FINANCING PROJECTS IN INDIA

Subcontracts India has been at the forefront of several project financing transactions across various sectors of the Indian economy. Our project financing services are particularly beneficial to Startups, shovel ready greenfield projects as well as brownfield and green shoot projects.

The last few years have witnessed increased government focus on urban development, which, experts believe, is expected to increase by 75% by 2030. Health and sanitation, mass transit and waste-to-energy will be focus sectors particularly for project financing activities. With traditional lenders such as banks and non-banking finance companies already facing a liquidity crisis and struggling under the impact of COVID19 pandemic, lenders are taking more calculated and nuanced risk calls, based on industry-wide issues faced by project developers (for instance, the tariff renegotiation of the renewable energy projects in Andhra Pradesh).
Funding structures and new sources of lending are being constantly and vigorously explored (such as InvITs, alternative investment funds and so on). The government has looked to significantly liberalize offshore lending to encourage Indian developers to reduce dependence on Indian banks and NBFCs.

India's rapid urbanization coupled with incoherent urban policies and inadequate urban infrastructure have made its cities among the most vulnerable to climate change. The outbreak of the COVID-19 pandemic has already shown how global shocks can further unearth the evils of decades of mismanagement of cities. Ironically, but not surprisingly, urban residents of slums and squatter settlements bear the maximum brunt and this, in turn, exacerbates existing socio-spatial gaps in Indian cities. So, cities need to change as they grow. Of late, green infrastructure has been viewed as a development priority, especially with respect to the creation of livable, environmentally sustainable and efficient cities for all citizens. Green infrastructure is conceptualized as "the network of natural and semi natural features, green spaces, rivers and lakes that intersperse and connect villages, towns and cities" and when appropriately planned, designed and managed, they have the potential to mitigate and adapt the effects of climate change.

We have the necessary expertise to approach numerous Banks, Investment Bankers, Non Banking Finance Companies (NBFCs), Financial Institutions (FIs), Venture Capitalists (VCs), Private Equity Investors (PE), Ultra High Net Worth Individuals (UHNWIs), Family Businesses, Hedge Funds, Pension Funds, Underwriters, Insurance Providers, etc. with great speed and efficiency. We understand how these fund providers and investors work and what are their main areas of interest. Targeting the right source is not just important but also crucial for achieving successful financial close.

Subcontracts India offers:

1. Identification of projects with a Cash Flows Generating component and bankability potential;
2. Support of project development to achieve bankability;

3. Preparation and structure of transaction by leveraging our consulting, financial and legal expertise;
4. Finding the right investor and achieving financial close;
5. Support to the client through the project execution and construction phases.

We can be present with our services across the entire project lifecycle:

1. Strategy and planning: Assisting long-term planning of individual projects or a portfolio by focusing on feasibility, alignment with corporate objectives and governance procedures in order to maximize return on investment.
2. Financing and procurement: Raising project finance; establishing and managing the procurement process to acquire services, material or equipment to deliver the project, and prioritizing capital allocation between projects.
3. Project organization, execution and construction: Setting up the project for success and strengthening client capabilities to deliver on time and to budget.
4. Operations and maintenance: Assessing ongoing lifecycle costs and providing insights around optimizing the performance and value of assets in operation.
5. Asset recycling, concession maturity & decommissioning: Determining when and how to discontinue investing in an asset, and transaction advisory services for investors in infrastructure assets.

Projects in India are typically financed by way of:

1. External commercial borrowings (ECBs).
2. Domestic term and working capital lending.
3. FDI into the special purpose vehicle (SPV) developing the project.

Financing may also be obtained through debt instruments, such as debentures, and availing of credit from the Export Import Bank of India. In the recent past, financing has also been obtained by infrastructure companies by way of issuance of rupee denominated bonds (popularly known as "masala bonds" and "green bonds").
Specific requirements may apply, depending on the nature of entity proposing to finance the project. For example, foreign portfolio investors may subscribe to unlisted non-convertible debentures only if the issuing company is in the infrastructure sector.
The key reasons for the underdevelopment of project financing lie in insufficient project maturity and

inability to develop projects to the level necessary to achieve bankability. Access to finance is one of the main reasons that infrastructure projects are not developing faster and the key stakeholders sometimes do not see a business case for financing. Moreover, lack of know-how and competence of key stakeholders require a complex multidisciplinary approach in order to guarantee project execution.
Projects, however, are funded solely on their merits. Although we do not make claims of 100% success rate in our pursuit of project finance, with our expertise and experience, our clients enjoy a definite advantage in terms of getting their projects successfully funded.

Non-recourse Project financing in India is much different from what exists in the more evolved developed economies. This is because the regulatory requirements governing lending require promoter guarantees and undertakings, as well as other recourse outside of the relevant project. As a result, there is no complete reliance on project and project revenues, and the term 'project financing' in India has morphed to refer to any form of financing of infrastructure projects generally. Furthermore, financing of infrastructure projects is primarily undertaken by banks, which are public sector undertakings (PSUs), controlled by either the government of India or state governments.

The 2020 Union Budget (2020 Budget) has sought to create higher incentives for investments in the infrastructure sector by creating a framework for 100 per cent tax exemption for sovereign wealth funds of foreign governments in respect of their interest, dividend and capital gains income from investments made in infrastructure, on the condition that such funds are invested for a minimum period of three years.

The 2020 Budget has also announced a National Infrastructure Pipeline that intends to comprise of over 6,500 infrastructure projects to boost infrastructure development. The details of these projects are awaited and are expected to be disclosed in the near future.

In an acknowledgement of the increasing importance of natural gas in the Indian Energy basket, the 2020 Budget has announced that the national gas grid will be expanded from 16,200 kilometres to 27,000 kilometres and a national level natural gas exchange will be developed.

Another important element of the 2020 Budget was the announcement of future public–private partnership (PPP) expansion of Indian railways to enable expansion of freight transportation and the development of a national cold supply chain for perishables such as meat, milk and fish and equipping freight trains with refrigerated coaches.

The 2020 Budget also prioritised inland waterways for development to enable economic development along rivers.However, because of the inherent risks in investing in India, the general trend has been for project developers predominantly taking on the role of executing projects as contractors or sub-contractors, where there is revenue certainty and a buffer from the risks to which infrastructure development is exposed to in India. Strategies for mitigating legal risks has always been a core function of a project finance lawyer. This has been gaining higher significance in India in view of 'public interest litigation' (PILs) against infrastructure projects. Judicial rulings resulting from PILs may lead to uncertainty of enforcement of long-term contracts. As a result, a project finance lawyer in India needs to be adept at developing strategies for handling dispute resolution scenarios and advising on long-term risk mitigation measures

Please read the below section to understand how project financing in India works.

SECURITY CREATION

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

Lenders typically have security over real property, plant, machinery and equipment. If the land leasehold property, permission may be required from the lessor for the creation of charge. If the security is created via an indenture of mortgage, it is necessary to register the same with the local registrar of companies (RoC). The charge created over movable/immovable properties is also required to be registered with the Central Registry Of Securitization Asset Reconstruction and Security Interest of India (CERSAI)

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

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

Security over shares is a prevalent for of security creation in India. Typically, a pledge agreement is entered into with a power of attorney to enforce the pledge which is also executed by the pledger upfront. If the shares are in certified form, the share certificates are physically deposited along with a share transfer form. If the shares are in dematerialized form, certain forms (indicating the agreement number, closure date of the pledge, quantum of shares pledged, etc.) will be required to be submitted at the relevant share depository.

In India, stamp duty on security documents varies from state to state. In some states, stamp duty is uncapped, whereas in others the liability is capped. Additionally, all indenture of a mortgage must be registered with the local registrar of assurances. In some states, a mortgage created via a deposit of title deeds is also compulsorily registrable; however, in most states such registration is optional (viz., powers of attorney and affidavits) are required to be notarized by a notary public, at a nominal charge.

The time taken to register a mortgage with the local registrar of assurances may vary drastically, depending on the efficiency of the local bureaucracy. Similar to stamp duty, registration fees payable also vary from state to state, as some states have ad velorem charges whereas others have capped limits. Filing/ registration with the RoC and AERSAI are required to be done online and is neither time-consuming nor expensive.

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

SECURITY TRUSTEE

The "trust" structure is recognized and the tights and obligations of the security trustee is typically recorded in a security trustee agreement. Such security trustee agreements grant the trustee the right to sue, on behalf of all the lenders cumulatively, for the enforcement of the security and to apply the proceeds to the claims of all lenders. A security is trust is recognized in India, so the security trustee can sue for the enforcement of the security and can apply the proceeds to the claims of all lenders. There is also no bar on any lender suing for enforcement independently.

ENFORCEMENT OF SECURITY

The timelines for enforcing security may depend on the nature of security held by the lender. To illustrate, enforcement of a pledge created over shares, which are in dematerialized form, is relatively simple and does not require a decree of a court of competent jurisdiction. Enforcement of a mortgage may require a decree of the court under the Civil Procedure Code, 1908 or enforcement action under the securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. In a scenario where an insolvent company is subject to proceedings under the IBC, a publicly solicited bid process is undertaken wherein bidders are required to submit resolution plans that are required to be inter alia approved by the committee of creditors. In assets in regulated sectors (e.g. airports, telecommunications, roads) the enforcement process is done through a "substitution" of the defaulting company by an entity nominated by the lenders, with the consent of the relevant regulatory authority.

Under Indian law, a foreclosure suit in respect of a mortgage may be filed by a mortgagee to debar the mortgagor of his right to redeem the mortgaged property in the event that the mortgagor is unable to pay the amounts due to the mortgagee. While foreclosure proceedings may be initiated under the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2018, from transferring any immovable property in India, unless permitted by the Reserve Bank Of India (RBI). Additionally, foreclosure suits may only be filed under the Transfer of Property Act, 1882 by a mortgagee by conditional sale or a mortgagee under an anomalous mortgage. However, if the mortgage creation is by way of an English mortgage, foreclosure suits may not be filed.

BANKRUPTCY AND RESTRUCTURING PROCEEDINGS

The IBC is the primary legislation governing insolvency of corporate entities today. The initiation of a corporate insolvency resolution process (CRIP) against the project company (which would ordinarily last at least 180 days, extendable by another 90 days, exclusive of any time spent in litigation). Accordingly, the project lender will be unable to enforce or exercise any rights in respect of its security during this period.

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

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

Under the IBC, these include transactions that are “preferential” in nature (and pertain to an antecedent liability owed to a creditor, surety or guarantor), those that are “undervalued” (including gifts), those that defraud creditors (which must necessarily pertain to undervalued transactions, which were entered into with the deliberate intention to defraud creditors), and such credit transactions that are “extortionate” in nature.

Further, the Income Tax Act, 1961 provides for transfers or charges to be void against any tax claim where it is created during the pendency of any tax proceeding or outstanding tax demand, without prior permission of the tax department.

While the IBC provides for and governs bankruptcy of individuals, partnership firms, limited liability partnerships and corporate entities in India, the provisions pertaining to bankruptcy of individuals have not yet been made operational. The regime, however, does not extend to the bankruptcy of financial service providers, which continue to be governed under the Companies Act, 2013. The Banking Regulation Act, 1949 governs the winding up of banking companies.

Post the initiation of the CIRP under the terms of the IBC, creditors are prohibited from enforcing their security interests and seizing the assets of a company. However, outside the IBC framework, there are several ways in which a creditor can enforce its security and seize the assets of a project company out of court. To illustrate, a creditor having security by way of an English mortgage has the right to sell such mortgaged property by way of private sale. Similarly, in respect of security by way of pledge, a creditor is entitled to enforce such a pledge without resorting to court proceedings, and to effect the sale of the pledged goods, after having given due notice to the pledgor.

Under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest

Act, 2001, banks, notified financial institutions, asset reconstruction companies, debenture trustees and certain notified NBFCs are conferred with private enforcement rights in respect of their security interests, other than in respect of pledges and liens. However, such rights do no extend to foreign creditors.

There are certain mechanisms that are available to companies to achieve a restructuring of its debts, outside of the formal insolvency regime provided for under the IBC, including the cramdown of its dissenting financial creditors. On February 12, 2018, the RBI had issued a circular titled "Resolution Of Stressed Assets- Revised Framework" (which resulted in an overhaul of all previous restructuring schemes issued by the RBI), under which lenders were obligated (either singly or jointly) to formulate a resolution plan which may provide for the change in ownership or restructuring of the corporate debtor, the moment there is a default in the company's account. However, the said circular was struck down by the Supreme Court of India on April 2, 2019. The RBI Governor has, on April 4, 2019, issued a statement stating that the RBI will take necessary steps, including issuance of a revised circular, as may be necessary, for expeditious and effective resolution of stressed assets.

In July 2018, a large majority of Indian banks have also entered into the Inter-Creditor Agreement for Resolution of Stressed Assets as part of Project Sashakt upon recommendations of the Sunil Mehta committee. Under the framework, the lead lender shall be authorized to formulate the resolution plan, which shall be presented to the other lenders for their approval. The decision-making shall be by way of approval of majority lenders, that is, the lenders with 66% share in the aggregate exposure. Once the resolution plan is approved by the majority, it shall be binding on all the lenders that are a party to the inter-creditor agreement.

Under the IBC, upon the initiation of the CIRP against the corporate debtor, it is the resolution professional that takes on the role of the management of the company, and the powers of the board of directors remain suspended during this period. In terms of section 66(2) of the IBC, directors may be held personally liable to make contributions to the assets of the corporate debtor (on an application made by the resolution professional to the NCLT), if such director knew or ought to have known that "there was no reasonable prospect" of avoiding the commencement of the CIRP against the corporate debtor under the terms of the IBC, and did not exercise the due diligence in minimizing the potential loss to the creditors during this period.

Separately under Section 66(1) of the IBC, such persons who are knowingly party to the carrying on of the business of the company during its CIRP or liquidation, in a manner that demonstrates their intent to defraud the creditors of the company, or for any other fraudulent purpose, may be held liable to make contributions to the assets of the corporate debtor (on an application made by the resolution professional to the NCLT).

FOREIGN INVESTMENT AND OWNERSHIP RESTRICTIONS

The foreign ownership of an Indian project company is subject to the Foreign Exchange Management Act, 1999 (FEMA) and the rules and regulations made thereunder. The Maser Direction on Foreign Investment in India read with the Foreign Exchange Management (Transfer or Issue of a Security by a Person Resident Outside India) Regulations, 2017 (FEMA Regulations, 2017) empowers the RBI to prohibit, restrict or regulate the transfer or issue of any security by a person resident outside India. FEMA Regulations, 2017 provides: (i) the limit of foreign investment in each sector in India which cannot be exceeded; and (ii) the entry routes for foreign investment in various sectors, which may be either automatic or with government approval. FEMA Regulations, 2017 also lists out the prohibited activities, which include real estate, agricultural activities, atomic energy and railway operations.

Further, from a tax perspective, where any taxpayer, including a foreign company, acquires any property, i.e. shares or other instruments which are characterized as security, then it must acquire such share or security at a “fair market value” as determined in accordance with a prescribed rule for valuation. If the consideration paid is less than such fair market value, then the difference would be subject to tax in the hands of the foreign investor as “income from other sources” at the rate of 40% (plus applicable surcharge and cess) in hands of a company or 30% (plus applicable surcharge and cess) in case of other investors.

There are several bilateral and multilateral investment treaties entered into by India with various countries in order to promote trade and commerce within the country. India also has comprehensive Double Taxation Avoidance Agreements (DTAA) with 88 countries, out of which 85 are presently in place. The Income Tax Act, 1961, provides for relief for two types of taxpayers. One is for taxpayers who have paid the tax to a country with which India has signed a DTAA, while the other is for taxpayers who have paid tax to a country with which India has not signed a DTAA. The rates differ from country to country. However, there are no treaties providing explicit protection to a foreign entity from restrictions on exchange control.

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

GOVERNMENT APPROVALS/ RESTRICTIONS

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

Security documents are required to be filed and registered with certain authorities.

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

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

Capital account transactions (which alter assets and liabilities), unless specifically permitted by the RBI or under FEMA, are prohibited. Specified routes are available for equity investment, borrowings, etc. Taxes on foreign currency exchange transactions would be levied depending on whether it results in income or deemed income in India. The actual transaction of foreign currency exchange may also be subject to the Goods and Services Tax (GST).

Tax is levied on remittances and repatriation of investment returns, levied by way if Income tax or capital gains tax, depending of the nature of the return. No tax is levied on the shareholder in the Indian project company for distribution of dividends under the law currently in force. However, the Indian company distributing dividend is subject to additional dividend distribution tax at the rate of 20.56% (including applicable surcharge and cess). Capital gains would be taxed as short term or long term depending on the period of holding the asset. Long-term capital gains arising on the sale of shares is generally taxable in the hands of a foreign investor at the rate of 10% (plus applicable surcharge and cess). Short-term capital gains would be taxed at the rate of 40% (plus applicable surcharge and cess). However, a lower rate of 30% is applicable on short term capital gains in the case of a foreign portfolio investor. Further, the short-term capital gains may be taxed at 15% only, if the gains are realized upon sale of the security on the stock exchange and the securities transaction tax paid, as prescribed.

Onshore and offshore foreign currency accounts are no permitted under applicable law, except in limited circumstances, as set out in the Foreign Exchange Management (foreign currency accounts bu a person resident in India) Regulations, 2015. For instance, an Indian project company receiving foreign investment under the foreign direct investment (FDI) route is permitted to open and maintain a foreign currency account with an authorized dealer in India, provided that the Indian project company has impending foreign currency expenditure. In the instance referred to hereinabove, the account is required to be closed immediately after the requirements are completed and is not permitted to be operational for more than six months from the date of the opening of such an account.

In addition to restrictions on declaration of dividend under the financing documents, the Companies Act, 2013 permits declaration of dividend only out of the profits of the Indian company and after maintaining reserves for depreciation. The payment of such dividend will be subject to the taxes mentioned above.

Depending on the nature and size of the project, project developers will be required to seek environmental clearances, approval of the resettlement and rehabilitation plan, consent to establish and operate, forest clearances and wildlife clearances, among others.

Any procurement by project companies may be governed by the terms of the bid documents and the subsequent concession agreements that may be signed by such a project company. That being said, in certain instances, additional taxes or duties may also be levied (for instance- the recently introduced safeguard duty on the import of solar panels from certain countries).

Finance for a Project in India can be raised by way of

(A) Share Capital

(B) Long-term borrowings

(C) Short-term borrowings

Both share capital and long-term borrowings are used to finance fixed assets plus the margin money required to obtain bank borrowings for working capital. Working capital is financed mainly from bank borrowings and from unsecured loans and deposits.

Share Capital consists of two broad categories of capital namely equity and preference. Equity shares have a fixed par value and can be issued at par or at a premium on the par value. Shares cannot normally be issued at a discount. However, in exceptional circumstances issue of shares at a discount is permitted provided (a) the shares are of a class already existing, (b) the discount is authorised by the shareholders, and (c) the issue .is sanctioned by the Central Government. Normally the Central Government will not sanction a discount exceeding 10%.

The corporates are now allowed to raise resources for expansion plans. by issuing equity shares with differential voting rights. The main advantages of such category of shares are :

1. Equity can be raised without diluting stake of the promoters.
2. Companies can reduce gearing-ratios.
3. The risk of hostile-takeovers is reduced to a considerable extent.
4. The passing of yield in the form of high dividends to the investors can be ensured

The following are the general disadvantages

1. The cost of servicing equity capital will increase.
2. Poor corporate governance may be encouraged.
3. If issued at discount, they may raise the equity burden.

Preference shares carry a fixed rate of dividend (which can be cumulative). These shares carry a preferential right to be paid on winding up of the company. Preference shares can be made convertible into equity shares. Issue of preference is not a popular form of capital issue.

The issue of capital by companies is governed by guidelines issued by the Securities and Exchange Board of India (SEBI) and the listing requirements of the stock exchanges.

Apart, from equity, there can also be various forms of pseudo equity. The most common forms are fully or partly convertible debentures and debentures, issued with warrants entitling the holder to subscribe for equity. There can also be an issue of non-convertible debentures.

Term finance is mainly provided by the various All India Development Banks (IDBI, IFCI, SIDBI, IIBI etc.), specialized financial institutions (RCTC, TDICI, TFCI) and investment institutions (LIC, UTI and GIC). In addition, term finance is also provided by the State financial corporations, the State industrial development corporations and commercial banks. Debt instruments issued by companies are also subscribed for by mutual funds and financing activities are also done by finance companies.

GENERAL REGULATORY FRAMEWORK

Recent government policies signal climate conscious urban transition in India. In particular, India adopted a National Action Plan for Climate Change in 2008 with some of the mission components explicitly focused on the cities. The “Nationally Determined Criteria” of India has attempted to balance environment protection, equity and inclusiveness and economic growth in their development objectives. However, many Indian cities have been experiencing, albeit in varying degrees, significant depletion of their water and green spaces to meet the increasing needs of industrial and infrastructural facilities and find it difficult to sustainably manage their environmental resources. Policymakers face the uphill task of balancing the climate and environmental praxis with the growth discourses and these result in a critical disconnect between policy prescriptions and their implementation. Planning for and investment in green infrastructure can be used as an adaptive approach to urban development in India to reconcile such competing discourses.

There is no umbrella legislation governing project finance transactions in India. Different sets of law will apply, depending on the nature of project financing transaction. Also, depending on the nature of the project finance undertaken, following legislations may apply:

1. The Reserve Bank of India Act 1934 and guidelines, notifications issued in connection with the same.
2. The Banking Regulation Act 1949.

However in following cases, financing availed is governed by their respective legislation:
In case of external commercial borrowings (ECB), Foreign Exchange Management Act 1999 prevails read with the:

1. Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations 2000.
2. Foreign Exchange Management (Borrowing or Lending in Rupees) Regulations 2000.

In case of Project funding where equity or quasi-equity instruments are used by non-residents:

1. Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations 2000 of the RBI.
2. The foreign direct investment (FDI) policy issued from time to time by the Department of Industrial Policy and Promotion (DIPP).

Apart from the general regulatory framework, following material laws should also be taken into consideration:

1. Companies Act 2013-regulates matters related to procedural compliances, registration of charge on company’s assets, conversion of debt into equity and in relation to availing of loans and creation of security by companies.
2. Indian Contract Act 1872-governs contracts which include security documents and loan agreements.
3. Transfer of Property Act 1882-regulates procedure and creation for enforceability of security over immovable property.

4. Securitizations and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI)- regulate enforceability of security for recovering However these benefits do not prevail to foreign creditor except to that of Asian Development Bank and related International Finance Corporation.
5. Insolvency and Bankruptcy Code 2016- It covers partnerships, companies, individuals in relation to bankruptcy and insolvency legislations
6. Code of Civil Procedure 1908 (CPC)-governs procedure for resolving disputes and civil court proceedings to be used by the creditors for enforcement of security and recovery proceedings.

International treaties

Apart from above, India has also entered into international treaties that influence cross-border project financing transactions like Free trade, Comprehensive Economic Partnership and Co-operation Agreements, Preferential Trade Agreements etc

Project Financing Participants and Agreements

Sponsor/Developer: The sponsor(s) or developer(s) of a project financing is the party that organizes all of the other parties and typically controls, and makes an equity investment in, the company or other entity that owns the project. If there is more than one sponsor, the sponsors typically will form a corporation or enter into a partnership or other arrangement pursuant to which the sponsors will form a "project company" to own the project and establish their respective rights and responsibilities regarding the project.

Additional Equity Investors: In addition to the sponsor(s), there frequently are additional equity investors in the project company. These additional investors may include one or more of the other project participants.

Construction Contractor: The construction contractor enters into a contract with the project company for the design, engineering, and construction of the project.

Operator: The project operator enters into a long-term agreement with the project company for the day-to-day operation and maintenance of the project.

Feedstock Supplier: The feedstock supplier(s) enters into a long-term agreement with the project company for the supply of feedstock (i.e., energy, raw materials or other resources) to the project (e.g., for a power plant, the feedstock supplier will supply fuel; for a paper mill, the feedstock supplier will supply wood pulp).

Product Off taker: The product off taker(s) enters into a long-term agreement with the project company for the purchase of all of the energy, goods or other product produced at the project.
Lender: The lender in a project financing is a financial institution or group of financial institutions that provide a loan to the project company to develop and construct the project and that take a security interest in all of the project assets.

Stages in Project Financing

Pre Financing Stage:
1. Project Identification
2. Risk Identification & minimizing
3. Technical and financial feasibility

Financing Stage:
1. Equity arrangement
2. Negotiation and syndication
3. Commitments and documentation
4. Disbursement

Post Financing Stage:
1. Monitoring and review
2. Financial Closure / Project Closure
3. Repayments & Subsequent monitoring

Preparation of Project Report

A Project Report is essential before a decision for setting-up of any project is taken. The most important thing in any project financing is preparation of Detailed Project Report (DPR) which should be made beautifully for getting the project approved from banks/financial institutions. After preparation of DPR the proposal is moved to the banks/financial institutions for processing of the file. Project Report must include the followings:

Technical Feasibility

All the factors relating to infrastructure needs, technology, availability of machine, material etc. are required to be scrutinized under this head. Broadly speaking the factors that are covered under this aspect include:

1. Availability of basic infrastructure- It includes the land and its location as per present and future needs, lay out and building plan including finalization of structure, availability of water and power, availability of cheap labour in abundant supply.

2. Licensing/ registration requirements

3. Selection of technology/ technical process- The technical process/technology selected for the project must be readily available either indigenously or necessary arrangements for foreign collaboration must be finalized. Further the selected technology must find a successful application in Indian environment and the management shall be capable of fully absorbing the technology.

4. Availability of suitable machinery/ raw material/ skilled labour etc- After selection of technical process, the availability of suitable kind of machinery is most important factor which needs to be considered. It should be ensured that the suppliers are capable to supply the plant and machinery timely along with all spare parts

Managerial Competence

The ultimate success of even well-conceived and viable project may depend on how competently it is managed. The promoters of the project have to provide necessary leadership and their qualification, experience and track record will be closely examined by lending institution. The detail of other projects successfully implemented by the same promoters may provide the necessary confidence of these institutions and help final approval of the project.

The reputation of the promoters group in the market is also very important factor which the banks/ financial institutions consider while lending to the companies. Also the bank/ financial institutions check the payment history of past loan raised by the companies in which the promoters are directors which shows their willingness of repayment of the loans. CIBIL is a very strong tool in the hand of banks/ financial institutions to verify the payment history and the number of loans raised by the companies from the date of existence.

Commercial Viability

Any project can be commercially viable only if it is able to sell its product at profit. For this purpose it would be necessary to study demand and supply pattern of that particular product to determine its marketability. Various methods such as trend method, regression method for estimation of demand are employed which is than to be matched with the available supply of a particular product.

Financial Viability

Factors to be considered for financial viability:

Cost of project: A realistic assessment of cost of project is necessary to determine the source for its availability and to properly evaluate the financial viability of the projects. For this purpose, the various items of cost may be sub-divided as many sub-heads as possible so that all factor are taken into consideration for arriving at the total cost.

Cost includes the following:

a. Land Cost- Acquisition of project land, registry charges, and charges for other clearance.

b. Site Development Cost- to make the project easily accessible it is necessary to build roads, water tank, boundary walls, arranging electricity, levelling the site, demarcation of site, making available the basic amenities etc.

c. Buildings Cost- it includes lay out and building plan along with the structure cost, building the site office, factory sheds, godowns, residential flats for staff etc.

d. Plant and Machinery- cost of plant and machinery, any foreign assistance for installation, salary of technical staff, transportation cost, foreign currency fluctuations (if any), bank commissions, L/C Charges etc.

e. Miscellaneous Fixed Assets

f. Preliminary Expenses- licence required to start commercial production from the local authorities along with other clearances etc.

g. Contingencies- normally 5% extra cost is taken as contingency to avoid any kind of cost over-run at the end of implementation of project.

h. Margin for Working Capital- for running a project it is necessary to fuel it with the working capital. It works like a lubricant for any kind of business. It is financed against receivables and stock. A proper assessment of the same should be done. Banks now generally require that 25% of the total current assets (working capital) shall be the margin to be provided from the long term resources and 75% shall be financed by them.

Means of Finance: After estimation of the cost of the project, the next step will be to find out the source of funds by means of which the project will be financed. The project will be financed by contribution of funds by the promoter himself and also by raising loans from others including term loans from banks and financial institutions.

The means of financing will include:

1. Issue of share capital including ordinary/preference shares.
2. Issue of secured debentures.
3. Secured long-term and medium-term loans (including the loans for which the application is being put up to term lending institutions).
4. Unsecured loans and deposits from promoters, directors etc.
5. Deferred payments.
6. Capital subsidy from Central/State Government.

Security Coverage and Promoters Contribution: In today scenario and being to play safe, the bankers wants that at least the promoters should contribute 40% of the total project cost. The long term sources of funds are utilized for acquisition of land, procuring the fixed assets and construction of building etc. But for day to day expenses, payment of staff salary, purchasing the stocks etc. the project require short term loan or working capital loans. Hence the financing for a project is the mix of both long term and short term loans. In project funding the bank has charge on the land, building, any super structure thereof and hypothecation of stocks & receivables and all the current assets relating to project. It is considered as primary security but the bankers may ask for collaterals also in addition to the primary security.

Profitability Analysis: After determine the cost of the project and means of financing, the viability of the project will depend on its capacity to earn profits to service the debts and capital. To undertake the profitability analysis, it will be necessary to draw estimates of the cost of production and working results. These estimates are made for a period which should at least cover the moratorium and repayment periods. Generally in case of project loans repayment begins after 2-3 years, the time gap between the disbursement of loan and repayment of first installment is called moratorium period. Further repayment should start in that quarter or month when it is assured that the project will have sufficient cash profit to service the same in that particular quarter or month. Also, the moratorium and repayment period is decided while submitting the proposal to the banks hence while selecting these periods' accurate calculations should be done.

Projected Balance Sheet, Profit and Loss Account and Projected Cash Flow: The projected financials of the project is prepared for the entire tenure as estimated above.

Break-Even Point: Estimations of working results pre-suppose a definite level of production and sales and all calculations are based on that level. The minimum level of production and sales at which the unit will run on “no profit no loss” is known as break-even point and the first goal of any project would be to reach that level. The break-even point can be expressed in terms of volume of production or as a percentage of plant capacity utilization. Break-even in terms of volume of production = Total Fixed Cost/ Contribution per unit

Debt Service Coverage Ratio (DSCR): Debt Service Coverage Ratio is calculated to find out the capacity of the project servicing its debt i.e. in repayment of the term loan borrowings and interest. The DSCR is worked out in the following manner: D.S.C.R = (PAT + Depreciation + Interest on Long Term Borrowings) / (Repayments of Term Borrowings during the year + Interest on long-term borrowings) The higher D.S.C.R. would impart intrinsic strength to the project to repay its term borrowings and interest as per the schedule even if some of the projections are not fully realized. Normally a minimum D.S.C.R. of 2:1 is insisted upon by the term lending institutions and repayment is fixed on that basis.

Sensitivity Analysis: While evaluating profitability projections, the sensitivity analysis may be carried in relation to changes in the sale price and raw material costs, i.e. sale price may reduce by 5% to 10% and raw material costs may be increased by 5% to 10% and the impact of these changes on DSCR shall be analyzed. If the new DSCR, so calculated after changes, still proves that the project is viable, the financial institution may go ahead in funding the project.

Internal Rate of Return: This is an indicator of earning capacity of the project and a higher IRR indicates better prospects for the project. The present investment in the cash flow which is assumed to be negative cash flow and the return (cash inflow) are assumed to be positive cash flows. Normally bankers want that internal rate of return should be at least 18% because it depicts the strength of the project and its earning and repayment capacity at the same time. Better the IRR better rating to the project.

Environmental, Political and Economic Viability

The performance of the project is also influenced by the external factors also such as existing government policies regarding particular sector, easiness in getting the licence to operate in a particular region or state, effects of the project on the environment, tax exemptions for particular region etc. Hence while compiling the project report it is important to study the industry scenario, government policies etc and these should be covered in the project report.

Project Appraisal

Project Appraisal is a process of detailed examination of several aspects of a given project before recommending the same. The lending institution has to ensure that the investment on the proposed project will generate sufficient returns on the investments made and that loan amount disbursed for the implementation of the project will be recovered along with interest within a reasonable period of time. The various aspects of Project appraisal are:

1. Technical Appraisal
2. Commercial Appraisal or Market Appraisal (Demand of the product, supply of the product, distribution channels, pricing of the product and government policies.
3. Economic Appraisal

4. Management Appraisal (assessing the willingness of the borrower to repay the loan)
5. Financial Appraisal

Methods of the Project Financing

There are three methods in Project Financing:

1. Cost Share Financing or Low interest loan financing.
2. Debts Financing.
3. Equity Financing.

Sources for Financing Fixed Assets

The type of funds required for acquiring fixed assets have to be of longer duration and these would normally comprise of borrowed funds and own funds. There are several types of long-term loans and credit facilities available which a company may utilize to acquire the desired fixed assets. These are briefly explained as under.

1. Term Loan:-
(a) Rupee loan- Rupee loan is available from financial institutions and banks for setting up new projects as, well as for expansion, modernisation or rehabilitation of existing units. The rupee term loan can be utilised for incurring expenditure in rupees for purchase of land, building, plant and machinery, electric fittings, etc. The duration of such loan varies from 5 to 10 years including a moratorium of up to a period of 3 years. Projects costing up to Rs. 500 lakhs are eligible for refinance from all India financial institutions and are financed by the State level financial institutions in participation with commercial banks. Projects with a cost of over Rs. 500 lakhs are considered for financing by all India financial institutions. They entertain applications for foreign currency loan assistance for smaller amounts also irrespective of whether the machinery to be financed is being procured by way of balancing equipment, modernisation or as a composite part of a new project. For the convenience of entrepreneurs, the financial institutions have devised a standard application form. All projects whether in the nature of new, expansion, diversification, modernisation or rehabilitation with a capital cost upto 5 crores can be financed by the financial institution either on its own or in participation with State level financial institutions and banks.

(b) Foreign Currency term loan- Assistance in the nature of foreign currency loan is available for incurring foreign currency expenditure towards import of plant and machinery, for payment of remuneration and expenses in foreign currency to foreign technicians for obtaining technical knowhow. Foreign currency loans are sanctioned by term lending institutions and commercial banks under the various lines of credits already procured by them from the international markets. The liability of the borrower under the foreign currency loan remains in the foreign currency in which the borrowing has been made. The currency allocation is made by the lending financial institution on the basis of the available lines of credit and the time duration within which the entire line of credit has to be, fully utilised.

2. Deferred payment guarantee (DPG)
Assistance in the nature of Deferred Payment Guarantee is available for purchase of indigenous as well as imported plant and, machinery. Under this scheme guarantee is given by concerned bank/financial institutions about repayment of the principal along with interest and deferred

instalments. This is a very important type of assistance particularly useful for existing profitâ€'making companies who can acquire additional plant and machinery without much loss of time. Even the banks and financial institutions grant assistance under Deferred Payment Guarantee more easily than term loan as there is no immediate outflow of cash.

3. Soft loan
This is available under special scheme operated through all-India financial institutions. Under this scheme assistance is granted for modernization and rehabilitation of industrial units. The loans are extended at a lower rate of interest and assistance is also provided in respect of promoters' contribution, debt-equity ratio, repayment period as well as initial moratorium.

4. Supplier's line of credit
Under this scheme non-revolving line of credit is extended to the seller to be utilized within a stipulated period. Assistance is provided to manufacturers for promoting sale of their industrial equipment on deferred payment basis. While on the other hand this credit facility can be availed of by actual users for purchase of plant/equipment for replacement or modernization schemes only.

5. Buyer's credit
Under a buyer's credit arrangement, a specific long-term loan is granted by a designated lending agency in the exporter's country to the buyer in the import, country against a guarantee by an acceptable bank or financial institution. The supplier receives payment for the exports on his delivering to the lending agency the requisite documents specified in the loan agreement and the relative commercial contract. The lending agency realizes the payment from the buy (importer) in instalments as and when they fall due. Ordinarily, the supplier of his obligation reckons the period credit as the duration from the date of completion.

6. Debentures
Long - term funds can also be raised through debenture with the objective of financing new undertakings, expansion, diversification and also for augmenting the long-term resources of the company for working capital requirements. Debenture holders are long term creditors of the company. As a secured instrument, it is a promise to pay interest and repay principal at stipulated times. In the contrast to equity capital which is a variable income (dividend/ security, the debenture / notes are fixed income (interest) security).

7. Leasing
Leasing is a general contract between the owner and user of the assets over a specified period of time. The asset is purchased initially by the lessor (leasing company) and thereafter leased to the user (lessee company) which pays a specified rent at periodical intervals. The ownership of the asset lies with the lessor while the lessee only acquires possession and right to use the assets subject to the agreement. Thus, leasing is an alternative to the purchase of an asset out of own or borrowed funds. Moreover, lease finance can be arranged much faster as compared to term loans from financial institutions.

8. Public deposits
Deposits from public is a valuable source of finance particularly for well-established large companies with a huge capital base. As the amount of deposits that can he accepted by a company is restricted to 25 per cent of the paid-up share capital and free reserves, smaller companies find this source less attractive. Moreover, the period of deposits is restricted to a maximum of 3 years at a time.

Consequently, this source can provide finance only for short to medium term, which could be more useful for meeting working capital requirements. In other words, public deposits as a source of finance cannot be utilized for project financing or for buying capital goods unless the payback period is very short or the company uses it as a means of bridge finance to be replaced by a regular term loan. Before accepting deposits, a company has to comply with the requirements of section 58A of the Companies Act, 1956 and Companies (Acceptance of Deposits) Rules, 1975 that lay down the various conditions applicable in this regard.

9. Own Fund:
a. Equity: Promoters of a project have to involve themselves in the financing of the project by providing adequate equity base. From the bankers/financial institutions' point of view the level of equity proposed by the promoters is an important indicator about the seriousness and capacity of the promoters.
Moreover, the amount of equity that ought to be subscribed by the promoters will also depend upon the debt: equity norms, stock exchange regulations and the level of investment, which will be adequate to ensure control of the company.
The total equity amount may be either contributed by the promoters themselves or they may partly raise the equity from the public. So far as the promoters' stake in the equity is concerned, it may be raised from the directors, their relatives and friends. Equity may also be raised from associate companies in the group who have surplus funds available with them. Besides, equity participation may be obtained from State financial corporation/industrial development corporations.
Another important source for equity could be the foreign collaborations. Of course, the participation of foreign collaborators will depend upon the terms of collaboration agreement and the investment would be subject to approval from Government and Reserve Bank of India. Normally, the Government has been granting approvals for equity investment by foreign collaborators as per the prevailing policy. The equity participation by foreign collaborators may be by way of direct payment in foreign currency or supply of technical knowhow/ plant and machinery.
Amongst the various participants in the equity, the most important group would be the general investing public. The existence of giant corporations would impossible but for the investment by small shareholders. In fact, it would be no exaggeration to say that the real foundation of the corporate sector are the small shareholders who contribute the bulk of equity funds. The equity capital raised from the public will depend upon several factors viz. prevailing market conditions, investors' psychology, promoters track record, nature of industry, government policy, listing requirements, etc. The promoters will have to undertake an exercise to ascertain the maximum amount that may have to be raised by way of equity from the public after asking into account the investment in equity by the promoters, their associates and from various sources mentioned earlier. Besides, some equity may also be possible through private placement. Hence, only the remaining gap will have to filled by making an issue to the public.

b. Preference share: Though preference shares constitute an independent source of finance, unfortunately, over the years preference shares have lost the ground to equity and as a result today preference shares enjoy limited patronage. Due to fixed dividend, no voting rights except under certain circumstances and lack of participation in the profitability of the company, fewer shareholders are interested to invest moneys in preference shares. However, section of the investors who prefer low risk, fixed-income securities do invest in preference shares. Nevertheless, as a source of finance it is of limited import and much reliance cannot be placed on it.

c. Retained earnings: Plough back of profits or generated surplus constitutes one of the major sources of finance. However, this source is available only to existing successful companies with good internal generation. The quantum and availability of retained earnings depends upon several factors including the market conditions, dividend distribution policy of the company, profitability, Government policy, etc. Hence, retained earnings as a source plays an important role in expansion, diversification or modernization of an existing successful company. There are several companies who believe in financing growth through internal generation as this enables them to further consolidate their financial position. In fact, retained earnings play a much greater role in the financing of working capital requirements.

d. Unsecured Loans: If there is some shortfall in the mean-of-finance, the promoters/ directors can mobilize funds from their friends, relatives and well-wishers. Such loans are always unsecured i.e., the lenders cannot have any charge over the assets of the company. Banks and financial institutions stipulate the following conditions if unsecured loan is to form part of the means-of-finance.

- The promoters shall not repay the unsecured loan till the term loan persists.
- Interest if any payable on unsecured loan shall be paid only after meeting the term loan repayment committees.
-The rate of interest payable on unsecured loan shall not be higher than the rate
of interest applicable for term loans. Normally unsecured loan component is expected not to exceed 50% of the equity capital.

10. Bridge Loans: This is a temporary loan meant for tying up the capital cost of the project. The necessity for bridge finance arises in situations where finance from particular source is being delayed. However, the availability of finance from that source is certain.

11. Seed Capital: In consonance with the Government policy which encourages a new class of entrepreneurs and also intends wider dispersal of ownership and control of manufacturing units, a special scheme to supplement the resource & of an entrepreneur has been introduced by the Government. Assistance under this scheme is available in the nature of seed capital which is normally given by way of long-term interest free loan. Seed capital assistance is provided to small as well as medium scale units promoted by eligible entrepreneurs.

12. Government subsidies: Subsidies extended by the Central as well as State Government form a very important type of funds available to a company for implementing its project. Subsidies may be available in the nature of outright cash grant or long - term interest free loan. In fact, while finalising the mean of finance, Government subsidy forms an important source having a vital bearing on the implementation of many a project.

The key to any project finance is to use a right mix of debt and equity. Further, there should be a right mix of foreign currency and rupee loans. It is also essential that there should be flexibility in respect of switching from foreign currency to rupee loan and vice versa. There are a number of issues highlighted herein above which need to be considered for the purpose of financing of the project. Besides, it is important that due care is taken in drafting the documents concerning the financing of the project. The companies should adopt the project financing structures so that the objective of shareholder's wealth maximization can be achieved. As the world is heading towards a global integrated market and the failure of governments as well as the demand for private capital in infrastructure assets is increasing, project finance will continue to play an important role in both developed and developing markets.

Compliance with Different Laws & Regulations

In this context it would be pertinent to note that while initiating the process for making a public issue of equity /preference shares, the promoters will have to comply with the requirements of different laws and regulations including Securities Contracts (Regulation) Act, 1956, Companies Act, 1956 and SEBI guide-lines etc., and various rules, administrative guidelines, circulars, notifications and clarifications issued there under by the concerned authorities from time to time.