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Practical cross-border insights into project finance

# Project Finance
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## Expert Analysis Chapter



## Q&A Chapters

# India


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## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

Project finance in India has traditionally been associated with "core" sectors such as roads, highways, power projects, ports and airports. While these sectors continue to dominate, the increased government focus on urban development and associated infrastructure has seen several transactions in the space of health and sanitation, mass transit and waste-to-energy. A welcoming move by the government is its intention to recognise data centres and clean energy storage as infrastructure sub-sectors, as announced in the budget for the year 2022, which came to be notified in October, 2022. This has not only led to lending in these sectors having gained significant popularity in the last year, but is also a step in the direction of furthering India's climate goals. The use of listed or unlisted bonds and debentures for project finance continue to see an increase, compared to the vanilla loan products which were the debt instrument of choice previously. Indian borrowers are also looking to cross-collateralise and cross-leverage across various assets, leading to a change in the traditional outlook of project finance as a limited recourse, single asset finance.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Earlier this year (2023), India's largest round the clock green energy project was financed by a green loan of USD 985 extended by 11 lenders led by Rabobank. Not only is this the first project financing of a renewable energy project coupled with battery storage but it is also the largest external commercial borrowing facility for a single Indian renewables project.

Another significant deal that took place this year in the infrastructure space is the term loan facility amounting to USD 1.5 billion availed by Adani Group from the State Bank of India towards part financing of the Navi Mumbai International Airport, which is said to be operational in early 2024. This is said to be one of the largest project financing loans extended by the State Bank of India.

Other notable developments in project finance is the one-of-a-kind financing package extended by Asian Development Bank to GreenCell Express Private Limited to develop 255 electric battery-powered buses on 56 intercity routes in India. A defining feature of this project is that it qualified for a 2x gender financing rating, a challenge launched at the G7 summit in 2018 to encourage gender lens investing among development finance institutions.

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Generally, in India, security is created over the following types of assets: immovable property; movable fixed assets; current assets; shares; assignment of rights in project and insurance contracts; and a charge over project bank accounts. The charge over immovable property is typically created by executing an indenture of mortgage or by undertaking a deposit of title deeds for the property. Security over movable assets (both fixed and current) is created by executing a deed of hypothecation. Security over shares is created via a pledge, which requires possession to be transferred by way of deposit of the share certificates, or if the shares are in dematerialised form, by recording the same with the depository. An assignment of rights (such as rent receivables) arising out of project contracts is carried out via a deed of assignment. The charge over immovable property, movable property and an assignment of rights can be clubbed together under a single indenture.

### 2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes, lenders typically have security over real property, plant, machinery and equipment. If the land is leasehold property, permission may be required from the lessor for the creation of charge. If the security is created via an indenture of mortgage or by way of deposit of title deeds in certain states, it is necessary to register/intimate the same with the local sub-registrar of assurances. Further, if security has been created by an Indian company, it is mandatory to register the charge with the Registrar of Companies (RoC). The charge created over movable/immovable properties is also required to be registered with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) and Information Utilities (currently National e-Governance Services Limited), the latter being the repository of information relied upon by financial creditors to establish default in insolvency proceedings.

**2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?**

Yes, security may be taken over receivables without the express consent of the debtors. However, such charge over receivables or other current assets (which is a floating charge) crystallises into a fixed charge only upon occurrence of an event of default.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Yes, a typical project financing security package involves the creation of security over project-specific bank accounts. The procedure to be followed in this case mirrors that of any other movable asset. A notice of such a charge is usually given to the bank.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

Yes, security over shares is a prevalent form of security creation in India. Typically, a pledge agreement is entered into with a power of attorney to enforce the pledge also executed by the pledgor upfront. If the shares are in certificate form, the share certificates are physically deposited along with a signed and undated share transfer form. If the shares are in dematerialised form, certain forms (indicating details of pledge) will be submitted at the share depository. Further, depending on the nature of financing being undertaken, the pledge of shares of an Indian company held by a non-resident Indian may also require approval of the Reserve Bank of India as per extant Foreign Exchange Management (FEMA) laws.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

In India, stamp duty on security documents varies from state to state. In some states, stamp duty is uncapped, whereas in others the liability is capped. Additionally, all indentures of a mortgage must be registered with the local sub-registrar of assurances. In some states, a mortgage created via deposit of title deeds is also compulsorily registrable or required to be intimated to the local sub-registrar of assurances; however, in most states such registration is optional. The charge creation is also filed/registered with the RoC and CERSAI. Certain types of documents (*viz.*, powers of attorney and affidavits) are required to be notarised by a notary public, at a nominal charge.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

The time taken to register a mortgage with the local registrar of assurances may vary, depending on the efficiency of the local bureaucracy. Similar to stamp duty, registration fees payable also vary from state to state; some states have *ad valorem* charges, whereas others have capped limits. Filing/registration with the RoC and CERSAI is carried out online and is neither time-consuming nor expensive.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

For the creation of security over freehold land, no consents are required unless the land has been reserved for a specific purpose (e.g. forest land, coastal land) by the government. If the land over which security is created is leasehold in nature, typically prior consent of the lessor would be required. However, with respect to pipelines (once embedded in the earth), the land over which pipelines for the transport of petroleum, minerals or gas are laid is not transferred to the borrower, who merely acquires the rights of a user over the land. Such right of way may also be assigned to the lenders.

## 3 Security Trustee

**3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?**

Yes, the trust structure is recognised and the rights and obligations of the security trustee are typically recorded in a security trustee agreement. Such security trustee agreements grant the trustee the right to sue, on behalf of all the lenders cumulatively, for the enforcement of the security and to apply the proceeds to the claims of all lenders in the order of priority of security of the lender.

In case of insolvency of a project company, a lender forming part of a consortium arrangement or syndicated facility can authorise a security trustee or an agent to act on his behalf in the committee of creditors to the extent of his voting share. Further, where the debt is in the form of certain types of securities (such as listed debentures), the trustee acting on behalf of debenture holders would have the right to act as secured creditors under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and for availing the benefit of the fast track enforcement process thereunder.

**3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?**

Please see our response to question 3.1 above. There is also no bar on any lender suing for enforcement independently.

## 4 Enforcement of Security

**4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?**

The timelines for enforcing security may depend on the nature of security held by the lender. To illustrate, enforcement of a pledge created over shares that are in dematerialised form is relatively simple and does not require a decree of a court of competent jurisdiction. Enforcement of a mortgage may require a decree of the court under the Civil Procedure Code, 1908 (CPC) or enforcement action under the SARFAESI. In a scenario where an insolvent company is subject to proceedings under the Insolvency and Bankruptcy Code, 2016 (IBC), a publicly solicited bid process is undertaken wherein bidders are required to submit resolution plans that are required to be, *inter alia*, approved by the committee of creditors. In assets in regulated sectors (e.g. airports, telecommunications, roads), the enforcement process is carried out through a "substitution" of the defaulting company by an entity nominated by the lenders, with the consent of the relevant regulatory authority.

### 4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Under Indian law, a foreclosure suit in respect of a mortgage may be filed by a mortgagee to debar the mortgagor of his right to redeem the mortgaged property in the event that the mortgagor is unable to pay the amounts due to the mortgagee. While foreclosure proceedings may be initiated under the CPC, an overseas lender, i.e. a non-resident entity, is prohibited, under the Foreign Exchange Management (FEM) (Acquisition and Transfer of Immovable Property in India) Regulations, 2018, from transferring any immovable property in India, unless permitted by the RBI. Additionally, foreclosure suits may only be filed under the Transfer of Property Act, 1882 by a mortgagee by conditional sale or a mortgagee under an anomalous mortgage (by the terms of which he is entitled to seek foreclosure) or a usufructuary mortgagee. However, in respect of an English mortgage (which is the prevalent form of mortgage for project finance), foreclosure suits may not be filed.

## 5 Bankruptcy and Restructuring Proceedings

### 5.1 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 security?

The IBC is the primary legislation governing insolvency of corporate entities in case of payment default exceeding INR 1 Crore. The initiation of the corporate insolvency resolution process (CIRP) against the project company under the terms of the IBC would result in the institution of a moratorium prohibiting, *inter alia*, initiation/continuation of any suits/proceedings against the project company or enforcement/foreclosure of security interests in respect of any of its creditors. This moratorium would remain in place until the completion of the CIRP against the project company (which would ordinarily last at least 180 days, extendable by another 90 days, with an overall time limit of 330 days; this is inclusive of any time spent in litigation, which can be extended further in exceptional cases). Accordingly, the project lender will be unable to enforce or exercise any rights in respect of its security during this period.

In the event of a successful CIRP (approved by at least 66% of the voting share of the committee of creditors and the National Company Law Tribunal (NCLT)), the IBC permits a resolution plan to provide for, *inter alia*, modification and/or release of pre-existing security interests created by the corporate debtor. In such case, the project lender will lose its right to enforce its security-related rights.

### 5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

Under the IBC, "insolvency resolution process costs" and "liquidation costs" are accorded the highest priority. Besides this, the payment of workmen's dues for 24 months preceding the liquidation commencement date is ranked *pari passu* with the dues of secured creditors that have relinquished their security interests to the liquidation estate. The IBC also contains protections in favour of creditors against antecedent transactions entered into by the corporate debtor during specified look-back periods (calculated backwards from the insolvency commencement date). Such provisions are equally applicable to transactions relating to security interests, created over the assets of the company as well.

These include transactions that are "preferential" in nature (and pertain to an antecedent liability owed to a creditor, surety or guarantor), those that are "undervalued" (including gifts), those that defraud creditors (which pertain to undervalued transactions entered into with the deliberate intention to defraud creditors), and such credit transactions that are "extortionate" in nature. Proceedings in relation to such transactions will survive the approval of the resolution plan by the NCLT.

Further, the Income Tax Act (ITA) and Goods and Service Tax (GST) legislation also provides for certain transfers to be void against any future tax claim that may arise in respect of a transfer or a charge created during the pendency of any tax proceeding or outstanding tax demand, without prior permission of the tax department to the extent of outstanding taxes due against the seller or transferor.

### 5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

While the IBC governs, *inter alia*, the bankruptcy of individuals and partnership firms, the provisions pertaining to the same, except for personal guarantors to corporate debtors, have not yet been made operational. The regime also does not extend to the bankruptcy of financial service providers (unless otherwise notified by the Central Government in consultation with the relevant regulator), which continue to be governed by their governing statute and/or under the Companies Act, 2013 (CA). The Banking Regulation Act, 1949 governs the winding up of banking companies.

### 5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

As noted in question 5.1 above, after the initiation of a CIRP under the terms of the IBC, creditors are prohibited from enforcing their security interests and seizing assets. However, outside of the IBC framework, there are several ways in which a creditor can enforce its security and seize the assets of a project company out of court. In this regard, please see our response to question 4.1 above.

### 5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

There are certain mechanisms available to companies to achieve restructuring of their debts, outside of the formal insolvency regime provided for under the IBC, including the cramdown of its dissenting financial creditors. On 7 June 2019, the RBI issued the RBI (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 (Prudential Framework). The Prudential Framework creates an enabling framework for restructuring outside of the IBC, and also encourages the use of the IBC as a restructuring tool. The Prudential Framework applies to banks, financial institutions and large non-banking financing companies. In the event of a default in an account of any lender (being the entities to whom the directions apply), all lenders are required to, within a period of 30 days of such default (Review Period), undertake a *prima facie* review of the account and decide on the resolution strategy. Thereafter, all lenders are required to execute an inter-creditor agreement broadly setting out the terms of finalisation of the resolution plan.

Any resolution plan that is approved by: (a) lenders representing 75% by value of the total outstanding; and (b) 60% by number, is binding on all lenders.

A project company can also consider a corporate debt restructuring scheme under the provisions of the CA. A scheme in this regard can be filed with the jurisdictional NCLT, which must be accompanied, *inter alia*, with the consent of secured creditors representing 75% in value of debt. If the application is permitted by the NCLT, the scheme must then be approved by the majority of stakeholders of each class, representing three-fourths in value, which is then required to be sanctioned by the NCLT. Upon being sanctioned by the NCLT, the scheme will become binding on, *inter alia*, the project company, all the creditors or members or a class thereof, and the contributories of the project company.

### 5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Under the IBC, upon the initiation of the CIRP against the corporate debtor, the resolution professional takes on the role of the management of the company, and the powers of the board of directors remain suspended during this period. In terms of the IBC, directors may be held personally liable to make contributions to the assets of the corporate debtor (on an application made by the resolution professional to the NCLT) if such director knew or ought to have known that "there was no reasonable prospect" of avoiding the commencement of a CIRP against the corporate debtor under the terms of the IBC, and did not exercise due diligence in minimising the potential loss to the creditors during this period. Separately, under Section 66(1) of the IBC, such persons who are knowingly party to the carrying on of the business of the company during its CIRP or liquidation, in a manner that demonstrates their intent to defraud the creditors of the company, or for any other fraudulent purpose, may be held liable to make contributions to the assets of the corporate debtor (on an application made by the resolution professional to the NCLT). Proceedings in relation to the same will survive the approval of the resolution plan by the NCLT.

## 6 Foreign Investment and Ownership Restrictions

### 6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

Capital issuance by a project company is regulated by the CA. Chiefly, this legislation sets out the requirements for valuation of the issuer in a capital raise, corporate approvals required from the issuer's board of directors (and/or committees thereof) and shareholders (for capital issuance and also other corporate actions affecting ownership such as registration of share transfers, dividend declaration, mergers, business/asset sales) and filings required to be made by the issuer with the RoC and Ministry of Corporate Affairs (MCA). Capital issuance and other instruments relating to creation/transfer of ownership in a project company are subject to various taxes and fees (such as fees for increasing authorised share capital of a project company for further capitalisation, stamp duty on agreements for issuance or transfer of shares and on share certificates).

Foreign ownership in India is further regulated by the Foreign Exchange Management Act, 1999 (FEMA) and the rules and regulations made thereunder (chiefly, the Consolidated Foreign Direct Investment Policy, 2020 (FDI Policy, 2020) read with the FEM (Non-Debt Instruments) Rules, 2019 (FEMA Regulations)). The FEMA Regulations lay out: (a) lists of sectors where foreign ownership is prohibited (such as real estate business, atomic energy etc.); (b) the entry routes for foreign investment in various permitted sectors (i.e automatic route and approval route); (c) categories of foreign investors and attendant investment conditions (such as venture capital funds, foreign portfolio investors (FPIs), foreign direct investors); (d) valuation restrictions for acquisition or disposal of ownership by non-residents; and (e) reporting requirements and downstream investment by project companies under foreign ownership.

From a tax perspective, there are direct and indirect taxes that are applicable. The gains accruing or arising to a foreign investor on the sale of foreign investments are regarded as long-term capital gains if unlisted shares in a project company are held for a period in excess of 24 months, and short-term capital gains if held for a lesser period. The long-term capital gains earned by the foreign company is taxed at the effective rate of 10.92%, whereas the short-term capital gains would be taxed at the higher rate of 43.68%. The purchaser shall have to withhold taxes payable by the foreign seller and deposit it as credit of the Indian Government. Taxes applicable on long-term capital gains and short-term capital gains are also subject to the benefits of any lower tax rates available under double taxation avoidance agreements (DTAAs). Additionally, as the anti-abuse provisions forming part of the Indian tax laws, tax may also be applicable on the difference between the sale price and fair market value (if the price is lower).

In cases where the investments are made into the Indian entities through loans/debentures, the interest payable to the foreign entity shall be subject to taxes in India and the Indian borrower shall have to withhold such taxes and deposit it to the credit of Indian Government. Taxes applicable on interest payable to a foreign entity is also subject to the benefits of any lower tax rates available under DTAAs.

Neither ownership nor transfer of shares from one foreign investor to another foreign investor would make such foreign investor liable to any GST.

There are no specific taxes on foreign ownership. Please see our response to question 7.6 below on taxes on repatriation of loan payments and investment returns.

### 6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

India has entered into several bilateral and multilateral investment treaties with various countries to promote trade and commerce within the country. For avoidance of double taxation of the same income as well as to ensure seamless flow of tax credits, India has also executed DTAAs with more than 90 countries/territories. Where there is a DTAA, India would tax the resident of that country at the rates prescribed in the treaty or the ITA, whichever is lower. The person should then get credit for taxes paid in India and *vice versa* in the case of an Indian taxpayer. There are no treaties providing explicit protection to a foreign entity from the restrictions on exchange control.

Eligibility to claim benefits under a relevant DTAA is subject to certain conditions prescribed therein, such as the limitation of benefits clause, substance test, principal purpose test, beneficial ownership, etc. It is also vital to take note of the changes under the Multilateral Instrument (MLI) issued by the Organisation for Economic Co-operation and Development. India is a signatory to the MLI and, hence, India's DTAAs with other signatory countries will need to be read in line with the changes provided under the MLI, which came into effect from the financial year 2020–21 onwards for its treaties.

### 6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 apply in relation to land acquisitions by the government for public purpose and compensation paid thereof. The Indian Constitution also grants the government the right to compulsorily acquire any property for a public purpose upon payment of compensation. The rights on the projects undertaken through public–private partnerships (PPPs) are automatically transferred to the concessioning authority at the end of the concession period.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

Each infrastructure sector in India has one or more regulators that exercise jurisdiction over the particular sector. For example, the Airports Authority of India and the Directorate General of Civil Aviation regulate the aviation sector, while the roads sector is regulated by the National Highways Authority of India (NHAI). Concession agreements or power purchase agreements, for example, may also be entered into with state-specific utilities/agencies.

### 7.2 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?

Please see our response to question 2.6 above.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

The government retains sovereign rights over ownership of natural resources, and the right to use such natural resources shall be subject to the terms of the licences granted by the government. Land and licences in respect of natural resources cannot be directly held by a foreign entity; however, it may be held by an Indian entity owned and/or controlled by such foreign entity, subject to the foreign investment thresholds specified in the response to question 6.1 above.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Yes. Royalties are payable for the extraction or export of natural resources, the amount for which will depend on the concession obtained and in accordance with the stipulations set out under the applicable law. Further, income tax is payable on income from the extraction or export of natural resources.

Further, income tax is payable on income generated/accrued from India and the income generated from extraction or export of natural resources in India would be considered as income generated/accrued in India. GST may also be payable on the licence fee for the right to extract. Moreover, export of iron and other metals and minerals may attract customs duty tax.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Any income earned by a tax resident of India from foreign currency exchange may be subject to tax in India. The actual transaction of foreign currency exchange is not subject to GST. However, GST is payable on the supply of services in relation to purchase and sale of foreign currency, including conversion of currency, where a separate consideration is charged for such service under the GST laws.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Yes, tax is levied on remittance and repatriation of investment returns, by way of income tax or capital gains tax, depending on the nature of the return. Please see our response to question 6.1 above. Short-term capital gains arising from the sale of listed securities, in case of such shares being held for 12 months or less, may be taxed at the lower rate of 15% if the security is sold on the stock exchange.

Dividends and/or interest earned by the foreign investor or foreign lender, as the case may be, would be subject to taxes in India. An Indian company distributing dividends is also required to withhold tax at applicable rates. The withholding tax rate on dividends is 10% for resident taxpayers and 20% for non-residents, subject to any lower rate of tax prescribed in the applicable DTAA.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Onshore and offshore foreign currency accounts are not permitted under applicable law, except in limited circumstances, as set out in the FEM (foreign currency accounts by a person resident in India) Regulations, 2015. For instance, an Indian project company receiving foreign investment under the foreign direct investment route is permitted to open and maintain a foreign currency account with an authorised dealer in India, provided that the project company has impending foreign currency expenditure. In the instance referred to hereinabove, the account is required to be closed immediately after the requirements are met, and it is not permitted to be operational for more than six months from the date of opening.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Dividends include any interim dividend or final dividend. The CA sets out restrictions on the source of the dividend and final dividend can only be declared out of: (a) profits of the financial year for which dividend is proposed to be declared; (b) profits of any previous financial years(s) remaining undistributed; (c) both; or (d) out of money provided by the Central Government or a State Government for the payment of dividend by the project company in pursuance of a guarantee given by that Government.

While the project company may declare interim dividend from: (a) surplus in the profit and loss account; (b) profits of the financial year for which such interim dividend is sought to be declared; or (c) profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.

Profits, in either case, must be calculated after:

(a) providing for depreciation in accordance with Schedule II of CA;
(b) excluding: (i) any amount representing unrealised gains, notional gains or revaluation of assets; and (ii) any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value; and
(c) setting-off any carried over previous losses and depreciation, not provided in previous year(s), against profit of the company for the current year.

Further requirements related to declaration of dividend out of reserve are governed by the Companies (Declaration and Payment of Dividend) Rules, 2014. Further, the FEMA read with the FEM (Current Account Transactions) Rules, 2000 and the FDI Policy, 2020 govern repatriation of dividends for non-resident shareholders. At present, repatriation of dividends to foreign shareholders is a freely permitted current account transaction. However, the remittance of dividends by any company, where dividend balancing is applicable, is a prohibited transaction.

### 7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Depending on the nature, size and pollution index of the project, project developers will be required to seek environmental clearances, approval of their resettlement and rehabilitation plan, consent to establish and operate, forest clearances, and wildlife clearances, amongst others. Each state in India also has local laws relating to the welfare of labourers employed by a project company.

### 7.10 Is there any specific legal/statutory framework for procurement by project companies?

Any procurement by project companies may be governed by the terms of the bid documents and the subsequent concession agreements that may be signed by such company. More recently, to promote India's "Make in India" initiative, the Ministry of New and Renewable Energy approves and empanels manufacturers in relation to wind turbine and solar photovoltaic module in respect of government associated renewable energy projects. Further, in certain instances, additional taxes or duties may also be levied (such as safeguard duty on the import of solar panels from certain countries).

## 8 Foreign Insurance

### 8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

Under Indian law, assets in India cannot be insured by way of an insurance policy issued by a foreign insurance company, unless separate permission of the Insurance Regulatory and Development of India is obtained. However, foreign insurance companies can provide reinsurance with respect to assets in India, subject to regulatory restrictions such as order of preference between foreign insurance companies and Indian reinsurers and complying with entry requirements for providing reinsurance in India. GST will be applicable on such reinsurance arrangement, based on the nature and quantum of such arrangement.

Investment by foreign insurance companies is subject to regulatory restrictions on ownership by foreign players.

### 8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

As per the regulatory framework, Indian insurers may issue policies to residents outside of India subject to currency restrictions. Residents outside of India who are beneficiaries can receive payment with respect to insurance claims/maturity/surrender value. Thus, for the purpose of receiving payments pursuant to insurance policies issued by an Indian insurer, the foreign (secured) creditors must be the beneficiary of the insurance policy and not merely a policyholder. Also, creation of security for external commercial borrowing would require the consent 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 creditor may enforce security created over the insurance policies and obtain the benefit of the same. Typically, project financing would also require insurance proceeds to be deposited into a bank account of the borrower which is charged to the lenders.

## 9 Foreign Employee Restrictions

### 9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

A foreigner may work in India subject to compliance with immigration laws and visa requirements. A foreign employee will generally be required to obtain an employment visa (in some cases, a business visa may be more suitable), which will be granted subject to certain conditions, including the following: (a) the applicant being a highly skilled and/or qualified professional engaged or appointed by a company/organisation/industry/undertaking in India on a contract or employment basis; (b) an employment visa will not be granted for jobs for which qualified Indians are available and also for routine, ordinary or secretarial/clerical jobs; and

(c) the applicant's salary being in excess of USD 25,000 *per annum* (subject to certain exceptions). Further, foreign nationals visiting India on long-term visas (more than 180 days) are required to register with the Foreigners Regional Registration Officer within 14 days of arrival.

Separately, in certain states, there are laws which mandate the employment of a specific percentage of local candidates in establishments. Further, certain states may also require that an establishment engage a specific percentage of local candidates in order to avail certain incentives or subsidies. These requirements may indirectly restrict the number of foreign workers that a company will be able to engage.

## 10 Equipment Import Restrictions

### 10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Under the Foreign Trade Policy 2015–2020 (applicable until March 31, 2023), all goods are freely importable on payment of requisite duties, except when regulated by way of prohibition, restriction or exclusive trading through State Trading Enterprises as laid down in the Indian Trade Classification (Harmonised System) of imports. Import of restricted goods can only be carried out with authorisation or by the procedures prescribed in the notification issued in this regard.

### 10.2 If so, what import duties are payable and are exceptions available?

The Customs Act, 1962 (Customs Act) empowers the government to levy duties of customs at such rates as may be specified under the Customs Tariff Act, 1975 (Customs Tariff Act). The import of goods is typically subject to the levy of the following:

(i) Basic custom duty: This is applicable to all the goods that are imported, unless specifically exempted.

(ii) Surcharge: A social welfare surcharge at a rate of 10% is imposed on specified goods imported into India.

(iii) Integrated GST: This is applicable to all goods that are imported as notified under GST law, unless specifically exempted.

(iv) Safeguard duty: The government is empowered to impose a safeguard duty on an article imported into India if it is satisfied that this article is in such increased quantities and under such conditions that may cause or threaten to cause serious injury to the domestic industry.

(v) Anti-dumping duty: The government may also impose an anti-dumping duty on an article imported into India if it is satisfied that such article is imported into India at a price less than its normal value, and that the same may cause or threaten to cause serious injury to the domestic industry.

Import of some goods, such as parts for the manufacture of aircraft, parts of wearables, printed circuit boards, etc., may attract concessional rates or be free from payment of customs duties, subject to conditions stipulated under the Customs Act or any other statutes or law currently in force.

## 11 *Force Majeure*

### 11.1 Are *force majeure* exclusions available and enforceable?

All project contracts typically contain *force majeure* clauses, the extent of which is defined thereunder. The nature of relief available upon occurrence of a *force majeure* event depends on the commercial agreement between the parties, and such clauses have been enforced by courts. In the event that the contract does not contain a *force majeure* exclusion to performance, Indian contract law recognises impossibility of performance as a basis to render a contract void. However, the requirements of impossibility are typically more stringent than the standards for contractually agreed *force majeure* clauses. *Force majeure* clauses are not typically found in financing arrangements; however, we have recently seen borrowers asking for *force majeure* exclusions under financing arrangements as well.

## 12 Corrupt Practices

### 12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The principal legislation dealing with corruption in India is the Prevention of Corruption Act, 1988 (PCA). The Act imposes strict prohibitions on public officials from obtaining any undue advantage. While the definition of public servants was enlarged in 1988 to include such public functionaries as Members of Parliament, corruption in the private sector still falls outside the ambit of the PCA, for which the applicable charging provisions are as per the Indian Penal Code, 1960 in the sections dealing with fraud, cheating, misrepresentation and criminal breach of trust. Furthermore, in terms of the CA, the Serious Fraud Investigation Office has been granted wide-ranging powers to investigate fraud relating to companies, including on the grounds of public interest. The CA also provided amendments introduced in 2018 to constitute the National Financial Reporting Authority which, *inter alia*, monitors and enforces compliance with accounting standards and imposes penalties for any professional or other misconduct for non-adherence. Lastly, various other statutes, such as the Prevention of Money Laundering Act, 2002, the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, the Fugitive Economic Offenders Act, 2018 and the Whistle Blowers Protection Act, 2011, prohibit corrupt practices.

## 13 Applicable Law

### 13.1 What law typically governs project agreements?

Project contracts entered into between two or more Indian parties are governed by Indian law. Where there is one (or more) foreign counterparty, contracts may be governed by foreign law and such governing law choice is recognised by Indian courts. Please see our response to question 14.1 in this regard.

### 13.2 What law typically governs financing agreements?

Where a borrower avails of a loan from a domestic lender, Indian law is the governing law. However, in foreign currency borrowings or borrowings from foreign lenders, typically English law is the preferred governing law.

### 13.3 What matters are typically governed by domestic law?

Typically, creation and enforcement of security is governed by Indian law, especially where mortgage of immovable property and charge over shares of an Indian company is concerned, which is specifically governed by the Transfer of Property Act, 1882 and CA, respectively.

## 14 Jurisdiction and Waiver of Immunity

### 14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

Generally, a party's submission to a foreign jurisdiction is legally binding. However, in the event of extraordinary and unforeseen circumstances and on discharging a heavy burden of proof that signifies that grave injustice would be caused to the party by such ouster, the Courts may construe such a clause to be unjust or unfair, depending on the facts and circumstances of the case. In relation to enforcement of foreign judgments, India is not a signatory to any international treaties for recognition or enforcement of foreign judgments. Under Section 13 of the Code of Civil Procedure, 1908 (CPC), a foreign judgment is conclusive insofar as the matters adjudicated thereby between the parties, except in certain cases such as where the foreign judgment has not been pronounced by a Court of competent jurisdiction, etc. Further, foreign decrees can only be enforced in India under Section 44A of the CPC, if they have been passed by a "superior court" of any "reciprocating territory". Reciprocating territories are notified by the Central Government from time to time (reciprocating territories include the United Kingdom, Aden, Fiji, Singapore, the United Arab Emirates, Malaysia, Trinidad and Tobago, New Zealand, the Cook Islands and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea, and Bangladesh). Additionally, only decrees or judgments under which a sum of money (other than taxes or other charges of a like nature or a fine or other penalty) is payable, can be executed under Section 44A of the CPC.

A waiver of immunity is generally recognised by Courts in India and the same is legally binding and enforceable.

## 15 International Arbitration

### 15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, contractual provisions requiring reference/submission to arbitration of disputes arising out of legal relationships between parties, where at least one of the parties is a national of/resident in or incorporated in a country other than India and the dispute is considered "commercial" under Indian law (such arbitrations being "international commercial arbitrations") are recognised under the Arbitration and Conciliation Act, 1996. Similarly, arbitral awards will be enforced by Indian courts unless they fall foul of any conditions that result in an award not being enforceable under the New York Convention.

### 15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

India is party to both the New York Convention and the Geneva Convention. An award made in a country which is a signatory to the New York or Geneva Convention can be enforced in India. However, the award should have become final in the territory of such country, and should arise out of a dispute that is considered as "commercial" under Indian law. In addition, India should have recognised the country as a convention country by way of an executive notification.

### 15.3 Are any types of disputes not arbitrable under local law?

The general rule is that private rights – "rights *in personam*" – are arbitrable, whereas "rights *in rem*", or public rights, are not. While most commercial disputes between parties are arbitrable, some disputes for which specific forums or tribunals are set up, such as the NCLT, and disputes falling within the purview of the Debt Recovery Tribunal, are not arbitrable. Simple allegations of fraud are arbitrable, while serious allegations of fraud are not. The rubric for this purpose is whether the plea permeates the entire contract and arbitration agreement or alternatively whether the allegations touch upon only the parties' internal affairs without any consequence on the public domain. Similarly, disputes pertaining to, trusts, *inter alia*, criminal matters and insolvency proceedings, being actions *in rem*, cannot be adjudicated by private fora and are therefore non-arbitrable.

### 15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

The principle of party autonomy insofar as the seat of arbitration is concerned is recognised in private/commercial disputes. There are no specific categories of disputes which are subject to mandatory domestic arbitration proceedings. However, most public procurement/PPP contracts typically provide for domestic arbitration. Further, certain statutes prescribe domestic arbitration; for instance, under the Electricity Act, 2003, the electricity regulatory commissions have the discretion to decide disputes themselves or refer them to arbitration.

## 16 Change of Law / Political Risk

### 16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

No specific practice exists in India in this regard. However, for instance, the Solar Energy Corporation of India (SECI) instituted the viability gap funding scheme to provide incentive funding to developers on project commissioning. This funding is backed by the Ministry of New and Renewable Energy (subject to availability of funds). It is also fairly common practice in India to execute direct agreements with project counterparties such as government-owned power purchasers or the Airports Authority of India. These direct agreements are usually limited to substitution rights for the lenders, allowing them to step in and replace the borrower with a third-party entity in a default scenario to take control of the SPV's management in instances of emergency, etc.

## 17 Tax

### 17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Please note the following:

(a) Payment of interest to domestic lenders would be subject to withholding tax at the rate of 10%. In the context of foreign lenders, varying withholding tax rates would apply depending on whether the loan given is designated in Indian rupees or in a foreign currency, the category of lender and borrower, as well as the rates prescribed under the (Indian) Income tax Act, 1961 (ITA) read with the relevant Double Taxation Avoidance Agreement (DTAA) (as applicable). The rate of tax on interest income ranges from 4% to 40% (exclusive applicable surcharge and cess). A special 5% rate of withholding tax is available in respect of certain debt instruments, such as money borrowed by an Indian company or business trust from outside of India before July 1, 2023 (1) under a loan agreement, (2) by way of issuance of long-term bonds, (3) by way of issue of rupee denominated bonds i.e. masala bonds, or (4) by way of issue of long-term bonds or rupee denominated bond which is listed in the International Financial Services Centre. Similarly, the special withholding tax rate of 5% would also be applicable on the monies borrowed from Foreign Institutional Investor or a Qualified Foreign Investor through (1) rupee denominated bond, (2) government securities, or (3) municipal securities.

(b) The nature and characterisation of payments with respect to proceeds of claim under a guarantee or enforcing security would need to be examined to determine the tax implications. If such payments are in the nature of interest payments, withholding tax rates would be applicable. If characterised as capital payment, in certain circumstances this may not be taxable.

**17.2 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?**

Please see our response to question 17.1 above.

Certain other benefits may be available to certain sovereign-owned banks or financial institutions due to specific notifications issued by the Central Board of Direct Taxes with respect to immunity from taxes, or as per the relevant DTAA. In addition, there is a tax exemption available on income in the nature of dividends, interest or long-term capital gains arising in the hands of certain sovereign wealth funds investing in infrastructure facility.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

Other than as set forth above, under the domestic tax laws, India has detailed transfer pricing regulations that require all payments to related parties to be made on an arm's-length basis. The ITA provides that a taxpayer would be required to carry out secondary adjustment where the primary adjustment to the transfer price has been made, *inter alia*: (a) *suo motu*; or (b) by the tax authorities and accepted by the taxpayer. It further requires that "excess money" shall be repatriated to India within the prescribed time, failing which it shall be treated as an advance to the related party, and interest would be computed thereon.

Additionally, Indian domestic tax laws contain certain "thin capitalisation" rules. Under these provisions, interest expenses claimed by an Indian entity in relation to payments made to its non-resident related parties will be restricted to the lower of: (a) 30% of its earnings; or (b) interest paid or payable to such related party.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

Bonds or other market instruments can be issued in India or offshore by project companies subject to various eligibility criteria, restrictions on end use and on the investment amount based on the nature of the borrowing or the investor, such as under the Master Direction – External Commercial Borrowings, Trade Credits and Structured Obligations, and the Securities and Exchange Board of India (Foreign Portfolio Investors) Regulations, 2019, read with the RBI's circulars on investment by FPIs in the debt market in India.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

At present, RBI regulations do not recognise Islamic finance products. Interest rates for market borrowings are usually linked to market-standard benchmarks such as the MCLR, and transaction-based rates such as the SOFR.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Typically, project contracts or financing contracts do not contain *Shari'ah* law as the governing law. Indian courts generally rely upon common law jurisdictions and other legislation in force in India for the resolution of disputes.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

Please see our response to question 19.1 above. Provisions pertaining to payment of interest are generally the norm in India and are held to be valid and enforceable. That being said, there are also laws that restrict: (a) the charging of interest by money lenders beyond certain set thresholds (in certain states); and (b) loans being provided at interest rates lower than government security rates, for certain states. However, these do not arise from compliance with *Shari'ah* law.

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Santosh has rich experience in banking, project financing, acquisition financing, structured financing, projects and private equity, and represents developers, sponsors, lenders and contractors in infrastructure and project finance transactions. Santosh is involved in various bond and structured debt financings. Santosh also leads the development of the Firm's renewable energy practice, advising developers, investors and lenders in this space, whereby the Firm has emerged as the pre-eminent firm in this sector in India.

Santosh has acted in a number of landmark transactions, including advising Indian lenders, the International Finance Corporation, Development Bank and other national and international financial agencies in the 4,000 MW Mundra Ultra-Mega Power Project, which is the first project to be financed by offshore lenders. He has also advised Tata Power Limited in relation to the investment by BlackRock Real Assets led consortium including Mubadala Investment Company in its renewable energy portfolio and on various high-yield bond transactions undertaken by Indian groups. A few of his recent significant transactions include advising a consortium of lenders, led by Rabo Bank in relation to financing amounting to USD 1 billion availed by a subsidiary of the Renew Group engaged in the development of hybrid wind and solar farms which is Round-the-Clock Battery enabled. He has also advised Engie Solar S.A. and Engie S.A. on the sale of solar projects to Edelweiss group, and advising various Indian developers on issuance of high-yield offshore bonds aggregating USD 1.5 billion.

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