

Legal opinions (loan financing) Q&A: India

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This Q&A provides jurisdiction-specific commentary on *Practice note, Legal opinions in finance transactions: Cross-border* and forms part of *Cross-border loan financing*.

RESOURCE INFORMATION

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Country Q&A

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JURISDICTION

India

Legal opinions

1. Can you please provide a brief description of the kind of legal opinions that law firms in your jurisdiction usually give in relation to cross-border loan financing transactions?

Law firms in India generally issue opinions on matters concerning Indian laws in relation to cross-border loan financing transactions. Legal opinions issued by Indian law firms are generally in the form of Standard documents:

- *Legal opinion: domestic company and foreign-law documents: Cross-border.*
- *Legal opinion: foreign company and domestic-law documents: Cross-border.*
- *Legal opinion: domestic company and domestic-law documents: Cross-border.*

Domestic company and foreign law documents

Law firms in India, subject to certain assumptions and qualifications, generally issue opinions on:

- Status and incorporation of the obligors.
- Corporate capacity and authorisations of the obligors.
- Due execution of the transaction documents (if an opinion is proposed to be given on the executed documents).
- Conflicts.
- Consent requirements.
- Registration and filing.
- Documentary taxes.
- Enforcement of foreign judgments.
- Choice of governing law.
- Jurisdiction.

Law firms in India may also provide additional opinions (as per their discretion and if specifically requested by the lenders) on:

- *Pari passu* ranking of the lender's claim.
- Deduction or withholding of taxes.
- Qualification to do business.

Foreign company and domestic-law documents

Law firms in India, subject to certain assumptions and qualifications, generally issue opinions on:

- Legal validity and enforceability.
- Consent requirements.
- Registrations and filings.
- Valid security interests (as applicable).
- Documentary taxes.
- Governing law.
- Jurisdiction.

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- Choice of governing law.
- Jurisdiction.

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- *Pari passu* ranking of the lender's claim.
- Deduction or withholding of taxes.
- Qualification to do business.

2. When are legal opinions from lawyers authorised to practise in other jurisdictions usually requested in relation to a cross-border loan financing transaction? What matters do these legal opinions usually cover?

Legal opinions from foreign lawyers are generally required if:

- The obligors (borrower, guarantor and/or other security providers) are incorporated in a foreign jurisdiction and the transaction documents are governed by Indian laws.
- The obligors (borrower, guarantor and/or other security providers) are incorporated in India and the transaction documents are governed by a foreign law.

Checklist, Legal opinion letters: Cross-border may need to be amended to include the consents and approvals required from third parties/lenders in relation to the transaction.

Foreign company and domestic law documents

Foreign lawyers/law firms are generally asked to provide their opinions on:

- Status and incorporation of the obligors.
- Corporate capacity and authorisations of the obligors.
- Due execution of the transaction documents.
- Conflicts.
- Consent requirements.
- Registration and filing.
- Documentary taxes.
- Enforcement of foreign judgments.
- Choice of governing law.
- Jurisdiction.

Domestic company and foreign law documents

Foreign lawyers/law firms are generally requested to provide their opinion on:

- Legal validity and enforceability.
- Consent requirements.
- Registrations and filings.
- Valid security interest (as applicable).
- Documentary taxes.
- Governing law.
- Jurisdiction.

3. To which entities are opinion letters issued by a law firm in your jurisdiction usually addressed?

Legal opinions are generally addressed to the lender or the lender's agent or security trustee (as the case may be).

4. Do lenders in your jurisdiction have specific requirements for legal opinions to be given in connection with certain types of transactions?

Legal opinions are generally addressed to the lender or the lender's agent or security trustee (as the case may be). Legal opinions clearly state who can and cannot rely on them.

Law firms in India generally provide a disclosure in the opinion stating that:

"This opinion is addressed to you solely for your benefit, solely for the purpose of the Facility Agreement. It is not to be transmitted to anyone else (except that it may be disclosed to, but not relied upon by, your professional advisors, auditors, regulators, or any potential transferees or sub-participants to the Facility Agreement) nor is it to be relied upon by anyone else or for any other purpose or quoted or referred to in any public document or filed with anyone without our express consent, except that it may be disclosed as may be required in connection with any legal process or the inquiry or demand of any governmental authority with jurisdiction over any of the foregoing."

5. Is there any applicable rule (including any professional conduct rules) that may limit the ability of a law firm or a lawyer authorised to practise in your jurisdiction to issue a legal opinion in relation to cross-border loan financing transactions?

The Advocates Act 1961 (Advocates Act), read with the Bar Council of India Rules (BCI Rules), governs the conduct, qualifications and right of lawyers to practise the profession of law in India.

Only lawyers can practise law in India (*section 29, Advocates Act*). There is no bar or restriction on a law firm or individual lawyer providing an opinion on any

matters concerning Indian laws in a cross-border loan transaction.

Chapter II of the BCI Rules (Standards of Professional Conduct) lays down the standards of professional conduct to be observed by an advocate qualified to practise in India. An advocate who has, at any time, advised in connection with the institution of a suit, appeal or other matter or has drawn pleadings, or acted for a party, must not act, appear or plead for the opposite party (*section II, Standards of Professional Conduct*).

6. Do law firms providing a legal opinion usually seek to mitigate their potential liability?

Legal opinions issued by law firms in India usually contain certain standard qualifications and assumptions to mitigate the firms' potential liability. Law firms may also insert specific language in the opinion to limit any potential liability to the fees they receive for the transaction. See also [Question 4](#) for a disclosure generally included in legal opinions.

7. How is an opinion letter that a law firm in your jurisdiction may issue in relation to a facility agreement in a cross-border transaction usually structured?

Law firms in India generally structure legal opinions as follows:

- Background.
- Definitions.
- Documents reviewed (including details of searches conducted at public registries).
- Assumptions.
- Opinions.
- Qualifications.
- Reliance/Benefit/Disclosure.
- Schedule (if any).

Legal opinions should not cover tax (except stamp duty) related matters unless this is specifically requested by the lender. If any tax matters are included in the opinion, the relevant tax partner must also sign off the opinion.

We would not make any changes to Standard documents:

- *Legal opinion: domestic company and foreign-law documents: Cross-border.*
- *Legal opinion: foreign company and domestic-law documents: Cross-border.*
- *Legal opinion: domestic company and domestic-law documents: Cross-border.*

8. What set of opinions would a law firm in your jurisdiction be prepared to give in relation to a facility agreement in a cross-border transaction?

See [Question 1](#) and [Question 2](#).

9. Does the expression "in good standing" have any meaning in relation to an entity incorporated in your jurisdiction? If so, please explain briefly what that meaning is.

The expression "in good standing" has no legal meaning under Indian law.

10. Does your law firm have a procedure for issuing legal opinions?

Our firm has a strict internal review process. A legal opinion is reviewed at two levels, after it is prepared by an attorney. The final review is conducted by a review partner who is well aware of the transaction and has knowledge in the relevant practice area. All our opinions are signed by partners of the firm who are authorised to do so.

We also conduct a conflict check of the lender to whom the opinion is being issued, and a brief check on the background of the borrower on whom the opinion is being given.

Our opinions always clearly state the scope of the opinion and the persons who can rely on it.

11. What kind of due diligence does your law firm carry out before issuing an opinion letter in relation to a cross-border loan financing transaction?

We generally conduct detailed due diligence only if specifically requested to do so in the engagement letter.

However, if the borrower, guarantor and/or security provider are domestic entities (irrespective of the jurisdiction in which the lender is incorporated), we review their status, constitutional documents and corporate authorisations, to check the borrowing power, security creation powers, common seal requirements (if any), and to ensure that the signatories to the documents are validly authorised to execute them.

Other checks are made on documents and filings available on the registrar of companies website (for a specific period of time, usually three years) and websites of the relevant courts. Physical searches may be carried out at the office of the Sub Registrar of Assurances (if immovable properties are being offered as security). We also review material contracts (including existing financing agreements) executed by the borrower, guarantor and/or security provider, to confirm any consent or approval requirements from third parties.

If the borrower, guarantor and/or security provider are foreign entities, we do not conduct any due diligence on those entities, instead relying on a foreign counsel opinion relevant to the jurisdiction in which they are incorporated.

If the lender is incorporated in a different jurisdiction, we check whether the lender is a recognised lender under the Master Direction - External Commercial Borrowings, Trade Credit, Borrowing and Lending in Foreign Currency by Authorised Dealers and Persons other than Authorised Dealers, issued by the Reserve Bank of India. We also check that the lending transaction is not prohibited under this Master Direction or any other Indian laws.

12. Would an opinion letter be usually signed at the end of the document after all the relevant schedules or immediately before the schedules?

Law firms in India generally sign an opinion before the schedules. However, law firms have different practices in this regard.

13. Is it necessary, prior to giving a legal opinion in relation to a company incorporated in your jurisdiction in connection with a cross-border loan financing transaction, to obtain and examine copies (or originals) of the company's constitutional documents or resolutions of directors or shareholders?

Prior to or at the time of execution, and in any event before giving a legal opinion on a domestic borrower, guarantor and/or security provider, it is customary to obtain and examine, in addition to the documents listed in *Standard documents, Legal opinion: domestic company and foreign-law documents: Cross-border: Schedule 1* and *Legal opinion: domestic company and domestic-law documents: Cross-border: Schedule 1*:

- Certified true copies of the relevant entity's constitutional documents.
- Board and shareholder resolutions.
- Certificates from accountants confirming that there are no breaches in respect of the relevant entity's borrowing limits/compliance with relevant sections of the Companies Act 2013.
- Approval from the relevant income tax authorities (if applicable) under the Income Tax Act, 1961 or a copy of the application made to such authorities.

Relevant certificates from compliance officers stating, among other things, that the relevant resolutions have not been superseded and are effective as of the date of the certificate, and that the copies of the constitutional documents are up to date.

14. What searches, including those of public registries, and enquiries need to be carried out in your jurisdiction in relation to a facility agreement when issuing a legal opinion?

Generally, a public search is carried out on the website of the Ministry of Corporate Affairs to check the status of the obligors and all corporate filings (including filings related to shareholders' resolutions and amendments to constitutional documents). If immovable property is being offered as security in the transaction, a firm will either:

- Rely on the title investigation report furnished by the local advocate appointed by the lenders.
- Conduct physical searches at the office of the relevant Sub Registrar of Assurance (having jurisdiction over immovable property in India).

A search of the various statutory registers that must be maintained by the borrower under the Companies Act 2013, including the register of shareholders, debenture holders and register of charges, is also carried out.

A firm will also rely on certificates issued by the borrower's compliance officer and independent chartered accountants or company secretaries on issues pertaining to borrowing powers, validity of the resolutions and constitutional documents provided, and any consents or approvals that may be required from other lenders/third parties for the transaction.

A firm will generally not undertake any searches at the trade mark registry or any similar registry dealing with intellectual property, or other similar registers (unless the mandate specifically requires the firm to do so), and will rely on certificates from independent practising attorneys in the matter.

15. What term would you use, in English, to denote any tax levied in your jurisdiction on documents?

Stamp duty is levied on documents in India. Additionally, registration fees must be paid for documents that are required to be registered with the office of the Sub-Registrar of Assurances.

16. Can all matters which are normally covered in an opinion letter issued by lawyers in your jurisdiction and relating to a facility agreement be confirmed as at the time when the opinion letter is issued (with the aid of, for example, last-minute checks at public registries or similar)?

Matters covered under certificates provided by chartered accountants and approvals given by statutory or regulatory authorities, such as income tax authorities (if applicable), as well as resolutions and corporate authorisations, are some matters which can only be confirmed as of the date of issuance of such certificates, approvals and resolutions but cannot be confirmed as at the time of the issue of the opinion letter.

A legal opinion will clearly state that it is valid in respect of the facts and background only as at the date of the documents that are being opined on and of the corporate authorisations, constitutional document, reports and certificates that are being relied on. Alternately, a firm can clearly set out the assumption that the facility agreement and other documents relied on have not been modified, rescinded and/or replaced.

Our firm usually conducts a last-minute check on the website of the Ministry of Corporate Affairs to ensure the status of the borrower/obligors. A copy of the search is also attached to our legal opinion, for clarity.

17. What mechanisms can be used in your jurisdiction to enable an opinion letter to be issued/delivered/released at a precise time (such as the time immediately preceding the advance of a loan to a borrower) so as to give the addressee(s) of the opinion letter, located in another jurisdiction, the best protection?

An opinion letter is usually effective as at the date of its issuance, which is also the date on which it is signed. The opinion letter does not cover matters after such date, and qualifications/assumptions to this effect are clearly included in all our legal opinions.

An opinion letter issued under Indian law to an overseas lender can be delivered by e-mail to the lender, already signed, and then held by such lender pending disbursement of the loan, if the legal opinion is a pre-requisite for disbursement. Law firms in India usually issue their opinion on cross-border loan transactions immediately before the disbursement of the loan.

18. Is it possible under the law of your jurisdiction for there to be any irregularity or deficiency in the internal procedures of a borrower, guarantor or security provider, in relation to the approving and signing of the document(s) being opined on, which may affect the rights of the lender(s), where the irregularity or deficiency is typically something which will fall within an exception to the matters confirmed by the legal opinion?

It is possible for irregularities or deficiencies to arise in the internal procedures of a borrower, security provider or guarantor in relation to approving and signing of the documents.

To safeguard against and reduce any risk to the lenders from such irregularities or deficiencies, lenders must procure necessary shareholders' and board resolutions (authorising the signing of the documents and approving their terms) and certificates issued by independent practising company secretaries/compliance officers of the company, stating that the resolutions/authorisations have not been rescinded, revoked or replaced.

19. What set of assumptions and qualifications are usually included in an opinion letter issued by lawyers in your jurisdiction in connection with a cross-border loan financing transaction?

We broadly recommend adding the following assumptions and qualifications to those set out in *Standard documents, Legal opinion: domestic company and foreign-law documents: Cross-border: Schedule 3 and Schedule 4, Legal opinion: foreign company and domestic-law documents: Cross-border: Schedule 3 and Schedule 4 and Legal opinion: domestic company and domestic-law documents: Cross-border: Schedule 3 and Schedule 4:*

Assumptions

The terms of the [Documents] **OR** [RELEVANT DOCUMENT] correctly reflects the intentions (commercial and otherwise) of the parties to it and each party has received independent legal advice in relation to the [Documents] **OR** [RELEVANT DOCUMENT] and made its own independent decision to enter into the [Documents] **OR** [RELEVANT DOCUMENT].

That the relevant electronic filings as required under [JURISDICTION] shall be made within the time period specified under the laws of [JURISDICTION] for creation and perfection of the security proposed to be created pursuant to the [RELEVANT SECURITY DOCUMENT] by the [RELEVANT OBLIGOR]; and certificates evidencing the creation and registration of such charge in favour of Lender shall be submitted to the Lender within the time specified under law as applicable in [JURISDICTION].

Qualifications

Insofar as matters herein are stated to be in our knowledge, such knowledge means the actual knowledge of lawyers presently at [INSERT REFERENCE TO LAW FIRM ISSUING THE OPINION].

We express no opinion regarding any financial or technical data in the [Documents].

Any waiver of statutory rights by the [OBLIGORS] may not be enforceable if the waiver is considered to have

been given otherwise than on an “informed” basis or if the waiver is considered to be in breach of the principles of natural justice.

Enforcement may be limited by general principles of equity and, pursuant to the Specific Relief Act, 1963, certain obligations cannot be specifically enforced. For example, equitable remedies or specific performance may not be available where damages are considered by the court to be an adequate remedy, or where the court does not regard specific performance to be the appropriate remedy. Provisions concerning the obligations to use “best efforts” or “endeavours”, may be unenforceable for the purpose of specific performance and incapable of specific performance.

Under Indian law, the payment of damages is governed by the provisions of the Indian Contract Act, 1872.

A party which suffers as a result of a breach of a contract is entitled to receive, from the party in breach, compensation for any loss or damage caused which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from such breach. Therefore, the compensation does not usually cover any remote and indirect loss or damage sustained by reason of the breach, unless this is specifically contracted for.

20. Consider the scenario in which your firm is requested to issue a legal opinion in relation to a cross-border loan financing transaction in which either (A) any of the parties is incorporated in England and Wales and the transaction documents are governed by the law of your jurisdiction or (B) any of the parties is incorporated in your jurisdiction and the governing law of the transaction documents is English law. What adjustments (if any) would you make to your firm’s usual sets of assumptions and qualifications in a legal opinion, as a result of the United Kingdom prospectively leaving the European Union (Brexit), with respect to:

- **Loan agreements entered, or to be entered, into before Brexit and with a maturity date before Brexit.**
- **Loan agreements entered, or to be entered, into before Brexit but with a maturity date after Brexit.**
- **Loan agreements to be entered into and with a maturity date after Brexit.**

From an Indian law perspective, in our view, there will generally be no impact of Brexit in relation to the issuance of a legal opinion for a cross-border loan financing transaction in which either:

- Any of the parties is incorporated in England and Wales and the transaction documents are governed by Indian law.
- Any of the parties is incorporated in India and the governing law of the transaction documents is English law.

We would not make any adjustments to our firm’s assumptions and qualifications in a legal opinion as a result of the United Kingdom prospectively leaving the European Union.

Related Content

Practice Note: Overview

- [Corporate loan facilities](#)
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- [Legal opinions in finance transactions: Cross-border](#)
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- [Loan signing and drawdown overview: Cross-border](#)
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- [Signing, closing and opinions: Cross-border](#)
Law stated as at 31-Jul-2017

Standard Documents

- [Legal opinion: domestic company and domestic-law documents: Cross-border](#)
Maintained
- [Legal opinion: domestic company and foreign-law documents: Cross-border](#)
Maintained
- [Legal opinion: foreign company and domestic-law documents: Cross-border](#)
Maintained

Checklists

- [Drawdown condition \(CP\) checklist: Cross-border](#)
Maintained
- [Legal opinion letters: checklist: Cross-border](#)
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- [Legal opinion: points of law and practice to be considered: checklist: Cross-border](#)
Maintained
- [Loan facility agreement signing: checklist: Cross-border](#)
Maintained

Country Q&A

- *Corporate loan facilities Q&A: India*
Law stated as at 31-Jul-2018
- *Preliminary documents (loan financing) Q&A: India*
Law stated as at 30-Jun-2018

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