restricted. Movable property, both present and future, tangible and intangible, includes movable fixed assets, movable plant and machinery, bank accounts, receivables, cash flows including sale proceeds, contractual rights, permits, licences, proceeds of insurance policies, current assets, intellectual property and goodwill.
- Movable property is usually secured in favour of lenders by way of a charge under a deed of hypothecation. Security interest over movable property can also be clubbed with mortgage of land under a registered mortgage deed. However, for the creation of a legal assignment on contractual rights or licences, or a deed of assignment or mortgage (along with immovable property in case of a mortgage) is required to be executed.
- Shares or securities of a company (usually the borrowing company), by way of a pledge of such shares or securities in favour of the lenders, under a pledge agreement. New shares issued after the creation of a pledge will require specific delivery. Restrictions or approval requirements for the creation or enforcement of a security interest, depending on factors such as the nature of the property, offshore ownership or location of assets, are provided for in different legislation, regulations and policies and are subject to existing contracts or permits applicable to the security provider. For instance, the creation of a security interest on Indian assets in favour of offshore lenders may require prior approval of the Reserve Bank of India (RBI) or an authorised dealer in India.

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

Collateral perfecting

2 | How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

With reference to the perfection of security interests, the following applies:

- Security interests created under all forms of security documentation, including mortgage and hypothecation, as well as a pledge, are required to be registered with the Registrar of Companies of the state in which the registered office of the security provider is located, if the security provider is a company. The order of filing of the security interest with the Registrar of Companies determines the priority of the security interest as regards the present and future holders of the security (with the charge created beforehand and registered as such having been a priority charge), in the absence of specific security ranking provisions in the security documents.
- The creation of security interests over immovable property in the case of an English mortgage must be registered with the relevant sub-registrar of assurances of the jurisdiction within which the mortgaged land is situated, along with payment of state-specific registration fees, as applicable in the state of registration of such document. Equitable mortgages in some notified states are also required to be registered with the relevant sub-registrar of assurance in some states or intimated to the relevant sub-registrar of assurances in the case of a few states (eg, Madhya Pradesh).
- Further, security interests (other than pledges) are also required to be registered by the holder of security with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India, along with the prescribed registration fees. However, this filing is for record purposes only and does not impact the priority of security interests. In most cases, priority of security as between various lenders having the benefit of common security, irrespective of whether their security interest has been filed prior or later in time, is agreed under intercreditor or security sharing arrangements among the lenders for ceding of *pari passu* security interest.
- 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 2016.

Typically, all contractual (such as third-party consents), regulatory (such as approvals from the RBI, authorised dealer, government authorities

where prescribed) and corporate authorisations (such as board and shareholder resolutions) required for the creation of a security are to be obtained prior to execution of the security documents.

Documents executed in India are subject to payment of stamp duty, which is prescribed by each state and is usually applicable depending on the state in which the documents are executed. Documents that are unstamped or inadequately stamped are rendered inadmissible in evidence, thereby impacting the enforcement of such documents without payment of heavy penalties.

A pledge of shares or securities requires physical delivery, which is effected by way of physical delivery in the case of physical shares or securities and by way of appropriate instructions to the depository where the shares or securities are in dematerialised form. It is permissible and quite usual in India for a security trustee or agent, being a corporate entity, to be appointed under a trust deed or agency document to hold collateral on behalf of secured lenders to neutralise the impact of the composition of the secured parties over time. It is even mandatory in some cases of debenture issuance for a debenture trustee to be appointed to act on behalf of debenture holders. Other than the registration requirements prescribed for debenture trustees under regulations issued by the Securities and Exchange Board of India, no other specific licence has been prescribed for a corporate entity to act as a security trustee or agent. The appointment of a security trustee under a trust deed is usually preferred over an agency structure for the secured assets to be remote from the bankruptcy of the security trustee, given that a trust structure has legal recognition in India.

Assuring absence of liens

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

While not conclusive as to the existence of prior charges or liens on property, since the absence of registration does not invalidate an existing security interest, a creditor (by appointing appropriate consultants) would usually undertake physical searches of the revenue records at the office of the relevant sub-registrar in whose jurisdiction the proposed mortgage property is located, online searches of the charges recorded in respect of the security providers with the Registrar of Companies of each state where the registered office of each security provider is located, and searches of the Central Registry of Securitisation Asset Reconstruction and Security Interest of India records in respect of each security provider. Separately, existing creditors would usually also require appropriate representations and warranties from the security providers in the loan documents as to the absence of previous liens or undisclosed security interest on the secured property.

Enforcing collateral rights

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Outside the context of bankruptcy proceedings, secured creditors can approach the Debt Recovery Tribunal established under the Recovery of Debts due to Bank and Financial Institutions Act 1993 for enforcement of their security or file an ordinary suit under the Code of Civil Procedure 1908. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act 2002 (the SARFAESI Act) further provides special self-help remedies to secured creditors (only Indian banks, Indian branches of foreign banks, notified financial institutions and certain classes of government-owned financial institutions in India). Powers of obtaining possession, taking over the management of the borrowing company and other enforcement action are typically set out in the contract between the parties.

An English mortgage may be enforced through a private sale of property subject to compliance with the conditions prescribed under the Transfer of Property Act 1882. The mortgage deed would usually confer and express a power of sale without the intervention of the court on the mortgagee. However, the intervention of the court would usually be required for enforcement of an equitable mortgage or hypothecation, or both. In the case of a pledge, court intervention is not required for the sale of pledged shares and the creditor may sell the pledged shares after giving reasonable notice to the pledgor. Right of foreclosure is not available in respect of a pledge.

In the case of offshore lenders, any sale pursuant to enforcement and repatriation of proceeds would be subject to extant RBI and foreign exchange regulations. However, offshore lenders usually secure their right to be entitled to proceeds recovered by Indian lenders (including through avenues such as SARFAESI that are not available to foreign lenders) on a pari passu basis, by way of appropriate intercreditor arrangements.

Enforcing collateral rights following bankruptcy

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Insolvency laws in India have been consolidated under a single unified code: the Insolvency and Bankruptcy Code 2016 (the Code). The Code provides a speedy insolvency process for companies, limited liability partnerships, partnership firms and individuals, and is intended to apply to both financial and operational creditors, whether domestic or international. The Code implements a process that identifies financial distress early and, at first, encourages resolution of such distress by way of a corporate insolvency resolution process. Such resolution process is taken to commence from the date an application is admitted by the National Company Law Tribunal, and is generally required to be concluded within 180 days, but mandatorily within an extended period of 330 days from the date of admission. Once the resolution process is initiated, the Code requires a moratorium on all proceedings against the relevant debtor until the completion of such resolution process. If the resolution process fails, the debtor's liquidation is commenced. Upon initiation of the liquidation process, a secured creditor may choose to relinquish its collateral and receive proceeds from the sale of the debtor's assets or realise its security interest over specific assets outside of the liquidation process.

In terms of liquidation waterfall, after payment of liquidation costs and expenses, the Code requires the satisfaction of outstanding labour dues and outstanding debt payable to secured creditors who have relinquished their secured assets. This is followed by payment of wages to employees (other than labour) and then financial debt owed to unsecured creditors. After clearing these dues, the crown debt of the debtor is satisfied, with payments (if any) to other secured creditors who did not relinquish their specific secured assets. The remaining estate is then distributed towards satisfaction of any remaining debts and dues, preference shareholders (if any) and equity shareholders or partners of the debtor, in that order. Agreements contrary to the liquidation waterfall may be disregarded by the liquidator. Preference transactions effected within one year of the initiation of the insolvency proceedings for an unrelated party and within two years for a related party of the debtor may be reversed by a liquidator. Similarly, any extortionate credit transactions undertaken within two years of preceding insolvency

proceedings may also be reversed. With a view to bringing within its ambit the offshore assets of the debtor, the Code puts in place a mechanism whereby the government may enter into agreements with other countries for enforcement of the provision of the Indian Insolvency Code. Generally, there are no entities that are excluded from bankruptcy proceedings. The availability of certain processes to seek remedy or initiate recovery proceedings may depend on the sector of operation of the project company and the nature of the borrower and the creditor. One such instance is under the SARFAESI Act, whereunder Indian banks and certain financial institutions can institute enforcement proceedings as a statutory right without recourse to courts.

FOREIGN EXCHANGE AND WITHHOLDING TAX ISSUES

Restrictions, controls, fees and taxes

6 | What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

Foreign exchange transactions are strictly controlled in India and are required to be routed through prescribed banking channels. The Foreign Exchange (Management) Act 1999 (FEMA) and the extant regulations under it constitute the relevant legal framework regulating the same. While the Reserve Bank of India (RBI) is the primary regulator in this regard, most foreign exchange transactions are required to either be approved by or reported to the regulator or its delegates, as prescribed.

While current account transactions are generally permitted and specially prohibited under the FEMA regulations for current account transactions, capital account transactions are generally restricted and specially exempted under the FEMA regulations for capital account transactions.

Investment returns

7 | What are the restrictions, controls, fees and taxes on remittances of investment returns (dividends and capital) or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Inward foreign investments in India are regulated on a sector-specific basis. Remittance of proceeds of investment made by offshore entities in various sectors is generally permissible, unless specifically prohibited under the FEMA or by RBI. Foreign investments are usually therefore made after checking the restrictions applicable in respect of the sector in which such investment is proposed. However, returns on such investments, including in the form of dividends or interest, are subject to Indian income tax provisions and applicable deductions and withholding taxes as may be reduced or exempted under tax treaties among the relevant countries. As regards borrowing from offshore lenders, the Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligations dated 26 March 2019, as amended from time to time, prescribes specific caps, restrictions and approval requirements for the maximum principal, interest, costs and fees in respect of external commercial borrowings as well as the minimum average maturity for such loans, the nature of security that may be offered and other aspects relating to availment of such loans.

Foreign earnings

8 | Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

The FEMA regulations provide that, barring specific exemptions, where any amount of foreign exchange is due or has accrued to any person resident in India (including project companies), such person shall take

all reasonable steps to realise and repatriate to India such foreign exchange within the period prescribed by the RBI. Foreign exchange earnings would usually be required to be converted to local currency or be used for discharge of a debt or liability denominated in foreign exchange, to the extent and in the manner specified by the RBI.

9 | May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Locally, project companies are permitted to establish specified forms of foreign currency accounts as per the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) Regulations 2015 for limited purposes and specifically permitted debits and credits only. For example, an Indian company receiving foreign investment under the foreign direct investment route may open and maintain a foreign currency account with an authorised dealer if such company has impending foreign currency expenditure. The account must be closed immediately after the requirements are met and within a maximum of six months. Project offices of foreign companies may open non-interest-bearing foreign currency accounts in India for the project to be executed in India. Such accounts must be closed on completion of the project and will be subject to the prescribed rules on credits and debits. An Indian company may open foreign currency accounts outside India in the name of its foreign office or branch or its representative posted outside India for usual business purposes of such foreign office or branch, subject to RBI stipulations and the stipulations of such offshore jurisdiction.

FOREIGN INVESTMENT ISSUES

Investment restrictions

10 | What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

Foreign investment in the infrastructure sector is under the automatic route in most cases and therefore does not require the prior approval of the Indian government. As a general rule, any foreign investment in India is required to comply with relevant sectoral caps and applicable conditions of investment, if any. Further, certain sectors are still restricted and any investment proposal beyond the permissible limit requires the prior approval of the relevant ministry. For instance, foreign investment in nuclear and atomic energy projects is restricted, and investment in the defence sector requires security clearance from the Ministry of Defence. At the time of writing, there are no bilateral arrangements that may provide exemption to investments routed through a particular jurisdiction from sectoral caps applicable to sectors. However, India has signed bilateral investment protection treaties with around 86 countries. While no specific registration requirements are prescribed (other than where a foreign investment is made through avenues other than the foreign direct investment route, such as foreign portfolio investors and foreign institutional investors), each investment proposal or any proposed transfer of share capital of the investee company is required to be reported by way of completing and submitting the appropriate forms to the government.

Insurance restrictions

- 11 | What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Typically, assets situated in India cannot be insured by an insurer whose principal place of business is outside India without the permission of the Insurance Regulatory and Development Authority (IRDA). Further, reinsurance arrangements must also be approved by the respective insurance company's board in consultation with the IRDA. Any remittance of any claim under any insurance cover by an offshore creditor would be subject to exchange control regulations as prescribed by the Reserve Bank of India from time to time. Foreign investment in the insurance sector is regulated, and any investment presently above 49 per cent of the equity capital of an insurance company requires the prior approval of the government.

Worker restrictions

- 12 | What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

Foreign workers, technicians or executives are permitted to be employed by a foreign company engaged for the execution of a project in India subject to certain conditions for obtaining an employment visa as issued by the Ministry of Home Affairs from time to time. A foreign national being sponsored for an employment visa may be required to draw a minimum annual salary in excess of US\$25,000 per annum (including salary and other allowances). Long-term visa recipients are required to register themselves with the concerned appropriate government authority within 14 days of their arrival.

The recipients of e-visas are protected under employment welfare laws as applicable to their Indian counterparts. From a taxation perspective, foreign employees are subject to Indian tax laws and if taken to be resident in India are required to pay the appropriate taxes.

Equipment restrictions

- 13 | What restrictions exist on the importation of project equipment?

Import transactions are regulated by the Directorate General of Foreign Trade under the Ministry of Commerce and Industry, Department of Commerce. Banks are permitted to provide credit facilities and allow remittances for import of goods unless the import of such goods is specifically restricted by the import policy in force.

In terms of applicable taxes, importing of project equipment is subject to applicable customs and import duties and goods and services tax (GST) under the new GST regime in India. Further, an anti-dumping duty may be levied if the government determines a good is being imported at below fair market price.

Nationalisation laws

- 14 | What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected (from nationalisation or expropriation)?

The Constitution of India enables the government to enact laws to acquire or appropriate any property or assets. All natural resources, such as airwaves, minerals or oil, are considered to be the property of the state and may be leased or licensed to private parties according to extant policies. For instance, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act

2013 specifies certain end uses for which land and property may be acquired by the government.

There are no specific protections for foreign investment from the government's ability to acquire or nationalise assets, except for judicial review of such acquisitions in light of prevailing laws in India. However, certain bilateral investment treaties entered into by India extend protection to relevant foreign investors in the event of expropriation or nationalisation. These treaties clearly reiterate that any appropriation of investments from a contracting country will not be made except in accordance with applicable law on a non-discriminatory basis coupled with reward of fair and equitable compensation.

While India is not a signatory to the International Centre for Settlement of Investment Disputes (ICSID), the bilateral agreements occasionally provide for reference of disputes to ICSID, for example, the Comprehensive Economic Partnership Agreement between India and Korea.

FISCAL TREATMENT OF FOREIGN INVESTMENT

Incentives

- 15 | What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

While no specific tax incentives are provided to foreign investors, in certain cases, depending upon the nature of the investment and the constitution of the investment vehicle, tax-saving benefits may apply. For instance, real estate investment trusts and infrastructure investment trusts are exempt from payment of dividend distribution tax. As a general rule, taxation laws are applicable to entities that are determined to be resident in India.

India has signed double taxation avoidance treaties with about 95 countries, and foreign creditors belonging to any contracting party may avoid double taxation and may avail appropriate benefits in accordance with the terms of such treaties.

GOVERNMENT AUTHORITIES

Relevant authorities

- 16 | What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Most sectors falling within the larger umbrella of the infrastructure sector have a separate ministry and government agency overlooking the activities being undertaken in such sector, including by way of rules, policies and regulations that are binding on projects within that sector. The relevant ministries and governmental agencies are statutorily empowered to formulate, delegate and implement governmental policy in each of the sectors. Typically, regulatory authorities have a presence at both the state and Centre level. For instance:

- power: the Ministry of Power, Ministry of New and Renewable Energy, and the Central and State Electricity Regulatory Commissions;
- telecommunications: the Ministry of Communication, Department of Telecom;
- ports: the Ministry of Shipping, Road Transport and Highways, Tariff Authority for Major Ports (soon to be abolished) and State level maritime boards;
- minerals: inter alia, the Ministry of Mines, the Ministry of Coal and the Indian Bureau of Mines;

- transportation: the Ministry of Shipping, Road Transport and Highways, the National Highways Authority of India and the National Shipping Board;
- oil and gas: the Ministry of Petroleum and Natural Gas and the Petroleum and Natural Gas Regulatory Board;
- chemicals: the Ministry of Chemicals and Fertilisers and the Department of Chemicals and Petrochemicals; and
- water treatment: inter alia, the Ministry of Environment and Forests, the Ministry of Water Resources, River Development and Ganga Rejuvenation and the Central Pollution Control Board, and the State Pollution Control Board.

REGULATION OF NATURAL RESOURCES

Titles

- 17 | Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

All natural resources are vested with the government of India. While surface rights over land and limited rights over water bodies are granted to private parties, a rich body of court-made jurisprudence confirms that natural resources (including oil and gas, minerals and coal) are held by the government in trust on behalf of the people, and therefore the government has the right to exploit the same or lay down laws that regulate the exploitation of natural resources by private parties.

Private parties can extract natural resources only with the appropriate government consents and approvals, usually in the form of a licence or concession. Foreign entities are generally restricted from directly acquiring land in India. Neither can such foreign entities directly undertake business operations in India except if the same is permitted as per the applicable foreign direct investment policy. However, if permitted under applicable laws, such as resident parties, foreign parties may also obtain the consent of the government to acquire such rights. Sector, area and land-specific approvals or compliances may additionally be required, such as if any mining activity is carried out in tribal areas, and companies are required to set aside a certain amount of their revenues for the welfare of tribal people.

Royalties and taxes

- 18 | What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Royalties, cess and licence fees may be payable for extraction of natural resources in accordance with the terms of the relevant licence granted, or concession entered into, with the government as per applicable law. Taxes on the income generated from the extracted natural resource, end product and sale of such assets may be payable based on the prevailing income tax laws.

Export restrictions

- 19 | What restrictions, fees or taxes exist on the export of natural resources?

Generally, goods and natural resources are freely exportable subject to sector-specific restrictions. However, the export of certain resources may be specifically restricted or prohibited, such as atomic energy, minerals and petroleum resources.

LEGAL ISSUES OF GENERAL APPLICATION

Government permission

- 20 | What government approvals are required for typical project finance transactions? What fees and other charges apply?

Typically, domestic lending for, or investment in, a project finance transaction in India does not specifically require any government approvals apart from project or concession-specific approvals or consents. However, foreign investments in equity instruments and loans availed from offshore lenders in the form of external commercial borrowings are regulated by the Reserve Bank of India (RBI) and FEMA rules and regulations. RBI approval may be required if the project finance proposed exceeds the limits or caps prescribed under the regulations or otherwise falls within restrictions as to end use, tenor, etc. Other than stamp duties, registration fees and filing fees as applicable, no other specific transaction fee is payable to the government for a project finance transaction per se.

Registration of financing

- 21 | Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

The security documents are required to be registered or filed with the governmental authorities in India, including the Registrar of Companies and the Registrar of Assurances. However, such registrations or filings are less from a validity and enforceability perspective and more from a public notice perspective to establish priority and maintain a public record.

Additionally, loans availed in the form of external commercial borrowings are required to be assigned a specific loan registration number by the RBI for which an application is to be made prior to disbursement of the loan. In India, notarisation of documents is used to verify and attest the execution of documents. In respect of foreign documents, since India is a signatory to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, the issue of an apostille certificate is usually sufficient to create a presumption under law that the party to the document has signed the document.

Arbitration awards

- 22 | How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The Arbitration and Conciliation Act 1996 (Arbitration Act) along with applicable procedural laws, governs dispute resolution by way of arbitration in India. Indian law recognises the right of parties to contractually submit their disputes to international arbitration. India is not a member of the ICSID Convention. However, India is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 as well the Geneva Convention on the Execution of Foreign Arbitral Awards 1927. Therefore, international arbitral awards passed in any of the convention member states are recognised by local courts in India. Such foreign awards are enforced as a decree of court but remain subject to certain conditions enumerated in the Arbitration Act. For instance, the subject matter of the dispute must be arbitrable in India and must not be contrary to the public policy of India. For awards that are passed in non-convention states, a fresh civil suit is required to be instituted in India.

Though Indian law does not specifically exclude any specific nature of disputes from arbitration, certain kinds of disputes have been excluded by the courts in India, such as suits for enforcement of a mortgage, criminal offences, insolvency, guardianship, antitrust or matrimonial disputes. Similarly, the Arbitration Act does not specifically set out any disputes that are mandatorily required to be arbitrated. Specific statutes and policies applicable to certain sectors may require or encourage resolution of disputes by way of arbitration. For instance, the Micro, Small and Medium Enterprises Development Act 2006 provides for automatic conciliation and arbitration of disputes.

Law governing agreements

- 23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Where the project is located in India, generally project agreements are governed by Indian law, as the functioning of the project and compliances are subject to Indian laws. Further, this makes it convenient to institute suits and seek necessary reliefs, including interim reliefs where required. Where there are non-resident parties to the agreement, and the transaction has a nexus with another jurisdiction, it is possible that the parties may opt for foreign laws as the governing laws for such agreements.

Project finance documentation for loans to fund project costs, where such loans are rupee-denominated, are typically Indian law-governed. However, it is not unusual for certain contractual comforts (such as sponsor support documentation or guarantees) to be governed by foreign laws if the provider of such comfort is a non-resident entity.

In the case of offshore financing transactions, it is usual for the facility agreement for external commercial borrowings to be made subject to foreign laws, usually a neutral law such as English law or Singaporean law, which are very often laws of jurisdictions where the lender has a presence. Security documents for Indian projects are usually governed by Indian laws due to the location of secured assets and for ease of enforcement and interim reliefs and given the wider range of remedies available to Indian lenders under Indian regulations for enforcement.

Submission to foreign jurisdiction

- 24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

The parties can contractually choose to submit to the jurisdiction of foreign courts and Indian courts will usually honour the same. Despite being courts of natural jurisdiction, Indian courts do not normally grant relief on matters where the parties have submitted to the jurisdiction of foreign courts. If approached, however, Indian courts may exercise their inherent jurisdiction, based on the cause of action having arisen within their territorial jurisdiction, or to prevent injustice where such a choice of jurisdiction is oppressive, unfair or inequitable and does not bear any real or substantial connection to the subject matter of the dispute in reliance on the doctrine of forum non conveniens. Once a foreign jurisdiction has been chosen, the burden of establishing that the forum of choice of the parties is a forum non conveniens or proceedings therein are vexatious is on the party so contending.

ENVIRONMENTAL, HEALTH AND SAFETY LAWS

Applicable regulations

- 25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Most infrastructure projects, such as power generation, transmission, oil refineries, road projects and water projects, require environmental clearance from the Ministry of Environment and Forests. Depending upon the location of the project, forest clearance and coastal regulation zone clearance are required to be obtained prior to the construction of the project. Under the pollution control laws, projects are required to obtain 'consent to establish' and 'consent to operate' from the relevant state pollution control board. Further, no-objection certificates from the Ministry of Defence, Airport Authority of India and the local land development authority may be required to be obtained depending on the location and impact of the project. If the project special purpose vehicle employs labour and employees, then compliance with industrial and labour legislation is to be ensured, and appropriate statutory licences may be required to be obtained from the government authorities. Typically, the list of approvals and consents across India is similar; however, certain additional statutory clearances may be required to be obtained under state-specific legislation.

PROJECT COMPANIES

Principal business structures

- 26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Usually, project companies are constituted as special purpose vehicles. A considerable source of finance is supplied by the banks, foreign portfolio investors and financial institutions in the form of debt. Both onshore and offshore funds are available to project finance companies. For domestic lenders, rupee loans and rupee-denominated bonds remain the popular funding structures. For offshore funds, the external commercial borrowing route remains the primary source in project companies. Some part of the funding requirement is met by way of plain equity or structured investments from the sponsors, domestic funds and international market participants.

PUBLIC-PRIVATE PARTNERSHIP LEGISLATION

Applicable legislation

- 27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

The government has implemented various policies to regulate the PPP model, and constituted committees at multiple levels to review the functioning of the PPP model depending on the value of the underlying project. The regulatory framework, however, is rather fragmented and sector-specific. There is no legislation that specifically deals with PPP. Nevertheless, the guidelines and policies relating to PPP are broad and generic and are generally aimed at ensuring competitiveness and providing transparency in the bidding process.

PPP – LIMITATIONS

Legal limitations

28 | What, if any, are the practical and legal limitations on PPP transactions?

India's experience with the PPP model, which has largely been introduced in the infrastructure sector, has strong links with the commercial dynamics that govern the infrastructure sector. The legal regime needs to be modelled to ensure minimisation of transaction costs and encourage optimal project risk allocation. The 'one size fits all' approach for project concession agreements is counter-productive, as it does not factor in project-specific risks. Further, a multi-disciplinary experts-led dispute resolution mechanism is necessary to kick-start various stalled projects, and ensure that underlying systemic problems are taken into consideration in dispute adjudication. Land acquisition-related complications, lack of a single window clearance mechanism from the government and a fragmented legal framework usually result in project delays and consequently an increase in project costs. Further, since concession contracts seek to encourage exercise of substitution rights by the lenders, and not the liquidation or transfer of assets, lenders are tied into projects. For power projects, especially those awarded on a competitive bid basis, the issue of project delays owing to government actions and external factors, such as a rise in the cost of imported fuel resulting in increased costs and non-viability of the project, remain a cause of concern.

PPP – TRANSACTIONS

Significant transactions

29 | What have been the most significant PPP transactions completed to date in your jurisdiction?

The Indian government has implemented the PPP model in various sectors, including power, ports, roads and airports. Over the years, India has emerged as highly significant in large-scale PPP financing deals. With continued investments in the road and transport sector, and focus of the government on power generation, recent times have seen multiple large-scale PPP projects.

In the roads sector, the National Highways Authority of India awarded a 30-year concession in relation to existing and operating highways on a toll-operate-transfer basis for an upfront payment of 96.8 billion rupees.

In the mining sector, pursuant to cancellation of existing coal allocations and reissuance of the same under the Coal Mining Special Provisions Act 2015, mining activity has been revived through the appointment of mine operators and developers.

In the railways sector, bids have been invited from the interested participants for setting up of 1 GW of land-based solar power projects on the land owned by the Indian railways. Additionally, the Indian railways has also floated the model concession agreement for redevelopment of the railway stations along with real estate development on a 'design, build, finance, operate and transfer' model and has invited participation from interested private individuals.

There have also been various PPP initiatives in the government-owned solar parks, including Bhadla solar park in Rajasthan (one of the largest solar parks in India, spread over about 10,000 acres of land), Ananthapur Ultra Mega Solar Park in Andhra Pradesh and Rewa Ultra Mega Solar Park in Madhya Pradesh.

In the healthcare sector, the Niti Aayog has prepared a draft concession agreement for inviting investments on a PPP basis to link new or existing private medical colleges with functional district hospital to augment medical seats.

In the airports sector, the government has offered privatisation of operation, management and development of six airports in India on a PPP basis. These airports are located in tier II cities (Lucknow, Ahmedabad, Jaipur, Mangaluru, Thiruvananthapuram and Guwahati), following the successful privatisation of Delhi and Mumbai airports in 2006.

In the 'under construction' stage, there is the ongoing Navi Mumbai Airport Project estimated at a project cost of about US\$1.47 billion and the 1,047 km road upgrade (Greater Noida-Ballia) Project, which is expected to cost US\$4.3 billion, and the 3,097 MW Etalin hydel power unit in Dibang Valley, which is proposed to be completed within a period of seven years and is estimated to cost around US\$3.7 billion.

UPDATE & TRENDS

Key developments of the past year

30 | In addition to the above, are there any emerging trends or 'hot topics' in project finance in your jurisdiction?

Resolution of Stressed Assets

The Reserve Bank of India (RBI) has issued new guidelines called 'Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions 2019 (Stressed Assets Directions)' on 7 June 2019 to fill the regulatory gap created due to the RBI guidelines dated 12 February 2018 for resolution of stressed assets (12 February 2018 circular) being held unconstitutional by the Hon'ble Supreme Court. One of the key differences of the Stressed Assets Directions from the 12 February 2018 circular was that a mandatory reference to insolvency under the Insolvency and Bankruptcy Code 2016 (IBC) at the end of 180 days from date of default was no longer required. The Stressed Assets Directions provides flexibility to lenders to exercise their judgment in respect of a suitable resolution plan. The Directions require the lenders deciding to pursue a resolution plan to enter into an inter-creditor agreement in a time-bound manner, providing for inter alia, a standstill on civil action and IBC proceedings during the prescribed standstill period with a few exceptions, and providing that a decision by lenders holding 75 per cent by value of total outstanding credit facilities (fund-based as well as non-fund-based) and 60 per cent of lenders by number shall be binding upon all the lenders.

Rationalisation of the ECB Circular

Pursuant to the RBI circular on External Commercial Borrowings (ECB) Policy – Rationalisation of End-use Provisions dated 30 July 2019 (Rationalisation Circular), the RBI has further rationalised the negative list of end uses set out under the RBI Master Directions – External Commercial Borrowings, Trade Credits and Structured Obligations dated 26 March 2019 (Master Directions) basis the feedback received by the RBI from various stakeholders. As per the erstwhile Master Directions, an ECB borrower was not permitted to utilise the proceeds from an ECB for working capital purposes, general corporate purposes and repayment of rupee loans with the only exception for proceeds of an ECB from a foreign equity holder. In light of the Rationalisation Circular, the aforesaid negative end uses have been rationalised (in addition to the exemption granted in case of foreign equity holder) to the extent of allowing a borrower to utilise the proceeds of an ECB for working capital purposes, general corporate purposes and repayment of rupee loans availed for capital expenditure or otherwise; and on-lending by a Non-Banking Financial Company, subject to compliance with the minimum average maturity requirements set out in the Rationalisation Circular.

Coronavirus

- 31 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Indian government has taken various steps to address financial stress on corporates and project developers on account of the pandemic. A few examples are set out below.

The RBI had, on 6 August 2020, to provide relief to eligible corporate borrowers, small business owners and individual borrowers from covid-19 pandemic-induced stress, released the Resolution Framework for COVID-19-related Stress (Resolution Framework), which allowed lenders to implement a resolution plan in respect of such borrowers while classifying such exposures as a standard asset on their books, subject to conditions specified under the Resolution Framework. Additionally, RBI has permitted lending institutions to allow a moratorium on repayment of term loans and to defer recovery of interest on working capital facilities for a specified period to deal with liquidity issues.

In relation to the IBC Code, the threshold of debt for initiating insolvency proceedings has been increased from 100,000 rupees to 10,000,000 rupees. Further, the government has granted a moratorium on IBC proceedings for any financial default by a corporate debtor during the period commencing from 25 March 2020 to 24 September 2020, which was subsequently extended to 25 March 2021.

As part of its relief package for the renewable power sector, the Government has inter alia notified delay on account of disruption of supply chains from China and any other country recognised as 'force majeure'; extended timelines for completion of certain inter-state transmission and under construction renewable energy projects (subject to relevant conditions); and undertaken liquidity injection for power distribution companies in India.

The government has granted extensions and concessions to concessionaires in relation to performance obligations for certain existing and operational PPP projects. Major ports are enabled to allow waiver of penalties under the concession agreements on a case-by-case basis. For the road sector, the Ministry has granted an extension of three to six months to the concessionaire for complying with obligations under the concession agreement on the basis of the site condition.

* The authors would like to acknowledge the contribution of Apoorv Jain (Principal Associate) and Anmol Chaudhary (Associate)



cyril amarchand mangaldas

Santosh Janakiram

santosh.janakiram@cyrilshroff.com

Ruchira Shroff

ruchira.shroff@cyrilshroff.com

Peninsula Chambers
Peninsula Corporate Park
GK Marg, Lower Parel
Mumbai 400 013
India
Tel: +91 22 2496 44 55 / +91 22 6660 4455
Fax: +91 22 2496 3666
www.cyrilshroff.com

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)