Cross-border loan financing

Q&As providing India specific commentary

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Comfort letters

1. Are comfort letters issued under the laws of your jurisdiction? If so, what are they called, and are they always issued by parent companies in respect of subsidiaries?

Yes, the concept of issuing comfort letters does exist under the laws of India. Comfort letters are also known as letters of support/undertaking in India.

Comfort letters are generally issued by the promoters of a borrower, or by parent companies in relation to a financial transaction entered into by their subsidiaries. In some cases, they are also issued by affiliates/associate companies which have substantial control over or a shareholding in the subject company, or by banks in favour of other banks.

Though "letter of comfort" is not defined under Indian law, a definition can be found in case law. The Honourable High Court of Karnataka, while relying on the definition of "letter of comfort" found in P. Ramanatha Aiyar's *Advanced Law Lexicon,* remarked that "a letter of comfort is a document that indicates one party's intention to try to ensure that another party complies with the terms of a financial transaction without guaranteeing performance in the event of default." (*United Breweries v Karnataka State Industrial Investment and Development Corporation Limited*).

2. Can comfort letters be issued in binding form as well as in non-binding form under the laws of your jurisdiction? If so, how common are binding comfort letters?

Yes, comfort letters can be issued in binding as well as non-binding form. Comfort letters are not defined under Indian law (see *Question 1*), and their enforceability largely depends on the language used in the letter, which indicates the underlying intent of the parties. The language of the comfort letter, together with surrounding circumstances, will play a key role in determining whether the intent was to create a legal relationship between the issuer and the receiver and to bind the issuer.

From our experience in the banking and finance sector, letters of comfort are granted by the promoter or an affiliate (which has substantial financial base) to the lenders of a borrower, with the intention of providing financial support to the borrower during the term of the loan. Lenders often accept guarantees in the form of a letter of comfort. In such cases, the letter of comfort/support will be worded so that it imposes financial obligations on and has a binding effect on the issuer.

Letters of comfort or letters of undertaking were at one time issued by domestic Authorized Dealer Category I Banks to overseas suppliers, banks or financial institution, on behalf of Indian importers, in respect of trade credits for imports into India. Both these types of letter created financial obligations on the issuer and were binding in nature. However, the Reserve Bank of India has instructed the Authorized Dealer Category -I Banks to discontinue issuing and recognizing letters of comfort and letters of undertaking for trade credits in import transactions (*Reserve Bank of India circular dated March 13, 2018*).

3. Are there any particular requirements for comfort letters (whether binding or non-binding) under the laws of your jurisdiction?

As letters of comfort are not specifically discussed or described under any Indian statute (see *Question 1*), there are no specific requirements set out by law for a binding or non-binding letter of comfort. A guarantee will often take the form of a letter of comfort, and vice versa.

In these cases, the letters generally have specific language stating that they do or do not constitute a guarantee under section 126 of the Indian Contract Act 1872 (**ICA**), as appropriate. Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration for the giving of the guarantee (*section 126, ICA*).

In order to make a binding letter of comfort enforceable in a court of law, the letter of comfort should be a valid contract, duly executed between the relevant parties with proper authorizations (such as a board resolution and so on) and must be adequately stamped as per the provisions of the applicable stamp laws (so as to make it admissible as evidence in a court of law).

We also suggest including the following wording in *Standard document, Comfort letter (binding): Cross-border,* in the interests of clarity:

> "If the Borrower fails to repay the loan or meet its obligations, we shall take all necessary steps to ensure that the Borrower can fulfil its obligations under the loan agreement, including funding the Borrower through unsecured loans or a capital increase."

A non-binding letter of comfort, executed by the relevant authorized person of the parties, may clearly mention that the parties to the letter of comfort intend to execute the letter as a non-legally binding document. In the absence of this express stipulation regarding the non-binding nature in the document, the letter of comfort may be presumed to be a binding contract between the parties depending on the facts of each case.

We suggest adding the following wording to *Standard document, Comfort letter (non-binding): Cross-border*, to establish the non-binding nature of the letter and to clarify that there are no financial obligations being imposed on the issuer:

"The parties to this letter of comfort intend to execute this letter as legally non-binding and this letter does not constitute a guarantee under section 126 of the Indian Contract Act, 1872."

4. Does a binding comfort letter differ from a primary or secondary liability guarantee under the laws of your jurisdiction, and if so how does it differ?

There is no specified format for a binding or non-binding letter of comfort (*see Question 3*). A letter of comfort does not create a liability on, or assign or otherwise transfer a liability to, the issuer unless this is expressly agreed by the issuer in the letter of comfort. A binding comfort letter may take the form of a primary or secondary liability guarantee, depending on how it is worded.

5. What are the differences between primary and secondary liability guarantees in your jurisdiction?

Under the ICA, a primary liability guarantee, that is, a contract by which one party promises to save the others from loss incurred due to the conduct of any other persons, is called a "contract of indemnity". By contrast, the liability of a surety (the guarantor) is a secondary obligation which is enforceable contingently on the principal debtor failing to perform the obligations which have been guaranteed (**ICA**).

Under the ICA, the key differences between a contract of indemnity and a contract of guarantee are as follows:

- A contract of guarantee is a tripartite agreement between three persons: the principal debtor, the creditor and the surety. A contract of indemnity is a bilateral contract between two persons: the surety (in this case the indemnifier) and the creditor (in this case the indemnity holder).
- In a contract of indemnity, there is no privity of contract between the surety (the indemnifier) and the principal debtor. The surety (the indemnifier) cannot compel the principal debtor to pay. To constitute a contract of guarantee there must be a contract, by which the principal-debtor, expressly or impliedly, requests the surety to act as a guarantor

Corporate loan facilities

1. Is there any general prohibition under the law of your jurisdiction on the lending of money by one company to another company (or other legal entity), with interest charged on the amount borrowed, and with an entitlement for the lender to call for early repayment of the loan in certain agreed circumstances?

No there is no general prohibition under Indian law on an Indian company entering into an inter-corporate lending transaction with another company or other legal entity. However, the lending company generally needs to comply with the provisions of:

- The Companies Act 2013 (**Companies Act**).
- The Contract Act 1872 (**Contract Act**).
- Other laws, as applicable.

A lender can charge interest on the loan amount, provided that the interest is not less than the prevailing yield of one-year, three-year, five-year or ten-year Indian government security closest to the tenor (that is, term) of the loan (section 186(7), Companies Act). The lending company is entitled to accelerate repayment of the loan on occurrence of certain events as may be contemplated under the lending agreement.

Restrictions under the Companies Act

A lending company may lend money to another company (or other legal entity), or to a related party or associate of the lending company, in accordance with the provisions of sections 185 and 186 of the Companies Act.

A lending company may not advance a loan to:

- Any director of the lending company, or of a company which is its holding company, or any partner or relative of such a director.
- Any firm in which such a director or relative is a partner.

(*Section 185(1), Companies Act*.)

A lending company may advance a loan to any person in whom any of the directors of the lending company is interested (see below), provided that both:

- Consent of the members of the lending company is obtained before the lending of money, by way of special resolution.
- The money proposed to be lent will be used by the borrowing company for its principal business activity.

(Section 185(2), Companies Act.)

In this context, "any person in which any of the directors of the lending company is interested" means:

- A private company of which such a director is a director or member.
- A body corporate, where not less than 25% of the total voting rights at a general meeting may be exercised or controlled by such a director, or by two or more such directors, together.
- Any body corporate, if the board of directors, managing director or manager of it acts in accordance with the directions or instructions of the board, or of any director or directors, of the lending company.

The following transactions are exempted from the restrictions under section 185(1) and (2):

- Lending of money to a managing or executive director either:
  - as part of the conditions of service extended by the lending company to all its employees; or
  - under any scheme approved by the members by a special resolution.
- Lending of money by a company which in the ordinary course of its business provides loans, or gives guarantees or security for the due repayment of any loan, where interest is charged at a rate not less than the prevailing yield of one-year, three-year, five-year or ten-year Indian government security closest to the tenor (i.e. term) of the loan.
- A loan made by a holding company to a wholly-owned subsidiary company.
- Any guarantee given, or security provided, by a holding company in respect of a loan made by a bank or financial institution to a subsidiary company.

In addition to the above, a lending company must comply with the provisions of section 186 of the Companies Act, which generally deals with:

- The total limit on the loan amount, which should not exceed 60% of its paid-up capital, free reserves and securities premium account or 100% of its securities premium account and free reserves, whichever is higher.
- The passing of a special resolution if the loan amount exceeds the limit stated above. This requirement does not apply where a loan or guarantee is given, or where security has been provided, by a company to a wholly owned subsidiary company or a joint venture company.
- The consent required from the lender of any outstanding loan if the loan exceeds the limit stated above and if there is no default in repayment of any loan instalments or interest to a public financial institution.
- The minimum rate of interest to be charged by the lender, specified above.

Contract Act

A loan agreement must also satisfy the following requirements of a valid contract under section 10 of the Contract Act:

- The parties to the lending transaction have given their free consent.
- The lending transaction has a lawful object.
- Lawful consideration has been provided for the contract.
- The lending transaction is not declared void under Indian law.

Requirements for non-resident lender

If the lender is not resident in India, then the parties to the lending transaction must also comply with the requirements in:

- The Foreign Exchange Management Act 1999 (**FEMA**).
- The Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations 2000 (**Foreign Exchange Borrowing Regulations**).
- The Master Direction – External Commercial Borrowings, Trade Credit, Borrowing and Structured Obligations, as may be updated from time to time (**ECB Master Directions**).

FEMA is the master Act which generally governs borrowing and lending and all other activities in relation to foreign exchange. It is a mechanism which gives the Reserve Bank of India (**RBI**) the authority to issue regulations, guidelines and circulars for all matters pertaining to foreign exchange, in line with India's prevailing foreign trade policy.

The Foreign Exchange Borrowing Regulations specifically lay down the conditions which need to be satisfied under various scenarios of borrowing and lending in foreign exchange. These conditions are covered under the ECB Master Directions. In particular, the ECB Master Directions prescribe a maximum all-in-cost ceiling, which is currently the benchmark rate (set by the RBI under the Master Directions) plus 450 bps per annum under the automatic route (that is, where prescribed conditions are met and no approval is therefore required to be obtained from the RBI). (see *Question 7*).

Other laws

If a resident lender in its ordinary course of business provides loans to a borrower in India, then the resident lender must also comply with (as applicable):

- The Reserve Bank of India Act 1934.
- The Banking Regulations Act 1949 (applicable to Banks).
- Directions issued by the RBI from time to time.
- Moneylending laws.

Foreign law-governed agreements

The courts in India recognize agreements governed by a foreign law.

To determine whether a foreign law has a substantial connection to the contract, the courts generally examine:

- The place of residence or business of the parties.
- The place where the relationship of the parties was centred.
- The place where the contract was made or performed.
- The nature and subject-matter of the contract.

*(Section 20, Civil Procedure Code (**CPC**).)*

However, if the cause of action of the dispute arises in India, or if the subject-matter has no real bearing on the foreign jurisdiction and both parties are Indian entities which have chosen the foreign jurisdiction with the intention of circumventing Indian law, then the Indian courts would have jurisdiction over the contract or transaction, and the choice of law may not be upheld by the courts. The Honourable High Court of New Delhi has, in *Pantaloon Retail (India) Limited v Amer Sports Malaysia Sdn Bhd & Anr*, laid down that, while interpreting the choice of forum by the parties to a contract, courts must keep in mind that, where the parties have not specified a governing law in the contract, the forum must not be against public policy or totally unrelated to the place of occurrence of the dispute (*I.A. Nos.820/2012 & 3347/2012 in CS(OS) No.115/2012*).

Generally, the courts in India, subject to exceptions laid down in section 13 of the CPC and to the fulfilment of conditions laid down in section 44A of the CPC, will recognize and enforce a judgment obtained from a competent court in relation to enforcement of a contract that has a foreign governing law (*section 44A, CPC*). The exceptions apply where:

- The judgment has not been pronounced by a court of competent jurisdiction.
- The judgment has not been given on the merits of the case.
- The judgment appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in a case where such law is applicable.
- The proceedings in which the judgment was obtained did not comply with the principles of natural justice (that is, of a fair and unbiased hearing).
- The judgment has been obtained by fraud.
- The claim is founded on a breach of any law in force in India.

(Section 13, CPC.)

Where a foreign judgment has been rendered by a

superior court in a territory which the Indian government has (by notification in the official gazette) recognized to be a "reciprocating territory", it may be enforced in India by proceedings in execution, as if the judgment had been rendered by a relevant court in India (*section 44A, CPC*). The UK has been declared to be a reciprocating territory, and a judgment by a high court or any superior court in the United Kingdom is enforceable in Indian district courts, provided it is brought in India within the limitation period of three years from the date of the judgment (*Article 101, Limitation Act, 1963*).

2. Are there any mandatory requirements relating to the layout or contents of a loan facility agreement governed by the law of your jurisdiction between two companies or other legal entities, and are there any particular signing, witnessing or notarisation requirements for a loan facility agreement?

There are no mandatory requirements relating to the layout or contents of a loan facility agreement governed by Indian law between two companies or other legal entities.

There are no specific signing, witnessing or notarisation requirements for a loan facility agreement, except if there is a clause establishing a power of attorney in the loan agreement. In this case, the authorized persons are required to sign the loan agreement in accordance with their relevant authorizations. The general practice for the execution of contracts should also be followed.

There is no legal requirement to execute a promissory note in relation to the loan facility agreement. It is, however, general practice for lenders in India to require the borrower to do so.

3. Is a loan facility agreement which is governed by the law of your jurisdiction binding on a lender once it has been signed if there are drawdown conditions which still need to be satisfied? What are the drawdown conditions (also referred to in some jurisdictions as conditions precedent) commonly set out in a facility agreement which is governed by the law of your jurisdiction?

Generally, a loan facility agreement is legally binding on the lender on signing. However, until the borrower meets the drawdown conditions stipulated in the agreement, the lender is not obliged to disburse any amounts.

An Indian-law governed loan facility agreement generally sets out the following conditions precedent:

- A certified true copy of the borrower's constitutional documents.
- A certified true copy of a resolution of the borrower's board of directors:
  - approving the execution of the finance documents;
  - authorising a specified person or persons on its behalf to approve the terms of, and the transactions contemplated by, the finance documents, and authorising the specified person or persons to execute the finance document on its behalf; and
  - authorising a specified person or persons, on its behalf, to sign and dispatch loan documents and all other documents, certificates and notices to be signed and dispatched by it under or in connection with the finance document to which it is a party.
- A certified true copy of the specimen signatures of each person authorized by the resolution referred to in the second bullet point above.
- Each of the relevant finance documents executed and delivered to the agent or trustee to the lender's satisfaction (the lender has the power to confirm whether a document has been correctly executed and handed over to the lender or trustee).
- A certified true copy of a resolution by the borrower's shareholders passed at a general meeting under and in accordance with sections 180(1)(a) and (c) of the Companies Act, approving the current borrowing-limit of the borrower.
- A confirmation from the borrower (signed by the authorized signatories) that:
  - each copy document submitted by it is true, correct, complete and in full force and effect as at a date no earlier than the date of the agreement;
  - borrowing within the total commitment would not exceed any borrowing or similar limit binding on the borrower;
  - the security created under the security documents would not exceed any relevant limit binding on the borrower;
  - where the lender is not resident in India (without prejudice to the second sub-paragraph above), the borrowing by the borrower of the loan in the financial year in which that loan is first made will not cause the aggregate external commercial borrowings of the borrower in that financial year to exceed the maximum amount permitted to be raised by the borrower consistent with the FEMA, Foreign Exchange Borrowing Regulations and the ECB Master Directions; and
  - where the lender is not resident in India, the borrowing of the commitment under the agreement and its application will comply with FEMA, the Foreign Exchange Borrowing Regulations and the ECB Master Directions.
- None of its directors' names or the borrower's name appears in the wilful defaulters list of the RBI, Credit Information Bureau (India) Limited, Export Credit Guarantee Corporation caution list or other lists such as the defaulters list by the Securities and Exchange Board of India or any lists issued by the Financial Action Task Force.

- An original certificate issued by the borrower's statutory auditors, certifying that the borrowing under the facility is within the total borrowing-limit sanctioned by the borrower's shareholders.
- An opinion from the legal advisor to the lender or arranger in India, substantially in the form approved by the lender before signing the agreement.
- Certified copies of the borrower's financial statements.
- Evidence that the fees, costs and expenses then due from the borrower under the loan facility agreement have been paid or will be paid by the drawdown date.
- Confirmation that the agent has carried out, and is satisfied with the results of, all necessary "know your customer" or other similar checks under all applicable laws and regulations pursuant to the transactions contemplated in the finance documents.
- Evidence that all stamp duties payable in India in connection with the execution, performance and enforcement of the agreement have been paid.
- Each fee letter duly executed by the borrower.
- A certified true copy of Form 83 filed with the RBI by the borrower (in relation to its foreign currency borrowing) and the relevant Authorised Dealer Category – 1 bank, as prescribed by the RBI under the FEMA, the Foreign Exchange Borrowing Regulations and the ECB Master Directions, together with a certified copy of the letter from the RBI allotting a loan registration number, in each case, in respect of the facility.
- A certified copy of any other authorisation or other document, opinion or assurance which the agent or lender considers to be necessary or desirable (if it has notified the borrower accordingly) in connection with the entry into and performance of the transactions contemplated by any finance document or for the validity and enforceability of any finance document.
- A copy of the latest Registrar of Companies' search report on the borrower, carried out by a practising company secretary in India.
- Any other documents and evidence required by the agent or the security trustee.
- Valuation of security.
- Consent of the relevant assessing officer under section 281 of the Income Tax Act 1961 in respect of the creation of a charge or security over the assets (except stock-in-trade) of the borrower or security provider or an application made in respect thereof.
- Due diligence investigation of the company or project documents or land, depending on the requirements of the transaction.

In addition to the above conditions precedent, the lender will also require the borrower to issue a drawdown request in the format (together with certain certificates) prescribed in the loan facility agreement.

4. Is there typically any restriction on the borrowing powers of a company incorporated under the law of your jurisdiction (or its officers), and can any such limit affect the rights of a lender?

There is generally no restriction on the borrowing powers of a company in India, unless these are restricted or limited by the shareholders of the company in a general meeting or by the company's memorandum of association and articles of association.

However, note that under section 180(1)(c) of the Companies Act a public company (and any private company which is a subsidiary of a public company) must obtain shareholder consent where the money to be borrowed, together with the company's existing total borrowing (apart from temporary loans obtained from the company's bankers in the ordinary course of business), exceeds the aggregate of its paid-up share capital, free reserves and securities premium.

In the case of immovable property, all charges must be registered with the registrar of companies or sub-registrar of assurances (for immovable property) in whose jurisdiction the property is situated, unless expressly exempted *(section 77, Companies Act, read with section 17, Registration Act 1908*).

Registration of a charge under the Companies Act amounts to constructive notice of the charge and its particulars stated in the registers maintained by the public officers, and any person acquiring any interest in the property of a company is deemed to have notice of the charge from the date of registration of such charge (*section 80, Companies Act*).

Therefore, it is common practice (and a practical necessity) for lenders to review the public records of the borrower, in order to find out whether there are any charges created on its movable and immovable property and the consents, if any, required for the transaction (if these are publicly available).

Against the above background, confirmations in the form of certificates and undertakings may be taken from the borrower, but the lender will still need to carry out a thorough review of public records. If a company borrows amounts in contravention of the restrictions laid down in the Companies Act, the rights of the lender may be affected, and its charge may be subordinated to other secured lenders whose charges were created earlier in time. Confirmations obtained from the borrower will protect the lender only if the borrower has deliberately hidden from the lender information which the lender has no way of obtaining publicly.

5. Are the lender's rights affected if the borrower applies the funds (directly or indirectly) to an illegal purpose and, if so, in what circumstances?

The lender's rights will not be affected if the lender has disbursed the amounts for a lawful and permitted purpose and the borrower has used the monies for an illegal purpose. In fact, the use of funds for illegal purposes would amount to a breach of the loan facility agreement, and in these circumstances the lender would be entitled to call an event of default and accelerate the loan.

6. Is approval from the shareholders or members of a borrower incorporated under the law of your jurisdiction required for a normal loan facility agreement?

Approval from the shareholders or members of a borrower in India is generally not required. However, borrowing can only be done to the extent that it remains within the borrowing-limit (if any) approved by the shareholders or members of the borrower and as permitted under the memorandum of association and the articles of association.

In addition, under section 180(1)(c) of the Companies Act a public company (and any private company which is a subsidiary of a public company) must obtain shareholder consent where the money to be borrowed, together with the company's existing total borrowing (apart from temporary loans obtained from the company's bankers in the ordinary course of business), exceeds the aggregate of its paid-up share capital, free reserves and securities premium (see Question 4).

7. Are any restrictions applied or incentives (other than tax incentives) provided to foreign lenders, and are there any significant costs which foreign lenders are more likely to incur than domestic lenders in relation to the grant of a loan facility, a guarantee, or security over assets? Are these restrictions or incentives different depending on whether the foreign lender is incorporated or authorized in an EU member state or a non-EU country?

Loans from a foreign lender to an Indian borrower are generally referred to as external commercial borrowings (**ECBs**) in India and are governed by FEMA, the Foreign Exchange Borrowing Regulations and the ECB Master Directions. The ECB Master Directions lay down ceilings for interest, fees, repayment and prepayment methods, the ECBs amount and end-use restrictions.

FEMA lays down certain restrictions on the remittance outside India of enforcement proceeds of assets obtained in India, although the ECB Master Directions allow for remittance of principal, interest and other charges to foreign lenders.

There are no significant costs (other than hedging costs) which a foreign lender may incur as compared with domestic lenders.

The ECB Master Directions do not dictate a different approach according to where the foreign lender is incorporated, provided that the foreign lender is a "recognised lender" under direction 2.23.3 of the ECB Master Directions, that is:

- The lender is a resident of a country which is either a member of the Financial Action Task Force (FATF) or a member of a FATF-Style Regional Bodies.
- The lender is not from a country identified in the public statement of the FATF as:
  - a jurisdiction having deficiencies in relation to strategic anti-money laundering or combating the financing of terrorism, to which counter-measures apply; or
  - a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

The ECB Master Directions further provide for the borrowers that are eligible to raise finance through foreign currency by way of ECB, which are (i) all those entities which are eligible to receive FDI, (ii) Port Trusts and (iii) Units in SEZ, SIDBI and EXIM Bank.

8. Is the concept of an agent acting (in relation to a loan facility agreement) on behalf of a group (syndicate) of lenders recognised in your jurisdiction?

If there are two or more lenders, it is standard practice to appoint an agent to act on behalf of the lenders, and to create security in favour of the agent to enable it to enforce the security and loan documentation on behalf of the lenders.

The agent must be given adequate powers under the agent appointment agreement to do the following:

- Act on behalf of the lenders.
- Enforce the security on the lenders' behalf.
- Apply the proceeds towards the claims of all the lenders.

The concept of agency is governed by section 182 of the Contract Act.

9. Where there is a group (syndicate) of lenders, can security be granted by the borrower to someone (a trustee or equivalent) who holds the security rights and deals with them on behalf of the group?

The trustee must be given adequate powers under the security trustee appointment agreement to do the following:

- Act on behalf of the lenders.
- Enforce the security on the lenders' behalf.
- Apply the proceeds towards the claims of all the lenders.

The concept of trust is governed by the Trusts Act 1882.

10. Are there restrictions on the making of loans by foreign lenders, or on the granting of security (over all forms of assets), or by way of guarantees, to foreign lenders? What is the position if a company (or other entity) which is subject to a restriction makes a loan in breach of that restriction?

There is no general restriction on a foreign lender lending to a borrower resident in India. However, the loan must comply with FEMA and the ECB Master Directions. The ECB Master Directions generally provide:

- Eligibility criteria for the foreign lender and Indian borrower.
- An all-in cost ceiling.
- End-use restrictions.
- Minimum average maturity.
- Security conditions.

If a foreign lender lends to a borrower resident in India in contravention of FEMA, the FEMA Foreign Exchange Borrowing Regulations and the ECB Master Directions, then the borrower will be subject to penalties or other proceedings by the RBI. Repatriation of the loan amounts and other payments under the loan facility agreement from India to the foreign lender may be restricted.

11. Can any laws of general application affect the validity of a loan, a guarantee or security over assets (or the terms on which they are made or agreed)?

See *Question 1*. As with any other agreement, loan agreements are subject to the Contract Act. In addition, the provisions of the Companies Act 2013, Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002 and the Transfer of Property Act 1882 are also applicable and may affect loans and security granted.

12. Are there any legal restrictions relating to repayment of a loan by instalments, or relating to voluntary early repayment of a loan?

There are no legal restrictions relating to repayment of a loan by instalments or relating to voluntary early repayment of a loan. Loan agreements in India generally set out the conditions for repayment and early repayment. However, in the case of foreign lenders providing ECBs (see *Question 7*), the restrictions on prepayment (or early repayment) under the ECB Master Directions must be complied with. The ECB Master Directions provide for minimum average maturity periods such as one, five, seven, or ten years, depending on the category of ECB loan availed by the borrower.

13. Are there any legal restrictions on the accrual or payment of interest, or on fees payable by the borrower to the lender? If so, how are they typically dealt with by lenders and borrowers?

No, there are no legal restrictions on the accrual or payment of interest, or on fees payable by the borrower to the lender. An agreement for the accrual of interest on the basis of a year of 360 days is enforceable.

Accrual of interest at a LIBOR-linked rate is permitted, provided this complies with the all-in-cost ceiling stipulated under the ECB Master Directions.

What provisions are permissible in order to cover the eventuality that the wholesale financial markets are disrupted and that as a result, in particular, the method agreed by the lender and the borrower for calculating the interest rate does not work (or produces an inappropriate result)?

A loan agreement provides the method to be used to re-set the interest rate in an unforeseen situation, if such a term has been agreed between the borrower and the lender. It is general market practice to provide a benchmark rate (usually based on the bank's cost of lending funds) to re-set the interest rate in such an eventuality. This rate is based on the prevailing market conditions and will be affected by any disruption in wholesale financial markets. Sometimes lenders will argue that a general clause should be added giving them the authority to change the interest rate for any reason whatsoever. However, such clauses, being one-sided, are usually strongly resisted by the borrower and are not very often accepted.

14. If a facility agreement is governed by the law of your jurisdiction, should the matters which are covered by representations also be described in the agreement as being "warranted"?

Yes, warranties are provided alongside representations under loan agreements governed by Indian law.

15. What are the appropriate accounting standards to be applied to borrowers who are incorporated in your jurisdiction?

The Indian Accounting Standard, as prescribed under the Companies (Indian Accounting Standards) Rules 2015.

16. Are there any restrictions on the types, duration or geographical scope of undertakings which can be given by the borrower to the lender in a facility agreement?

No, generally there are no such restrictions.

17. Can an undertaking contained in a facility agreement or security document not to grant security to any other creditor (a "negative pledge") be enforced against and affect the rights of third parties?

Yes, it can be enforced against third parties. However, the enforcement of such an undertaking may be limited if the third party had no constructive notice (see *Question 4*).

18. Can a lender be liable under environmental laws for the actions or omissions of a borrower, guarantor or security provider?

No, generally it will not be liable. However, if the lender comes into possession of the assets on enforcement of the security, and the lender implements an infrastructure project having a bearing on the environment or becomes owner of the borrower pursuant to enforcement of a pledge on the borrower's share capital, then the lender must comply with environmental laws.

However, where the lender exercises its enforcement rights in connection with the sale of the project or assets then the lender may not be required to comply with environmental laws.

19. If a borrower agrees to procure that a subsidiary incorporated in your jurisdiction acts or refrains from acting in a particular way, can such an undertaking be enforced by the lender? What would be a typical definition of a subsidiary company, for use within a facility agreement?

Yes, such undertakings are generally enforceable in India.

Indian-law governed loan facility agreements generally provide the following definition of a "subsidiary":

"'subsidiary', in relation to any other company (that is to say, the holding company), means a company in which the holding company—

controls the composition of the board of directors; or

exercises or controls more than one-half of the total voting power either on its own or together with one or more of its subsidiary companies."

The term "control" is defined in the Companies Act as follows:

"'control', shall include the right to appoint a majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders' agreements or voting agreements or in any other manner."

20. Are there currency exchange controls which restrict payments to a foreign lender or in a foreign currency under a facility agreement, security document guarantee?

See *Question 7*.

21. Are there any limits on events which can be categorised in a facility agreement governed by the law of your jurisdiction as events of default, entitling a lender to demand early repayment? Is a provision which states that a lender is entitled to early repayment, in certain circumstances, without the need for the lender to make demand, enforceable?

No, there are no limits on which events can be categorised as events of default in a loan facility agreement governed by Indian law.

Yes, a provision for early repayment under certain circumstances without the need for the lender to make demand is enforceable.

22. Are there any laws in your jurisdiction affecting the right of (a) a borrower to remedy an "event of default" and/or (b) a lender to waive (that is, release) an event of default?

No, there are no such laws.

23. Are there any restrictions on the accrual or payment of additional amounts (such as "default interest") as a result of the occurrence of an event of default? If so, how are they typically dealt with in a facility agreement?

No, generally there are no restrictions on the accrual or payment of default interest as a result of the occurrence of an event of default, provided this is agreed in the loan agreement. However, under the Fair Practice Code guidelines prescribed by RBI applicable to non-banking finance companies (**NBFCs**), RBI has advised NBFCs not to charge interest or default interest rates beyond a certain level which may be seen as excessive.

24. What would be the typical list of insolvency procedures (and similar) which would constitute events of default in the case of a borrower incorporated in your jurisdiction?

The following is the typical list of insolvency events and procedures which would constitute events of default:

- The borrower entering into or resolving to enter into any arrangement, composition or compromise with or assignment for the benefit of its creditors or any class of them in any relevant jurisdiction.
- The borrower being unable, or admitting its inability, to pay its debts when they are due.
- The borrower being declared insolvent under a statutory provision of a relevant jurisdiction.
- A moratorium being declared in respect of any financial indebtedness of the borrower.
- The borrower becoming, or meeting the criteria for being declared, a "sick" industry or a relief undertaking under the Companies Act or any other statutory provisions applicable with respect to sick industries or relief undertakings.
- Any corporate action (excluding any third party corporate action), or any other voluntary legal proceedings or other procedure or step, being taken in relation to the suspension of payments, winding-up, dissolution, administration, provisional supervision or reorganization (by way of voluntary arrangement, scheme of arrangement or otherwise) of the borrower.
- The borrower commencing a voluntary proceeding under any applicable bankruptcy, insolvency, winding up or other similar applicable law in effect now or in the future, or consenting to the

submission of an order for relief in an involuntary proceeding under any such applicable law, or consenting to the appointment or taking possession by a receiver, liquidator, assignee (or similar official) for the whole or a substantial part of its property, or taking any action towards its liquidation or dissolution.

- An order being made or an effective resolution passed or analogous proceedings taken or filed for the winding up, bankruptcy or dissolution of the borrower, for which no stay or dismissal has been applied for by such borrower, or no stay in relation to such proceedings has been obtained.
- A liquidator or provisional liquidator being appointed to the borrower or a receiver, receiver and manager, trustee or similar official being appointed in respect of the borrower or any of its assets, or an event analogous with any such event occurring in any relevant jurisdiction.
- Commencement of corporate debt restructuring of the borrower.
- Filing of an application for initiating a corporate insolvency resolution process, if the application is not dismissed or stayed.
- Occurrence of any other event which would, under any law, have a substantially similar effect to any of the events listed above.

25. Does the law of your jurisdiction provide for any kind of moratorium on enforcement of a lender's claims in the event of insolvency of the borrower? If so, does the moratorium apply also to the enforcement of security rights against entities (or individuals) other than the borrower?

Section 14 of the Insolvency and Bankruptcy Code 2016 deals with moratoriums and restricts, amongst other things:

- The institution of suits or the continuation of pending suits or proceedings against a corporate debtor.
- Transferring, encumbering, alienating or disposing of the assets by a corporate debtor.
- Any action to foreclose, recover or enforce a security interest created by a corporate debtor.
- Recovery of any property by an owner or lessor where such property is occupied by or in the possession of a corporate debtor.

The Government of India amended section 14 of the Insolvency and Bankruptcy Code 2016, by way of the Insolvency and Bankruptcy (Ordinance) 2018 issued pursuant to a notification dated 6 June 2018, to exclude a surety or guarantor from the moratorium provisions under section 14.

26. Are any fees payable to a governmental authority on the granting or enforcement of a loan facility, guarantee or security interest, and what registrations or filings need to be made at public registries (and by whom)?

Yes, stamp duty and court fees are payable at the time of the execution of a loan agreement and also its enforcement.

If a security interest is created over immovable assets of the borrower or a third-party security provider, then this needs to be registered before the Registrar of Sub-Assurances in whose jurisdiction the property is situated. A registration fee is also payable.

A borrower or security provider must file a charge creation form CHG-1 with the Registrar of Companies where a security (other than a guarantee) has been created by the borrower or security provider.

The lender or security trustee must also file Form 1 with the Central Registry of Securitisation Asset Reconstruction and Security Interest.

27. What is the position in relation to transfers to a third party of a lender's outstanding rights under a facility agreement?

Transfer of the lender's outstanding rights under a facility agreement is generally permitted under Indian law. The rights of the lender under a facility agreement can be divided among more than one transferee.

The transferee generally acquires the same rights as provided to the original lender under the facility agreement. There is no special requirement which must be satisfied by the transferee for enforcement of the loan or the guarantee (other than the execution of a novation deed, accession deed or deed of assignment in relation to the loan facility agreement or security documents).

Lenders generally obtain a confirmation from the guarantor or third-party security provider when transferring the lender's outstanding rights to a new lender.

28. Does a provision under which a lender and a borrower agree that communications are deemed to have reached the recipient in certain circumstances, even if they do not in fact arrive, work (and are there any specific requirements in relation to a demand by a lender for early repayment)?

Yes, unless otherwise agreed in a loan agreement by the borrower and the lender. There are generally no specific requirements as to how a demand for early repayment must be conveyed by the lender to the borrower and the same are based on the contractual understanding of the parties.

29. Is an agreement by a borrower not to set off any amounts due to it by a lender, against amounts due from it to the lender, enforceable by the lender?

Yes, it is generally enforceable.

30. Is a one-sided jurisdiction clause (limiting the borrower to commencing proceedings in one specific jurisdiction only, but allowing the lender to commence proceedings anywhere)

enforceable in your jurisdiction?

Yes, the Indian courts generally recognize the choice of forum by the parties in a commercial transaction.

31. Is arbitration or some other form of non-court dispute resolution procedure sometimes agreed on in the case of a facility agreement involving your jurisdiction, and will the courts in your jurisdiction recognize and enforce an arbitration award given against a borrower without re-examining the merits of the case?

Parties generally provide for dispute resolution through the courts. Arbitration as a dispute resolution procedure is not generally provided for in loan facility agreements. However, where the parties have chosen arbitration as a dispute resolution procedure under the loan facility agreement, the courts will recognize and enforce it.

The law relating to domestic and international arbitration and all related matters is set out in the Arbitration and Conciliation Act 1996 (Arbitration Act).

The enforcement of domestic arbitral awards is governed by sections 34 to 36 of the Arbitration Act, while foreign arbitral awards are subject to conditions set out under sections 44 to 60 of the Arbitration Act.

An arbitral award given against the company will be enforced by the courts in accordance with the provisions of the CPC, without going into the merits of the award. Subject to any challenge to the arbitral award, it will be enforceable as a decree, and in such a situation the principles of res judicata will apply and the arbitral award will be final and binding on the parties and persons claiming under it.

32. Are there any restrictions in the case of foreign lenders who wish to (a) commence proceedings against a company in your jurisdiction or (b) enforce security rights within your jurisdiction? Are these restrictions different depending on whether the foreign lender is incorporated or authorized in an EU member state or a non-EU country?

No, there are no restrictions on foreign lenders (including for EU and non-EU lenders) commencing proceedings against a company in India or enforcing security rights in India, provided that any remittance of the proceeds of such enforcement complies with FEMA (see *Question 7*).

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33. What category/ies of creditor of the borrower can rank ahead of the lender in respect of entitlement to repayment, both while the borrower is a going concern and in an insolvency?

If the borrower is a going concern, the lender's entitlement to repayment of the loan will be governed by the loan facility agreement. However, where the borrower is insolvent, its assets must be distributed in accordance with section 53 of the Insolvency and Bankruptcy Code 2016 (IBC), which stipulates that insolvency and liquidation costs rank above amounts owing to workmen (for a period of 24 months preceding the liquidation date) and amounts owing to secured lenders. Under the Industrial Disputes Act 1947, workman means any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward.

34. From the point of view of your jurisdiction, what points do you anticipate might arise in relation to a loan facility agreement in the form of Standard document, Facility agreement if, during the life of the agreement the UK were to cease to be a member of the EU, when the agreement either:

- **contains an express choice of English law as the governing law, or**
- **has a UK-incorporated lender or borrower as a party and is governed by the laws of your jurisdiction.**

From an Indian law perspective, in our view, there will generally be no impact if the UK ceases to be a member of the EU, when the agreement either:

- Contains an express choice of English law as the governing law.
- Has a UK-incorporated lender or borrower as a party and is governed by Indian law.

35. In relation to any points that you identify under Question 35, would you recommend that any adjustment should be made to Standard document, Facility agreement, if the standard document were to be utilised as a facility agreement governed by the law of your jurisdiction and the agreement were to be entered into after the UK had ceased to be a member of the EU by a UK-incorporated lender or borrower?

See Q*uestion 35*

Legal opinions in finance transactions

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 law 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 authorizations of the obligors.
- Due execution of the transaction documents (if an opinion is proposed to be given on the executed documents).
- Conflicts with respect to existing obligations of the obligor and under their constitutional documents.
- 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 (at their discretion and if specifically requested by the lender) 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.

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

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

Domestic company and domestic-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 authorizations of the obligors.
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- Conflicts with respect to existing obligations of the obligor and under their constitutional documents.
- Consent requirements.
- Registration and filing.
- Documentary taxes.
- Choice of governing law.
- Jurisdiction.

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

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

2. When are legal opinions from lawyers authorized 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 law.

- 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 authorizations of the obligors.
- Due execution of the transaction documents.
- Conflicts with respect to existing obligations of the obligor and under their constitutional documents.
- 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.

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

Legal are no specific requirements for legal opinions in India. Generally, as a pre-disbursement condition, lenders require a legal opinion issued by the lender's counsel to cover, in particular, the validity and enforceability of financing documents, creation and perfection of security, filings and registrations, corporate status and capacity, authorizations of the obligors, payment of stamp duty on the financing documents. Legal opinions are generally addressed to the lender or the lender's agent or security trustee. 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 authorized 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 law 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 an amount equal 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 on financing documents do not usually cover tax related matters (other than stamp duty) 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 the following 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 has been 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 authorized 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 in relation to which 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 authorizations, to check the borrowing power, security creation powers, and common seal requirements (if any), and to ensure that the signatories to the documents are validly authorized to execute them.

Other checks are made on documents and filings available on the Ministry of Corporate Affairs' website (for a specific period of time, usually three years) and websites of the relevant courts (where online search is available). Physical searches may be carried out at the office of the Sub Registrar of Assurances (if immovable property is being offered as security). We also review material contracts (including existing financing agreements) executed by the borrower, guarantor and/or security provider, to establish whether there are 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, in respect of a foreign currency loan (that is, external commercial borrowing) or trade credit transaction, is incorporated in a different jurisdiction, we check whether such 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, Circulars or Notifications released by RBI from time to time or under any other Indian laws.

12. Would an opinion letter usually be 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, certain law firms may follow the practice of signing the opinion letter after the schedules.

13. Is it necessary, before 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 practising chartered accountants, the company secretary or the statutory auditor confirming that there are no breaches in respect of the relevant entity's borrowing limits or 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, as the case may be.

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 relevant 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 (as required by the lender):

- Conduct title investigation and furnish a title investigation report to the lender or rely on the title investigation report furnished by a separate local advocate appointed by the lender.
- Conduct only 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 or authorized person 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 or 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 by 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 authorizations, are some matters which can only be confirmed as of the date of issue 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 authorizations, constitutional document, reports and certificates that are being relied on. Alternatively, a firm can clearly set out the assumption that the facility agreement and other documents relied on have not been modified, rescinded or replaced.

Our firm usually conducts a last-minute check on the website of the Ministry of Corporate Affairs to confirm the status of the borrower and any 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 issue, which is also the date on which it is signed. The opinion letter does not cover matters after such date, and qualifications and 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 email 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 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 or compliance officers of the company, stating that the resolutions or authorizations have not been rescinded, revoked or replaced. These are usually examined and covered in a legal 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].

The genuineness of all signatures and seals of the parties and the authenticity of the documents provided for the purpose of the review.

All statements, warranties, representations, assurances and confirmations made in the documents and serving as grounds for the conclusions of this opinion are true, accurate and complete.

All statements as to matter of fact, financial or technical data (or opinions pertaining to financial or technical data) contained within the documents are correct.

The borrower is in compliance with all its obligations, covenants and undertakings contained in all agreements with third parties.

Or such other assumptions, as deemed fit by the lender's counsel, may be added in the closing opinion depending on the transaction.

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.

Claims may become barred under the Limitation Act 1963 or may be or become subject to the defence of set-off or counter-claim.

Enforcement of obligations may be limited by the provisions of Indian law applicable to agreements held to have been frustrated by events happening after their

execution.

Or such other qualification, as deemed fit by the lender's counsel, may be added in the closing opinion depending on the transaction.

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:

- **Any of the parties is incorporated in England and Wales and the transaction documents are governed by the law of your jurisdiction.**
- **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 into, or to be entered into, during the transition period with a final repayment date before the end of the transition period.**
- **Loan agreements entered into, or to be entered into, during the transition period with a final repayment date after the end of the transition period.**

From an Indian law perspective, in our view, there will generally be no impact of Brexit in relation to the issue 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 leaving the European Union.

Loan signing and drawdown (CP) checklist

Checklist: Loan facility agreement signing

1. Is it necessary or customary for the parties (or their lawyers) in your jurisdiction to attend a meeting at which the facility agreement and other documents are signed and exchanged between the parties?

No, it is not necessary under Indian law (except in certain cases) for the parties (or their lawyers) to attend a meeting at which the facility agreement and other documents are signed and exchanged between the parties.

However in practice, lenders in India insist that their lawyers and all the parties to the transaction attend the meeting at which the facility agreement and other documents are signed between the parties. Copies of identity documents (of the persons signing the documents on behalf of the borrower, guarantor or security provider) and specimen signatures of these persons are also procured at the time of the execution, to ensure the identity of the persons executing the documents as authorized under the relevant authorizations or resolutions passed by the entity.

If the security is created over immovable property by way of an "English mortgage" (as defined in section 58 of the Transfer of Property Act 1882) or by mortgage through the deposit of title deeds (in certain Indian states, where registration of a mortgage is compulsory), then the parties to such security documents are required to attend the office of the relevant registrar having jurisdiction over such immovable property, in accordance with sections 32 and 32A of the Indian Registration Act 1908 (**Registration Act**). In such a scenario, the parties must execute, or admit the execution of, the security documents in the registrar's presence, following which the registrar provides a registration number for the registered document. The parties to such security documents are also required to affix their respective photographs to the relevant documents submitted for registration.

In addition, certain documents, such as powers of attorney and affidavits, will have to be notarised. Such documents are then executed by the relevant parties in the presence of the notary, who maintains a record of the documents so executed and notarised in the registers maintained by them.

The governing law of the document or the jurisdiction of incorporation of one or more of the parties will not affect the above response.

2. If a meeting is not required, how are facility agreements and other documents signed and brought into effect? In particular, is there any requirement for one and the same document to be signed by all the parties, and can signed "signature pages" be added to the rest of an agreement to form a signed agreement?

If a meeting is not required by the lender, the facility agreements and other documents can be confirmed by the parties through emails and by executing the documents in counterparts. Each counterpart, when executed, will have the same effect as if the signatures on the respective counterparts were on a single copy of the relevant document. Usually to provide for such execution in counterparts, a specific clause is inserted in the documents which states that:

"This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but which together shall constitute one and the same instrument."

Except for the types of document listed in the First Schedule to the Information Technology Act 2000 (**IT Act**), there is no specific requirement for the same document to be signed by the parties, and signed pages can be added to the rest of an agreement to form a signed agreement.

The documents can be separately executed (without a meeting) by way of electronic execution. In this case, the parties can execute the documents by affixing their respective electronic or digital signatures in accordance with the provisions of the IT Act. Stamp duty must be paid for each document executed electronically. The stamp paper procured in respect thereof may mention the details or particulars of the document and the transaction in respect of which the stamp paper has been procured. A stamp paper is a paper issued by the relevant authority (person or agency duly authorized by the state government) bearing stamp embossed or engraved on that paper and denoting the value of stamp duty paid on the instrument to which the stamp paper is affixed or attached.

It is also to be noted that certain financing and security documents (which require compulsory registration under section 17 of the Registration Act) should be registered within a period of four months from their date of execution.

The governing law of the document or the jurisdiction of incorporation of one or more of the parties will not affect the above response.

3. What is the date on which an agreement comes into effect under the laws of your jurisdiction?

Generally, under Indian law, the date on which the last party signs the agreement becomes the effective date of such agreement, unless otherwise specifically agreed under the agreement itself.

The parties can agree on a date preceding the date of actual signature as the effective date under the facility agreements and other documents. However, lenders in

India generally keep the date of the actual signature as the effective date of such agreements.

4. If a facility agreement is subject to the law of your jurisdiction, would the agreement typically contain a set of conditions which need to be satisfied before drawdown of a loan under it? Would any such set of conditions typically be set out in a list attached to (or forming part of) the agreement?

Yes, lenders in India prefer to include in the agreement a set of conditions that must be satisfied before the first drawdown, and then a set of conditions that must be satisfied before each subsequent drawdown.

5. Might a company seal, or a notary, be needed in the context of a secured financing transaction involving the law of your jurisdiction or a party incorporated in your jurisdiction?

The Companies Act 2013 (**Companies Act**) does not provide any definition for a common seal. A common seal is generally the seal of a company which can be affixed only with the approval of the company's board of directors and in accordance with the company's constitutional documents. A company has only one common seal on its incorporation.

It is not mandatory to affix the common seal on a facility agreement and other financing documents, unless so specified in these documents or a lender insists as a matter of their internal policy.

However, if the charter documents of a company stipulate that the common seal be affixed on certain documents, then affixing of the common seal on such documents should be carried out. Presently, it is common practice to ensure that companies affix their common seal on loan and security documents (although companies incorporated under the Companies Act are now not required to have a common seal, as stated above).

The Notaries Act 1952 (**Notaries Act**) gives a public notary the power to notarise certain types of documents such as powers of attorney and affidavits, either at the notary's office or at the place of execution. Section 139 of the Code of Civil Procedure 1908 and section 297 of the Code of Criminal Procedure 1973 require affidavits to be notarised (unless they are administered before any court or magistrate or officer appointed by the concerned High Court), in order to be admissible as evidence.

Notarisation is needed for any instrument intended to take effect in any country or place outside India where the instrument is intended to operate (section 8, Notaries Act).

A nominal fee will be payable for notarisation.

6. Are there any specific requirements as to the form in which a facility agreement or security document is prepared for signature?

There is no particular form in which an agreement or security document needs to be prepared. If the documents require the common seal to be affixed, then the common seal of the borrower or security providers should be affixed in accordance with the resolutions of their respective boards of directors and articles of association.

7. What public registers normally need to be checked by a lender in the context of a secured financing, and are any fees payable? Are there any arrangements for protecting a lender who has checked a register before entering into a facility agreement, so that the lender is not affected by a subsequent registration?

Companies must maintain a register giving the particulars of every charge (together with a copy of the security document) created on their assets and undertakings (*section 85, Companies Act; Rule 10, Companies (Registration of Charges) Rules 2014* (**Registration of Charges Rules**)).

Further, under section 77 read with section 79 of the Companies Act, the charges created or modified by a company on its assets must be registered with the relevant Registrar of Companies (that is, the office of the registrar with whom the company is registered under the Companies Act) within a period of 30 days of such creation or modification. A nominal fee applies for the filing of the notification form, in accordance with the Registration of Charges Rules.

If the security is created over immovable property by way of a simple mortgage, an "English mortgage" (as defined under section 58 of the Transfer of Property Act 1882) or by a mortgage through the deposit of title deeds (in certain Indian states, where registration or a mortgage is compulsory), then these security documents must also be registered with the Registrar of Assurances with jurisdiction over such immovable property. A registration fee is payable in respect thereof, under the Indian Registration Act.

Banks and financial institutions must register the details of any security interest created in their favour with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (**CERSAI**) within a period of 30 days from the date of creation of the security interest (Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002). A fee is payable, as prescribed by Rule 7 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Rules 2011.

In addition, lenders must register any security interest created in their favour with an information utility (a public company that is part of an information network that stores financial data and supplies this information to lenders and insolvency professionals), in accordance with the provisions of section 215 of the Insolvency and Bankruptcy Code 2016 and the associated rules. A fee is also payable as per the structure and formula prescribed in Regulation 32 of the IBBI (Information Utilities)

Regulations 2017 (**IBBI Regulations**), and as agreed between the financial institution or lender and the information utility.

That said, lenders in India generally only check the public records of a corporate borrower or security provider (registered as a company or a limited liability partnership (**LLP**)) which are maintained with the Registrar of Companies and the Sub-registrar of Assurances, or the filings made by other lenders in relation to securities charged in their favour by the borrower. In respect of non-corporate borrowers or security providers, only the public register maintained with the Sub-registrar of Assurances is verified in order to check the charges and mortgages registered with the aforesaid public registry on the immovable properties of such borrowers or security providers. "Sub-Registrar" means a person who has been appointed by the state government to be the sub-registrar of several sub-districts to exercise the powers and discharge other functions under the Indian Registration Act 1908 including the registration of documents.

A lender's charge over a particular security interest granted by a corporate borrower or security provider (registered as a company or an LLP) on their assets will be recognised only if it has been registered with the relevant Registrar of Companies in order to enjoy priority over subsequent charges, unless otherwise agreed by the lender with subsequent lenders (*section 77, Companies Act and section 34, Rule 24, LLP Act*) and to be counted as a secured lender in the event of winding up or liquidation of the company.

8. What checks does a lender need to make in relation to the corporate status and powers of a borrower, guarantor or security provider incorporated in your jurisdiction, and in relation to the authority of the signatory signing on behalf of such a borrower, guarantor or security provider?

A lender should inspect the constitutional documents of the borrower, guarantor (if a corporate guarantor) and security provider, to check their corporate status and powers.

In the case of a company, the board and shareholder resolutions of each of these entities should also be reviewed to ensure that the loan, guarantee or security, together with drafts of the documentation, have been approved by the company's board and shareholders (wherever required, under the law or the articles of association). In the case of other borrowers, guarantors or security providers (other than companies), their respective authorizations and constitutional documents should be examined.

The resolutions and relevant authorizations are reviewed to check and identify the authority of the signatory signing the documents on behalf of the borrower, guarantor or security provider.

Lenders generally procure a search report from a practising company secretary (a member of the Indian Institute of Company Secretaries), covering the status of the register of charges, the register of shareholders and debenture holders, and other things in respect of a corporate borrower, guarantor or security provider. This report should also cover details of the entity's corporate status, specifying whether it is an active company which makes all its secretarial filings (this generally includes the filing of annual returns of the company, of various statutory forms such as ADT-1, MGT-4, MGT-7, DIR-2, and the routine filing of minutes of board and shareholding meetings of the company under the Company Act) regularly and giving details about its incorporation, shareholding structure and the restrictive clauses, if any, in its constitutional documents.

The company secretary or authorized officer of the borrower, guarantor and security provider is usually required to provide the lenders with certified copies of the constitutional documents and resolutions of the respective company at the time of execution or before the execution. Copies of identity documents (of the persons signing the documents on behalf of the borrower, guarantor or security provider) and specimen signatures of these persons are also procured at the time of the execution.

A legal opinion from the lender's legal counsel is also required.

9. What filing or registration requirements apply to security given by a borrower, guarantor or security provider incorporated in your jurisdiction, and to security created over real property or other assets located in your jurisdiction?

See *Question 7*.

In addition, in respect of security in the form of a pledge or hypothecation over dematerialised securities a prescribed form (Form W) is required to be filed with the depository participants, in order to record the pledge or hypothecation in favour of the lender in their records.

10. Are there any matters which would normally form part of the practicalities of signing and drawdown and which are specific to your jurisdiction?

In addition to the items listed in the Checklist, Loan facility agreement signing: Cross-border, the lenders will generally add due diligence reports and consent requirements.

Lenders generally prefer to arrange for a thorough review of the business and secretarial matters of the borrower by their legal counsel, and a report is usually submitted by the legal counsel to the lenders, before signing.

Often, the security stipulated by the lender involves the creation of a charge over the borrower's rights and interests in material documents of a commercial nature (such as project documents). In these cases especially, the legal counsel of the lender submits a report to the lender to provide it with a list of parties from whom consent is required for execution of the transaction.

Together with this report, the borrower also furnishes originals of all consents provided by various parties from whom consent is required.

In addition, certified copies of all constitutional documents and resolutions, together with certificates from practising chartered accountants or chartered secretaries are obtained by the lenders, confirming and certifying the following:

- Shareholding structure.
- Borrowing limits.
- Charges created by the borrower.
- Authority of the borrower to borrow.
- Amounts which are owing to income tax authorities.

Checklist: Drawdown condition (CP)

11. Are CP checklists utilised in your jurisdiction? If so, what would a typical CP checklist look like and, in relation to a borrower (or guarantor or security provider) incorporated in your jurisdiction, what items would normally be included?

CP checklists are an integral part of almost all lending transactions in India, unless it is lending in the form of invoice discounting or working capital (which may have only a small number of conditions precedent).

A CP checklist for a lending transaction in India does not differ much from the *Checklist, Drawdown condition (CP): Cross-border*. However, it would also typically include the following additional conditions precedent:

- Certain documents such as consents from third parties (consenting to the creation of a charge and the loan transaction).
- Certificates from practising chartered accounts or chartered secretaries, confirming and certifying, among other things:
  - shareholding structure;
  - borrowing limits;
  - charges created by the borrower;
  - the borrower's authority to borrow;
  - the status of amounts owing in respect of income tax (including submission of an application by the security provider to the Income Tax department seeking its consent under section 281(1)(ii) of the Income Tax Act 1961 for the creation of a charge on any of the security provider's assets if any proceedings are pending or notices have been issued against the security provider); and
  - a due diligence report.

12. Are there any items which are typically included in a CP checklist in your jurisdiction but which would not normally be listed within a facility agreement, and if so what are they?

Generally, all facility agreements contain a clause or a schedule specifically detailing each CP that needs to be procured before a drawdown. See *Question 11*.

Loan financing preliminary documents

Confidentiality agreement

1. How frequently do you find that confidentiality agreements are put in place in your jurisdiction in the context of proposed loan facilities?

Generally, the lender or arranger and the borrower enter into a confidentiality agreement or a term sheet containing a confidentiality clause before executing the financing documents, in the case of syndicated financing or where the original lender proposes to sell its exposure.

A non-disclosure clause is also included in the subsequent loan agreement; it stipulates the terms and conditions of disclosure and the confidentiality to be maintained in relation to the information provided by the borrower or security providers to the lenders (including its agent, trustee or representatives), with certain exceptions.

2. In the context of a proposed loan facility, would contractual obligations on the lender set out in a confidentiality agreement, not to disclose confidential information supplied by the borrower, restricting the making of copies and the method of storage of the information, and requiring the return or destruction of papers and materials, be enforceable obligations?

Standard document, Confidentiality agreement (loan financing): Cross-border would be enforceable in India; however, the enforcement of *clause 3* and *clause 7* may be restricted if the clauses do not comply with the applicable Indian laws.

Generally, Indian financing laws and regulations prescribe the manner and procedure for handling any information (including any dissemination of such information) received by the lender during the course of its business from its customers and proposed customers.

The confidentiality agreement needs to comply with the applicable Indian laws, such as the Indian Contract Act 1872 (**ICA**), the Information Technology Act 2000 (**IT Act**) and rules made under those statutes, as well as the central and state stamp laws as applicable.

Under the ICA, a confidentiality agreement needs to satisfy the essential conditions of a valid contract. Under section 10 of the ICA, to be enforceable the agreement must satisfy the following requirements:

- The parties to the agreement must be competent.
- Both parties must freely consent to the agreement.
- The consideration provided for, and the object of, the agreement must be lawful and not be in violation of any applicable law.
- The agreement must not be expressly declared void by the provisions of the ICA or any other law.

Any "sensitive personal data or information" of any person in the possession of a body corporate needs to be dealt with in compliance with the IT Act and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules 2011 (**IT Rules**).

In accordance with the Indian Stamp Act 1899 (**Stamp Act**) and the relevant state stamp laws, an instrument (including a confidentiality agreement) must be properly stamped in accordance with the Stamp Act to be admissible in a court of law in India.

3. Would contractual obligations set out in a confidentiality agreement which is governed by the law of your jurisdiction be additional to legally-imposed obligations of confidence (such as banker-customer confidentiality obligations), or would they replace them?

Yes, the contractual obligations set out in a confidentiality agreement would be additional to banker-customer confidentiality obligations and will not replace them.

4. What types of information (i) cannot, under the law of your jurisdiction, be protected by a confidentiality agreement or (ii) are usually excluded from the definition of Confidential Information contained in a confidentiality agreement governed by the law of your jurisdiction?

The types of information which cannot be protected by a confidentiality agreement, or are excluded from the definition of confidential information, are:

- Any information which is known to the public.
- Any information which is required to be disclosed by law.
- Any information where there is a duty to the public to disclose it.
- Any information where the interest of the bank requires disclosure of such information.
- Any other information which is explicitly approved for release by written authorisation of the disclosing party.

(Reserve Bank of India (RBI) Know Your Customer Direction, February 25, 2016.)

5. Is information which is held electronically treated differently from information on paper under the law of your jurisdiction?

Under Indian law there is no difference between information held in paper form and information held in

electronic form. It should be noted that, in the case of electronic information, this also needs to be originated, communicated and stored in compliance with certain Indian laws.

6. Can findings, data or analysis derived from confidential information itself constitute confidential information under the law of your jurisdiction?

Under Indian law, any data or analysis derived from confidential information itself may not constitute confidential information unless this is provided for under the confidentiality agreement. However, even if the confidentiality agreement stipulates that it is confidential information, it may still not be treated as such if it falls within the categories set out in Question 4.

7. Is an undertaking by a lender not to disclose the fact that a confidentiality agreement has been entered into, or the fact that confidential information has been made available, enforceable?

Yes, an undertaking by a lender not to disclose the fact that a confidentiality agreement or the fact that confidential information has been made available is enforceable, provided the essentials of the valid contract are satisfied in respect of the said undertaking as per the provisions of the Indian Contract Act (see Question 2).

8. Is it necessary for "consideration" (that is, value, of some kind) to be given by a borrower in order for a confidentiality agreement to be binding on a lender under the law of your jurisdiction? If so, does agreement by the borrower that it will provide confidential information after a confidentiality agreement has been entered into constitute such consideration?

Yes, an agreement by the borrower that it will provide confidential information after a confidentiality agreement has been entered into will constitute valid consideration. Under the ICA, consideration is an act, forbearance or promise done or given at the desire (intention) of the promisor. Consideration must be real and for some value in the eyes of law. It need not be adequate.

9. What are the remedies available in your jurisdiction in the case of a breach, or an anticipated breach, of obligations set out in a confidentiality agreement, or confidentiality obligations imposed by the general law of your jurisdiction?

The following remedies are generally available in the case of a breach of the obligations set out in a confidentiality agreement:

- Injunction against the third party, restricting them from using the confidential information and ordering them to return all such confidential information (*Specific Relief Act 1963, read with Code of Civil Procedure 1908*).
- Compensation for losses or damage suffered by the disclosing party which arose in the usual course of events from such breach (*section 73, ICA*).
- Criminal breach of trust, punishable with imprisonment of either description (under section 53 of the Indian Penal Code this means either "simple" or "rigorous" imprisonment (that is with hard labour)) for a term of up to three years, or a fine, or both (*section 406, Indian Penal Code*).

In addition to the above, any person who is in breach of confidentiality obligations could also be liable to imprisonment with or without a fine under the IT Act. The IT Act provides that any person meeting all the following criteria will be liable to imprisonment for a term of up to three years, or with a fine of up to INR500,000, or both:

- Providing services under the terms of a lawful contract.
- Securing access to any material containing personal information about another person, with the intent of causing (or knowing that this is likely to cause) wrongful loss or wrongful gain.
- Disclosing, without that person's consent, or in breach of a lawful contract, such material to any other person.

(Section 72A, IT Act.)

10. Does the law of your jurisdiction impose a limit on the time during which the obligations set out in a confidentiality agreement may continue to apply?

Obligations under a confidentiality agreement may continue to apply for any term agreed under the confidentiality agreement.

11. What would be the typical list of permitted disclosees in a confidentiality agreement governed by the law of your jurisdiction?

Under Indian law, the following are generally included as permitted disclosees under confidentiality agreements:

- The Reserve Bank of India (**RBI**).
- A credit information company authorized by the RBI.
- Any other person with whom the lender intends to enter into any kind of transfer, participation or other agreement or transaction in relation to the proposed loan facilities (including its agents, representatives and officials).
- Any officers, employees or representatives of the lender, or of the lender's group.

Any professional advisers or consultants engaged by the lender in connection with the proposed loan facilities.

12. What would be the typical list of situations under the law of your jurisdiction in which a lender might be compelled to disclose confidential information supplied by a borrower (and which should therefore form express exceptions to an undertaking to keep

them confidential)?

The list of situations under the law where a lender is compelled to disclose the confidential information are:

- Where the information must be disclosed by the lender under any statute.
- Where the information must be disclosed by an order of any court of competent jurisdiction, or of any regulatory, judicial, governmental or similar body, or any competent taxation authority.

13. Would undertakings not to entice away officers or employees or not to solicit customers of the disclosing party be enforceable?

Yes, undertakings not to entice away officers or employees or not to solicit customers of the disclosing party are generally enforceable under Indian law provided (in relation to employees or officers) this does not amount to a contract in restraint of trade under section 27 of the ICA.

14. Could members of the borrower's group enforce a confidentiality agreement, without being parties to the agreement?

No, under Indian law only parties to the agreement can enforce a confidentiality agreement.

15. Could a borrower enforce a confidentiality agreement under the law of your jurisdiction against permitted disclosees, without those disclosees being parties to the agreement?

No, under Indian law only parties to the agreement can enforce a confidentiality agreement (see Question 14). Where any breach is committed by the permitted disclosees, the borrower will have recourse against the lender for such breach.

16. Does a written confidentiality agreement which is governed by the law of your jurisdiction need to be signed by all the parties on one and the same document? If not, what procedure needs to be followed if signature of separate (but identical) documents is to be effective?

No, under Indian law parties may execute the confidentiality agreement in counterparts, and they do not need to sign the same document.

No specific procedure is provided under Indian law for signature of separate (but identical) documents. Procedures applicable generally for execution of contracts should be followed in this scenario.

17. Under the law of your jurisdiction, can the law chosen as the governing law of a confidentiality agreement restrict the parties' choice of law in respect of the subsequent transaction documents?

No, the law chosen as the governing law of a confidentiality agreement will not restrict the parties' choice of law in respect of subsequent transaction documents. Choice of governing law by the parties is permitted under Indian law.

In the case of cross-border financing transactions entered into by borrowers in India, in our experience, foreign lenders are inclined to choose:

English law as the governing law of a confidentiality agreement.

English courts as the exclusive jurisdiction to decide any dispute that may arise from, or in connection with, the agreement.

Term sheet

18. Would a fairly detailed term sheet normally be contractually binding? Is there anything specific (for example, by way of labelling, express qualification or content) which can prevent such a term sheet from being binding or, conversely, anything specific which can make it legally binding?

The detail (or lack thereof) of the term sheet does not affect its effectiveness. Generally, lenders in India enter into a fairly detailed term sheet in relation to a loan facility. The term sheet will be contractually binding if it fulfils the essential conditions of a valid contract as set out in the ICA (*see Question 2*).

If the parties propose to make the term sheet binding, then it is advisable that an express provision to that effect be included in it, and that the stamp duty applicable in the relevant state in India (where such term sheet is proposed to be signed or executed) be paid. An unstamped term sheet will not be admissible in a court of law in India (section 35, Stamp Act). Stamp duty varies from state to state in India, and may be fixed or ad valorem, and rates vary substantially. If a document is stamped in one state but the original or copy of the document is brought into another state that has a higher stamp duty, the difference between the two amounts of stamp duty may need to be paid on the document. Stamp duty on a confidentiality agreement is generally fixed, rather than ad valorem (the amount being up to a maximum of INR300).

A non-binding term sheet, executed by the relevant authorized person of the parties, may clearly state that the parties to the term sheet intend to execute it as legally non-binding document. In the absence of such an express stipulation regarding the non-binding nature in the document, the term sheet may be presumed to be binding between the parties, depending on the facts of each case.

19. Where a term sheet is contractually binding under the law of your jurisdiction, how does your law deal with those points which would be covered in a detailed facility agreement and which do not appear in the term sheet?

If the parties intend that a term sheet should be binding, then the term sheet will be deemed to be conclusive in relation to the rights and obligations of the parties provided for under the term sheet, unless the parties

subsequently sign a loan agreement.

Where a loan agreement is subsequently signed, the parties generally agree that the terms and conditions of the term sheet are expressly subsumed into the loan agreement, or that the loan agreement expressly supersedes the term sheet.

The points which are covered in a detailed facility agreement and which do not appear in a legally binding term sheet are subject to negotiation and agreement between the lender and the borrower prior to finalisation and execution of the facility agreement.

20. Where there is a duty to negotiate terms in good faith under the law of your jurisdiction, what does that duty entail, and what are the possible sanctions for breach of that duty?

There is no such duty recognized under Indian law.

21. Can a term sheet be partially binding and partially non-binding under the law of your jurisdiction? If so, how should that be achieved?

Yes, a term sheet can be partially binding and partially non-binding under Indian law. Such an intention of the parties should be expressly provided for in the term sheet itself with respect to the relevant provisions.

22. Does the amount of detail contained in a term sheet affect the requirements (if any) imposed by the law of your jurisdiction on the parties, whether or not the term sheet is binding, as regards their conduct in negotiating the detailed finance documents?

As a general rule, the amount of detail contained in a term sheet does not determine whether the term sheet is binding or not.

The *Standard document, Term sheet: syndicated acquisition finance facilities: Cross-border* includes the preliminary terms and conditions of a proposed loan facility; it does not create any commitment on the part of the lender to disburse the facility on the basis of such terms and conditions unless relevant financing documents are executed and pre-disbursement conditions are satisfied. Once the parties agree and sign the terms of the such a term sheet, it becomes binding on the parties and the points agreed will need to be replicated in the facility agreement or annexed as a schedule to the financing agreement.

23. Would a term sheet typically be discussed and adjusted between the lender and the borrower, and then finalized, or would it typically be accepted by the borrower once issued by the lender (subject to any points agreed separately between them)? Does the position vary according to the circumstances in each case?

A borrower generally negotiates the term sheet with the lender before finalisation of the same. Though at times the lenders provide their standard term sheets to the borrower for acceptance, the borrower can negotiate them. The negotiation power of the borrower will depend on various factors, such as its reputation, its credit standing and the amount of loan.

24. Would a term sheet typically be signed by the parties, or not, and would such signing have any specific legal effect?

Generally, the borrower and lender in India sign the term sheet once it is finalized between them. Once signed, the term sheet will be effective and binding on the parties, provided the essential conditions of a valid contract are satisfied (see Question 2) and the intention is not to make it a non-binding term-sheet

25. Would you refer, in a term sheet drafted by you, to the conditions which need to be satisfied before a borrower can draw down a loan as "drawdown conditions" or "conditions precedent"?

Yes, a term sheet generally refers to the conditions which need to be satisfied before a borrower can draw down a loan as either "drawdown conditions" or "conditions precedent".

Waiver and consent letter

1. Is it possible for a lender to relinquish rights unilaterally? If so, are there any formalities to be observed in order to do that, and (if there are) what are they? Is there a particular term used in your jurisdiction for such a relinquishing of rights (equating to "waiver")?

A promisee (**the lender**) has a right to dispense with, or remit wholly or in part, the performance of any promise made to them by the promisor (**the borrower**) (*section 63, Indian Contract Act 1872*).

It is possible for a lender to unilaterally relinquish any right it has under a facility agreement or other finance document. In case of a consortium or syndicate financing, the lead lender, majority lenders or the facility agent will generally waive the rights of the lenders under the facility agreement or other finance document on their behalf.

Where a lender relinquishes its rights under a facility agreement governed by Indian law, this is generally referred to as a "waiver". Facility agreements usually contain a specific waiver clause giving the lender, majority lenders or the facility agent the right to waive any condition of the facility agreement if the borrower fails to fulfil the condition for any reason whatsoever. Such waiver may or may not be conditional.

A waiver may be oral or in writing. However, lenders generally prefer to issue waivers in the form of a written letter usually at the request of the borrower.

2. Would a waiver and consent given by a lender located in your jurisdiction, or given in relation to a finance document which is subject to the law of your jurisdiction, normally be restricted to specified provisions of the finance documents?

Under the facility agreements governed by Indian law, lenders generally do not restrict waiver and consent to specified provisions of the finance documents.

3. Who would be entitled to countersign a waiver and consent letter on behalf of the borrower incorporated in your jurisdiction?

Irrespective of the governing law of a waiver and consent letter, any director or officer or authorized person of an Indian borrower who is authorized to do so by a resolution (passed by the board of directors in accordance with the Companies Act 2013) in terms of the relevant constitutional document or authorizations, is entitled to countersign the waiver and consent letter on behalf of the Indian borrower. However, if a waiver and consent letter is governed by foreign law, then such foreign law should also be complied with.

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