GETTING THE DEAL THROUGH

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India

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1 Collateral

What types of collateral are available?

Collateral for the purposes of financing forms an essential part of any project. Subject to applicable laws and contract conditions, several types of collateral may be available, including pledge of shares, bonds and debentures of promoters and shareholders of the company, marketable securities, creation of a charge on bank accounts and escrow accounts, immoveable and moveable property such as land, buildings, plant and machinery, stock in trade, current assets, intellectual property, etc.

2 Perfection and priority

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?

Broadly speaking, there are three ways to create and perfect a security interest: (i) through a mortgage of immoveable property in writing or otherwise; (ii) through a hypothecation and pledge of moveable property in writing; and (iii) by assignment of intellectual property and contractual rights as well as receivables in writing through a deed of assignment.

A mortgage can be created and perfected through a written and registered deed of mortgage (commonly referred to as an English mortgage) or through a physical deposit of title deeds (commonly referred to as an equitable mortgage). While both forms of mortgage are prevalent in India, since the English mortgage form involves payment of stamp duty charges at the time of registration etc, the equitable form has become a more popular and cost-effective method of mortgage creation. Furthermore, an intention to create a security is one of the essential elements of an equitable mortgage. An equitable mortgage is recognised by section 58(f) of the Transfer of Property Act and section 59 of the Act expressly excludes a mortgage by deposit of title deeds from registration, if it satisfies the requirements stipulated therein. Also, in the case the immoveable property is leasehold in nature, all requisite permissions as may be required from the lessor would have to be obtained prior to creation of the charge.

Historically, banks and financial institutions have experienced considerable difficulties in recovering loans and enforcement of securities charge held with them.

As regards moveable property, a security interest may be created by means of a pledge or hypothecation. A pledge is bailment of moveable property by way of a security that involves an actual or constructive possession of the pledge property to the lender. In the case of a hypothecation, a written document in the form of a deed of hypothecation must be executed, which is liable to stamp duty under article 16 of the Indian Stamp Act. However, a letter of hypothecation accompanying a bill of exchange is exempt from stamp duty. However, in either case, a fixed as well as a floating charge can be created against the securities.

A floating charge over stock in trade may be created by way of hypothecation and thus execution of a deed of hypothecation. A security interest may be created in shares and securities by way of a pledge by execution of an instrument in writing. In all cases, all formalities as may be prescribed by the creditor would be applicable apart from the norms set by the statutory regulatory authorities.

The Companies Act 1956 (the Companies Act) enshrines the legal principle that where the debtor is a company, the secured creditors would have priority over all other creditors and claimants.

The debts are payable to the fullest extent unless the assets are insufficient to meet them, in which case they are abated in equal proportions. In the later stages of winding-up proceedings, priorities are stacked running from the secured creditors out of the assets of the company, subject to the pari passu claims of the workforce, in furtherance of the costs and expenses of winding-up under section 530(6) of the Companies Act, followed by the payment to preferential creditors under section 530(1), the floating charge holders and the unsecured creditors. In addition to this, there are other statutory preferential payments for taxes, revenues and cesses, wages or salary for past dues, prior to the winding-up or for a period not exceeding four months when there is a continuous employment for the beneficial winding-up and for provident fund, pensions and other claims.

3 Existing liens

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

The general lien is a valuable right of the secured creditor which is judicially recognised. A lien comprises property of the debtor in the possession or under the control of the creditor. A creditor enjoying the lien, however, has no right to sell or dispose of the said property. In other words, it is only entitled to retain possession.

For a creditor to assure itself that there are no prior liens with priority to its lien, it is essential that the creditor itself or through its authorised agents or representatives, examines the original documents, title deeds, etc in relation to the security. Insofar as the security offered by the debtor is an immoveable property, the creditor should get the land records verified from the relevant statutory authorities and registry and obtain a non-encumbrance certificate, which would indicate existence of a registered mortgage. Further, an absence of original documents in the debtor's possession would prima facie indicate existence of a prior mortgage.

A company formed under the Companies Act is statutorily required to file requisite forms such as Form 8 with the Registrar of Companies in the event of creating any security on any of its assets. Therefore, in the event of the debtor being a company, relevant searches at the Registrar of Companies should be done to check the existence of charges. However, it must be emphasised that such a search would not be a conclusive search as the company might not have filed the said forms and hence the company search would not reflect the existence of such a charge. Therefore, the company search must also be supplemented with other searches such as Registrar search, examination of original documents, examination of the company records including the Register of Charges, etc.

In relation to a pledge of the relevant securities, if they are in physical form, the possession of such documents, including share certificate etc would be required to be handed over to the creditor.

In the case of shares and such securities of listed companies in dematerialised form, the creditor can make appropriate inquiries to assure itself as to the absence or presence of any lien.

4 Enforcement of collateral

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?

In India, self-help remedies are not available. The option of judicial sale has been provided under the Code of Civil Procedure as well as the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the SARFAESI Act), Recovery of Debts Due to Banks and Financial Institutions Act 1993 (the RDBFI Act) and State Finance Corporations Act (the SFC Act). However, recent legislation such as the SARFAESI Act does contemplate direct action such as taking over possession of the secured asset, auction of the same, etc without the involvement of court proceedings.

The execution of a decree against property of the judgment debtor can be under two categories:
- attachment of property under relevant statutes; and
- sale of property of the judgment debtor.

'Attachable property' belonging to a judgment debtor may be divided into two classes: moveable and immoveable property. If the property is immoveable, the attachment is to be made by an order prohibiting the judgment debtor from transferring or charging the property in any way and prohibiting all other persons from taking any benefit from such a transfer or charge. Where an attachment has been made, any private transfer of property attached, whether it be moveable or immoveable, is void against all claims enforceable under the attachment. The project lenders can participate as buyers in a sale. The sale proceeds cannot be taken in foreign currency.

An arbitral award under the Arbitration and Conciliation Act 1996 (the Arbitration Act) cannot be enforced as a decree until the period of challenge under section 34(3) is over or the objections filed have been dismissed. It is common practice that whenever an arbitral award is made, the party adversely affected by it files a petition under section 34 of the Arbitration Act at court. By the time the stage of filing execution comes, the party against whom the award had been made disposes of its assets so as to defeat the execution proceedings. Unless a party has taken interim orders under section 9 of the Arbitration Act against disposal of assets etc, there is a good chance that by the time the execution application is filed, the party against whom the award is to be enforced will have practically spirited away all its assets.

5 Bankruptcy proceeding

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 (eg, tax debts, employees' claims) 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?

Enforcement of security interests, and enforcement of claims of special creditors, is dealt with by several statutes in India, including the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (the SARFAESI Act). In the case of secured creditors like banks or financial institutions the Recovery of Debts Due to Banks and Financial Institutions Act 1993 is applicable, and the State Finance Corporations Act in the case of creditors that are state finance corporations, etc. Most of these laws provide for sweeping security enforcement provisions, without regard to the equities and interests that corporate insolvency and restructuring laws seek to preserve.

Enforcement of security interests by the secured creditor is a global norm, but in India a special position has been conferred on the workforce by provisions in section 529 and section 529A of the Companies Act. The workforce has been put at par with the interests of the secured creditors. Further, secured creditors are given the right to enforce their securities outside court as well. The claims of both Indian and foreign lenders are treated equally under the Companies Act, though not included within its definition of 'secured creditors'. No entity is excluded from bankruptcy proceedings under corporate insolvency laws.

6 Foreign exchange

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

In India, all transactions pertaining to foreign currency exchange are regulated by the Foreign Exchange Management Act (FEMA) 1999. FEMA has empowered the Reserve Bank of India (RBI) to specify, in consultation with the central government, the permissible capital account transactions and the limits up to which foreign currency exchange may be drawn for such transactions.

Capital account convertibility is the freedom to convert local financial assets into foreign financial assets and vice versa at market-determined rates of exchange. It allows anyone to freely move from local currency into foreign currency and back. In the aftermath of the financial meltdown, the RBI had adopted a cautious stance on financial reforms, including the full convertibility of the local currency subjected to permission of the RBI.

Current account convertibility refers to currency convertibility required in the case of transactions relating to exchange of goods and services, money transfers and all those transactions that are classified in the current account and can be opened, held and maintained by authorised dealers. However, local currency was made fully convertible on current account way back in 1994, allowing conversion of the rupee into foreign currencies for trade-related issues.

7 Remittances

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

The outward remittance of investment returns or interest due on loans is a current account transaction that is allowed subject to the regulations and notifications published by the RBI.

Outward remittance of current income such as rent, dividend, pension, interest, etc, arising in India is permitted to be debited from the non-resident ordinary (NRO) rupee of the account holder. Authorised dealer banks may also allow repatriation of current income such as rent, dividend, pension, interest, etc, of non-resident Indians (NRIs) who do not maintain an NRO account in India, based on an appropriate certification by a chartered accountant, thereby certifying that the amount proposed to be remitted is eligible for remittance and that applicable taxes have been paid or provided for. NRIs or persons of Indian origin (PIO) also have the option to credit the current income to their non-resident (external) rupee (NRE) account, provided the authorised dealer bank is satisfied that such credit represents current income of the non-resident account holder and income tax thereon has been deducted or provided for.

As far as loans are concerned, the RBI has given designated authorised dealer banks, the general permission to make remittances of instalments of principal, interest and other charges in conformity with external commercial borrowings guidelines issued by the government and RBI from time to time. With respect to loans given by NRIs or PIOs resident outside India to residents, repayment can be made through an NRE rupee account or foreign currency (non-resident) (FCNR) account or NRO rupee account.

In cases where the dividend or interest on shares, bonds or debentures held on repatriation basis is to be credited to the non-residents holder's NRE account with a bank in India, it may be paid by issuing individual dividend or interest warrants to the shareholder's mandate banks for credit to NRE account. In cases where any investment is made on a non-repatriation basis, application to the RBI is required to be made for the remittance of the same. Since 1996–1997, entire income has become repatriable and hence remittances are allowed to be made in one lump sum or in instalments.

Under the NRO account, remittance of investment returns or loan payments cannot be carried out without the approval of the RBI, as the balance in this account is not eligible for remittance outside India. If the loan was given by the NRI from the NRE or FCNR account then the repayment and interest on that loan shall be credited to the NRE or FCNR account. In all other cases the payment shall be made by credit to the NRO account.

With respect to remittance of returns on investment made in companies, no restrictions have been set out by the RBI. For payment of investment returns payable on investments of non-residents in partnership firms or proprietary concerns general permission has been given by RBI. Investment returns and payment of loan are taxable under law. Therefore, remittance of the same is allowed to be made by an authorised dealer only on the production of an undertaking by the remitter along with a certificate issued by a chartered accountant.

8 Repatriation

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

Repatriation refers to the process of converting foreign currency back into the currency used in one's own country. An Indian project company does not necessarily need to repatriate its earnings. It is free to invest the earnings in India in any industry or sector either through asset purchase or equity investment under the terms of the Foreign Direct Investment (FDI) Policy. Therefore, a project company can repatriate its earnings or make downstream investment in India itself, subject however, to the requisite statutory requirements as above.

9 Offshore and foreign currency accounts

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

Banks that are designated as authorised dealers can open non-interest-bearing foreign currency accounts for project offices in India. The foreign currency account has to be closed on completion of the project. Each project can have only one foreign currency account. A person resident in India may open, hold and maintain with an authorised dealer in India a foreign currency account, known as an exchange earners' foreign currency (EEFC) account, subject to the terms and conditions of the Exchange Earners' Foreign Currency Account Scheme.

Further, project companies located in a special economic zone (SEZ) may also open, hold and maintain a foreign currency account with an authorised dealer in India on receipt of foreign exchange funds. The funds held in the account shall be used for bona fide trade transactions in the SEZ. An Indian entity or body corporate can open a bank account outside India without any prior approval from the RBI or an authorised dealer, subject to certain limits on remittances as prescribed under the Foreign Exchange Management (Foreign Currency Accounts by a Person Resident in India) (Second Amendment) Regulations 2001.

The RBI has granted general permission to foreign companies to establish project offices in India, provided they have secured a contract from an Indian company to execute a project in India. Authorised dealers can open a non-interest-bearing foreign currency account for a project office in India subject to certain conditions to be closed at the completion of the project.

10 Foreign investment and ownership restrictions

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 India is regulated by the Foreign Direct Investment (FDI) Policy. While investment in most sectors is under the automatic route, namely, it does not require prior approval from the Foreign Investment Promotion Board (FIPB), certain sectors do require mandatory approval from the FIPB for foreign investment. This requirement of approval from the FIPB acts as a restriction. Apart from the above restriction, there is also a cap on investment in certain sectors.

India has signed bilateral investment protection agreements with over 50 countries. In the event of foreclosure on the project, the foreign investors would continue to enjoy such rights as may be in the secured assets subject, however, to the guidelines of the RBI and other statutory authorities from time to time.

India has also signed around 90 agreements for the avoidance of double taxation (DTAAs) with various countries (including limited DTAAs with nine other countries). These DTAAs, inter alia, provide tax relief for certain kinds of income, either in totality or partially (by reducing the tax rates) in India.

Further, under the provision of DTAAs, foreign companies can also offset the credit (or benefit) of the tax paid in India from the tax payable in their home country.

The profits of a project office or branch of a foreign company in India are taxed at around 42 per cent, irrespective of the remittance of such profits to the head office in the home country.

On the other hand, the corporate income tax rate for domestic companies is approximately 33 per cent. Although dividend in the hands of shareholders is tax-free, the domestic company declaring dividend is required to pay a dividend distribution tax of around 17 per cent on the distributed profits.

Thus, effectively a foreign company and a domestic company pay corporate tax at almost the same rate on their income.

11 Documentation formalities

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?

As per the provisions of the Registration Act 1908, all documents of which registration is compulsory if it relates to immoveable property as well as documents of which registration is optional should normally be presented for registration in the office of the sub-registrar within whose sub-district the whole or some portion of the property to which the document relates is situated.

Documents relating to the following immoveable property transactions must be registered, including: gifts of immoveable property; non-testamentary rights; leases of immoveable property for more than 11 months.

12 Government approvals

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

Government approvals for financing projects differ depending on the specific project sector and depending on the sectoral caps. The government's cooperation is critical in large projects and is required to assist in obtaining the necessary approvals, authorisations and consents for the construction and operation of the project. Foreign currency loans or external commercial borrowings (ECB) are regulated by the RBI under the provisions of FEMA. Other primary approvals required deal with company incorporation, obtaining registration and licensing, as well as FIPB approvals for foreign investment. Licences are required prior to commencing work in certain fields, wherein payments are required to be made to the Secretariat for Industrial Assistance (SIA).

Relevant operating approvals may also be required from the concerned governmental departments, at both central and state levels as well from the regulatory body. Further, prior to starting a new project, a number of approvals and clearances are required from different authorities such as the Pollution Control Board, chief inspector of factories, electricity boards, municipal corporations, etc.

Additionally, fees and charges would apply as required under the statutes governing the activities being undertaken. The fees and charges would also vary based on the state or area of operation.

13 Foreign insurance

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?

General insurance business in India is undertaken by insurance companies, which are registered with the Insurance Regulatory and Development Authority (IRDA). Foreign insurance companies can enter India only in collaboration with domestic insurance companies. However, foreign insurance companies cannot retain board control in Indian insurance joint venture companies. Persons, firms, companies, etc resident in India are not permitted to take insurance cover of any kind with insurance companies in foreign countries without the prior permission of the RBI. In addition, government permission under the General Insurance Business (Nationalisation) Act 1972 is required in such cases.

Insurance cover on risks inside India (including all risks insurance) on assets in India owned by residents of India may be issued only in rupees. This is also applicable to assets of Indian branches or offices of foreign companies, banks, etc. Reinsurance can be taken with foreign reinsurers to the extent of the residual uncovered risk after obligatory placements domestically with Indian insurance companies. The IRDA proposes to allow three kinds of insurance brokerage firms to operate in the country, namely, insurance, reinsurance, and composite brokerage firms. The 26 per cent equity cap will apply to such firms too, except that composite brokers may enjoy a higher equity cap of 49 per cent.

In the insurance policy, the creditor can be a beneficiary under appropriate clauses, which may be inserted after negotiation. However, redemption of any claim thereunder by such a creditor would be subject to exchange control regulations as prescribed by the RBI from time to time.

14 Foreign employee restrictions

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

Indian consulates across the world grant employment visas or work permits to foreign nationals coming to work on projects or contracts in India. In the event that a foreign national holding an employment visa is stationed in India for a period exceeding 180 days, they have to register with a foreign regional registration officer (FRRO) within 15 days of arrival in India. Foreign nationals working in India are generally taxed only on their Indian income.

Indian labour law is applicable to all employees working in the territory of India irrespective of their nationality who are not termed as Indian employees. Foreign workers, employees drawing salary in any currency and in any manner are covered by Indian labour law.

15 Equipment import restrictions

What restrictions exist on the importation of project equipment?

Project imports are the imports of machinery, instruments, and apparatus, etc, required for the initial setting-up of a unit or for substantial expansion of an existing unit. Import trade is regulated by the Directorate General of Foreign Trade (DGFT) under the Ministry of Commerce & Industry, Department of Commerce, government of India; authorised dealers, while undertaking import transactions, ensure that imports conform with the export and import (EXIM) policy in force and Foreign Exchange Management (Current Account Transactions) Rules 2000. Authorised dealers may freely open letters of credit and allow remittances for import of goods unless they are included in the negative list requiring licence under the EXIM policy in force.

Several restrictions can be placed by the government on the import of certain equipment subject to the market conditions in India to facilitate domestic trade. Customs duties are also exempted on -certain goods depending on the type of equipment or product. Remittances against imports are required to be made within six months from the date of shipment except in cases where amounts are withheld towards guarantee of performance, etc. Deferred payment arrangements including payments beyond a period of six months from date of shipment are treated as external commercial borrowings (ECBs). Advance remittances without any ceiling are also permitted subject to certain conditions.

16 Nationalisation and expropriation

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

Indian jurisprudence regarding requisition and nationalisation has evolved over the years as the right to property has been altered from being a fundamental right guaranteed under the Constitution to a constitutional right specifying that legislation would be required to deprive a person of his or her property. Various agreements entered into with the government should therefore seek to formulate clear consequences in event of both requisition and nationalisation. Several bilateral investment treaties clearly reiterate that expropriation or nationalisation of investments from a contracting country will not be made except for a public purpose pursuant to the Land Acquisition Act on a non-discriminatory basis and against fair and equitable compensation. Judicial review is available to the affected parties, if desired.

17 Fiscal treatment of foreign investment

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?

Central and state governments offer several incentives to investors with a view to attracting investment and stimulating industrial growth and infrastructure development. The tax laws of India provide for exemption of tax on certain kinds of income earned for services rendered in India. Foreign nationals have the option of being taxed under the tax treaties that India may have signed with their country of residence and benefits may be available under the specific provisions of the relevant DTAA. India has entered into tax treaties with certain countries that offer favourable tax incentives to foreign investors such as capital gains exemptions, lower tax rates on interest, and so on.

Five-year tax holidays are provided to infrastructure projects, firms engaged in exports, new industries in notified states and for new industrial units established in electronic hardware and software parks. Tax deductions of 100 per cent are provided to export profits. A deduction of 30 per cent of net (total) income is given for 10 years for new industrial undertakings as well as a deduction of 50 per cent on foreign exchange earnings by construction companies, hotels and on royalties, commission, etc, earned in foreign exchange. No specific tax exemptions are provided to foreign creditors.

18 Government authorities

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?

The petroleum industry in India has been closely regulated: the government of India has subjected each link in the chain – exploration and production (E&P), refining, marketing and distribution – to controls and checks. The Geological Survey of India is the principal agency for geological mapping and regional mineral resources assessment of the country. Detailed exploration on land is done by the Mineral Exploration Corporation, directorates of mining and geology of state governments, and various central and state public sector organisations. The states have the greater share of generation and transmission assets and almost the entire distribution of power under their control through central and state electricity regulatory commissions. The Ministry of Road Transport and Highways along with the National Highway Authority of India is responsible for the development and maintenance of national highways in the country. The infrastructure and facility for air traffic is provided by the Airport Authority of India. It is also responsible for maintaining domestic and international airports and civil enclaves at defence airports in the country.

Most project sectors in India, including oil and gas, mineral extraction, chemical refining, water treatment, power generation and transmission, ports, telecommunications, etc are operated through central or state bodies. But private participation has been opened up in most sectors these days along with foreign investment in accordance with the FDI policy as per the sectoral caps.

19 International arbitration

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?

As far as arbitration in India is concerned, the Arbitration and Conciliation Act 1996 (the Arbitration Act) was modelled on the UNCITRAL Model Law. Section 48 of the Arbitration Act provides grounds for challenging the enforcement of an arbitral award, as follows:

- incapacity of a party;
- invalidity of the agreement;
- want of proper notice;
- the award deals with disputes not referred to arbitration;
- the arbitral tribunal was defective in composition;
- the subject matter not capable of arbitration; or
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country where the award was made.

Further, owing to a few judicial precedents, a two-tier structure has been adopted whereby, prior to enforcement of an arbitral award, the conditions prescribed under section 34 of the Arbitration Act must be met, namely, that the award should not conflict with public policy. Indian courts may refuse enforcement on any of the above-mentioned grounds and adjourn the enforcement of the award.

The provisions of part II of the Arbitration Act give effect to the New York Convention and the Geneva Convention. The foreign award to be enforced in local courts should pertain to commercial disputes and must be passed in a country notified by the Indian government to be a country to which the New York Convention applies.

Disputes related to different types of business, contracts, construction, commercial recovery, property and insurance are some of the disputes open to resolution by arbitration. Certain fields, such as insolvency matters – declaring a person insolvent, dissolution or the winding-up of a company – are not arbitrable.

20 Applicable law

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

International commercial arbitration has gained momentum in India. Arbitration is rapidly becoming the preferred process for resolving international commercial disputes. A foreign investor, in many instances, does not have confidence in the impartiality of the local tribunals and courts in settling any dispute that may arise between the investor and the local parties and opt for foreign laws to govern their agreement. Arbitration, in a neutral state before a neutral tribunal, has traditionally been seen as the best method of securing impartial justice. In the case of a dispute with a foreign contractor, the dispute shall be settled in accordance with the provisions of the UNCITRAL Arbitration Rules. In the case of obtaining interim measures, or for restraining sale of properties situated in India, local laws come to the rescue as it helps in the enforcement procedure and ideally Indian laws govern such transactions. As a result, local parties do prefer to have their own national laws applicable, with jurisdiction being vested with Indian courts for convenience in enforcement.

21 Jurisdiction and waiver of immunity

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

When the courts have to decide the question of jurisdiction pursuant to an ouster clause in an agreement, it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. However, it does not, ipso facto, take away the jurisdiction of other courts. Where an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific, accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction.

Further, both private parties and the government cannot employ its sovereignty to ignore obligations or cancel the privileges of the contracting party who has executed its multiple duties under the contract, as it is a purely commercial transaction entered between two parties, and this has been well settled through judicial precedents.

22 Title to natural resources

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?

It is a well-established principle that the government is the undisputed owner of natural resources and has the right to fix its price and that no individual or commercial entity could claim right to such resources. The government owns all the natural resources of the country, including minerals underground, and it is the sole arbiter of how those resources should be exploited in the public interest. The government grants licences to companies that wish to produce hydroelectric power by exploiting water resources. Similarly, it auctions airwave frequencies to telecoms companies or grants licences to those wishing to mine coal or iron ore. These authorisations are granted subject to conditions that are laid down in contracts signed with the private businesses on payment of royalties.

23 Royalties on the extraction of natural resources

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

The fiscal regime for exploitation of natural resources is treated as a distinct entity in public finance discourse, because of issues related to public responsibility for conservation and proper extraction. Taxation of natural resource exploitation in India is also based on the royalty mechanism. Royalties, levied on the volume or value of resources extracted, are the most preferred tax tool for raising revenues from natural resources. Royalties effectively arbitrate between the investor's expectations of current profit from resource extraction and the government's opportunity cost. The maximum amount of royalty that can be imposed is the difference between the price adopted and the extraction cost. Royalty is levied as per ad valorem rates or as a percentage of the sale prices.

24 Export of natural resources

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

Every exporter and importer is required to comply with the provisions of the Foreign Trade (Development and Regulation) Act 1992, the rules and orders made thereunder, the provisions of the foreign trade policy, and the terms and conditions of any licence, certificate or permission granted to it, as well as provisions of any other law for the time being in force. However, restrictions can be made by the government with respect to the export of natural resources either absolutely or subject to fulfilment of conditions before or after clearance by the DGFT, such as notification by virtue of powers vested to it under section 11(2) of the Customs Act 1962. The rate of duties and fees applicable on various natural resources is prescribed in the Customs Tariff Act 1975 and is revised on a yearly basis, leviable as per specific rates or on the basis of value.

25 Environmental, health and safety laws

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

Every sector has its own set of regulations. Environmental, labour and tax law regulations will apply to all sectors.

Constitutional provisions have been given effect through 'regulatory' environmental protection laws exemplified in the umbrella Environment (Protection) Act 1986 and the more specific Water (Prevention and Control of Pollution) Act 1974 and the Air (Prevention and Control of Pollution) Act 1981. With regard to prevention and control of pollution and environmental hazards in energy generation and use, an environmental impact assessment is essential. Further, the location of energy generation, oil and gas projects should be based on environmental considerations including pollution, displacement of people and loss of biodiversity.

A large amount of labour legislation has been enacted for the promotion and protection of workers' welfare. The Factories Act 1948 and the Workmen's Compensation Act 1923 are specifically directed towards occupational health and safety matters.

26 Project companies

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

The legal structure of the entity or project company should be chosen based upon the objectives and purposes for which it entered into India. In the case of execution of a project or contract a project office must be established. Companies can be set up as either public or private. The Registrars of Companies (ROC) under the Ministry of Corporate Affairs (MCA) operates as a registration authority for the purposes of the Indian Companies Act.

Finance for a project in India can be raised by way of share capital, long-term and short-term borrowings. Working capital is financed mainly from bank borrowings and from unsecured loans and deposits. Long-term borrowings are obtained in the form of foreign currency term loans.

Deposits from the public are a valuable source of finance particularly for well-established large companies with a huge capital base. Term finance is mainly provided by the various All India Development Banks (IDBI, IFCI, SIDBI, IIBI, etc), specialised financial institutions (RCTC, TDICI, TFCI) and investment institutions (LIC, UTI, GIC). Financing can also be obtained through equity, debt (both foreign borrowing subject to the External Commercial Borrowing Rules and local borrowing) and internal accrual.

The level and terms of bank finance and commercial paper are governed by the current directives of the RBI. The terms on which a company can collect fixed deposits from the public are governed in the case of finance companies by RBI and in the case of non-finance companies by the Companies Act.

27 Public-private partnership legislation

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

Several sector-specific laws have been enacted to restructure industries, introduce competitive markets and set up new regulatory institutions. Legislation has been passed by several state governments such as Gujarat, Andhra Pradesh and Punjab with regard to possible PPP models that can be adopted by other states. The government of India has put in place an overarching policy framework to promote public-private partnerships in the Indian economy. It has led to the enactment of several pieces of enabling legislation, institutional arrangements at central and state level for regulatory oversight.

Various pieces of PPP-enabling legislation have been enacted at state level, for example Gujarat Infrastructure Development Act 1999. This Act provides for a regulatory framework for private sector participation in financing, construction, maintenance and operation of infrastructure projects undertaken on a private sector participation-basis in the state of Gujarat.

The central government has unveiled schemes for enabling PPPs in infrastructure such as the formation of IIPDF, VGF scheme, project financing arm in terms of IIFCL, model concession agreements in the road, airport and port sectors, introducing panels of transaction advisers, framing of model RFQ and RFP documents, and the like.

28 PPP – limitations

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

PPPs are being promoted for the implementation of infrastructure projects. Promotion of PPPs is necessary since it is the most preferred mode of investment, but several limitations exist on its proper implementation.

Most sectors face difficulty in enabling a regulatory framework as well as consolidated policy. Further, the inability of private sectors to fit into the risk of investing in diversified projects needs to be overcome. Modernisation of new airports, transmission systems and building power-generating plants are some of the avenues that require skilled manpower. Inconsistency is still visible in the limitations of PPP projects, in spite of continued initiatives by the authorities concerned. It is not easy to monitor the performance and manage the PPP processes for a public agency since this increases the workload, while public systems are not capable of handling such complicated models of project execution.

The process of PPP procurement can be time-consuming and expensive. Several initiatives have been undertaken by the government of India to enable a stronger PPP framework in order to eradicate the above-mentioned constraints. The government has taken the initiative to frame standardised contractual documents to set out the terminology related to risks, liabilities and performance standards. Approval schemes for PPPs in the central sector have been streamlined through the Public Private Partnership Appraisal Committee (PPPAC).

29 PPP – transactions

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

There have been several significant PPP transactions in India. The most important, from a size and novelty perspective, is the Delhi Commonwealth Games 2010 wherein the total expenditure is expected to be around US$1.6 billion.

Prima facie, PPP was observed in metro rail projects with two major projects – Mumbai Metro Line 2 and Gurgaon Metro. The world-class new integrated terminal 3 (T3) of Indira Gandhi International Airport (IGIA), Delhi, Mumbai Airport, Bangalore Airport and Hyderabad Airport were also built using the PPP model. The eight-lane Worli-Haji Ali Sea Link was executed under the PPP model through a concession agreement and has an estimated expenditure of US$1.1 billion. In addition to the above, several highway and railway projects have also adopted the PPP route.

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