



Real Estate

in 31 jurisdictions worldwide

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Acquisition of real estate

1 Legal system

How would you explain your jurisdiction's legal system to an investor?

Indian law follows the common law system. Many common law principles have been codified. The courts structure in India consists of the Supreme Court as the apex court, high courts in the states, as well as other subordinate courts. The Supreme Court is primarily a court of appeal and has extensive appellate jurisdiction. The law declared by the Supreme Court is binding on all courts in India. The Indian judiciary is independent of the executive and legislature. The Constitution of India, which is the supreme legislation, recognises the rule of law, equality and non-discrimination. Indian courts have been dynamic in protecting and expanding the scope of the same. The principles of equity have found statutory recognition in India through various enactments and the courts in India are courts of equity as well as of law. Under the Indian legal system, a person may obtain a permanent or perpetual injunction to prevent a wrong, by establishing his or her right and the actual or threatened infringement of it by another.

An oral contract, per se, is permitted in India, but there are some enactments that require that the understanding between two parties must be in writing in certain cases. If parties have entered into a contract that is not required by law to be in writing, it is open to the parties to modify its terms by oral contract and it may be substantiated by parol evidence.

2 Recording conveyance documents

What are the legal requirements for recording conveyance documents?

Conveyance of an immoveable property is required to be effected by a duly registered written document. The applicable registration charges and the stamp duty is required to be paid in connection with the execution of the document.

Conveyance documents attract ad valorem stamp duty, which varies from state to state. Generally, the stamp duty varies from 4 to 10 per cent of the sale value. Payment of stamp duty and registration charges may be contractually provided for by the parties. Otherwise, the onus is on the purchaser.

3 Foreign investors

What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Foreign direct investment (FDI) is prohibited in the real estate sector. However, some exceptions have been carved out for FDI in real estate sector.

100 per cent FDI is permitted under the automatic route for development of townships, housing, built-up infrastructure and construction development projects, inter alia, subject to the following conditions:

- minimum area to be developed (either of the following apply where the project is a combination of serviced housing plots and construction development projects):
 - 10ha of land in case of development of serviced housing plots; or
 - 50,000m² of built up area in case of construction-development projects;
- minimum capital to be infused:
 - US\$10 million in case of a wholly owned subsidiary of the foreign investor; or
 - US\$5 million for investment in a joint venture with an Indian partner; and
- other requirements:
 - a three-year lock-in period on repatriation of original investment;
 - at least 50 per cent of the project must be completed within five years of obtaining all statutory clearances;
 - sale of undeveloped plots is not permissible;
 - foreign investor is responsible to obtain all necessary approvals; and
 - the funds must be brought into India within six months of commencement of business by the investee company.

100 per cent FDI is also permitted under automatic route, both for setting up and in established industrial parks, subject to the prescribed conditions.

Lastly, 100 per cent FDI is also permitted in setting up of Special Economic Zone (SEZ) subject to the provisions of the SEZ Act, 2005.

In a sector where FDI is permitted, the entity through which the activity is engaged in can own real estate for the purpose of the activity namely, hotels, factories, etc.

4 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues? What about return of capital?

A foreign investor may invest in real estate in India in accordance with the FDI policy. A non-Indian resident who is a citizen of India and a person of Indian origin resident outside India may acquire immoveable property in India, other than an agricultural property, plantation property or a farmhouse, provided that the payment of purchase price (if any) shall be made out of funds received in India by way of inward remittance from anywhere outside India, or designated bank accounts. A non-Indian citizen or a person of non-Indian origin is not permitted to acquire immoveable property in India. The returns on an investment made in India (unless made on a non-repatriable basis) in accordance with the FDI policy may be repatriated freely.

For foreign direct investment in the real estate sector, kindly refer to question 3.

5 Legal liability

What types of liability does an owner of real estate face? Is there a standard of strict liability and can there be liability to subsequent owners? What about tort liability?

The owner of real estate may be liable for statutory dues relating to the land, such as land revenue and property tax, even for a period prior to such person becoming the owner, as such dues attach to the land.

Indian law entails a duty of reasonable care upon the owner of a property.

Indian law recognises the strict liability standard and, in recent years, Indian courts have evolved a more stringent standard of 'absolute liability'. Accordingly, if an enterprise is engaged in an activity that is considered hazardous or inherently dangerous (such as volatile chemicals), and harm results to anyone on account of an accident in the operation of such activity, the enterprise is absolutely liable in tort, and such liability is not subject to any of the exceptions that operate regarding the tortious principle of strict liability.

6 Protection against liability

How can owners protect themselves from liability and what types of insurance can they obtain?

It is important that the representations, warranties and indemnities be drafted so as to cover the various possible situations in which liability may arise from pre-existing defects on the property. Insurance companies in India sell protection against loss or damage to the property belonging to a third party, including, loss arising as a consequence of pollution, on-site cleanup of unknown pre-existing or new conditions triggered by discovery or a third-party claim.

7 Choice of law

How is the governing law of a transaction involving properties in two jurisdictions chosen? What are the conflict of laws rules in your jurisdiction?

A transaction involving sale of an immoveable property would be governed by the provisions of the Transfer of Property Act 1882, which is a federal enactment and is applicable to most parts of India, as well as the state and local laws where the property is situated. In India, while constituent states have the power to legislate on certain matters, the operation of the statutes so framed are limited to the state legislating it. Under the principles of supremacy of legislation, the federal laws, if conflicting, prevail over the state laws.

8 Subject-matter jurisdiction

Does subject matter jurisdiction exist? Who are necessary parties? What is required for out-of-jurisdiction service? Must a party be qualified to do business in your jurisdiction to enforce remedies in your jurisdiction?

Suits relating to immoveable property are to be instituted in the courts within whose local limits the subject matter of dispute – the immoveable property – is situated.

A necessary party is considered to be a person without whom no order can be made effectively; this is opposed to a proper party who is a person in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings.

The service of summons may be made by delivering or transmitting a copy thereof by prescribed forms of mail and other approved means such as facsimile or email. The court may permit the plaintiff to effect service of such summons on such defendant. Further, if the defendant resides outside India, the summons may be sent to him

or her by prescribed forms of mail, by facsimile or by email or any other approved means.

Enforcement of a remedy by a person does not require such person to be qualified to do business in that jurisdiction.

9 Investment entities

What legal forms can investment entities take in your jurisdiction? Which entities are not required to pay tax for transactions that pass through them (pass-through entities) and what entities best shield ultimate owners from liability?

Foreign investors usually invest directly in Indian targets through countries such as Mauritius or Cyprus, which have friendly double taxation avoidance agreements (DTAAs) with India.

The legal forms of entities in India may broadly be classified as incorporated entities such as companies incorporated under the Companies Act 1956, and unincorporated concerns such as unincorporated joint ventures or sole proprietorships or partnerships. India is currently in the process of introducing an enactment that will enable partnerships to be set up with limited liability.

The foreign investment is permitted in India through the following routes:

- foreign venture capital investment (FVCI);
- portfolio investment scheme (PIS); and
- foreign direct investment scheme (FDI policy).

As mentioned earlier in question 3, FDI in certain real estate projects is permitted. While real estate is not on the negative list, but the Reserve Bank of India (RBI) has been taking a cautious approach towards FVCI investment in real estate. Under PIS, registered foreign institutional investors (FIIs) are permitted to purchase securities of Indian companies (including listed real estate companies) on recognised stock exchanges. In addition to registering as a FII, an overseas fund may also bring in investment into India as a sub account of a registered FII.

Venture capital companies (VCCs) and certain venture capital funds, are regarded as pass-through entities for tax purposes. The taxability of real estate mutual funds (mutual funds investing in shares of real estate companies – REMFs) and real estate investment trusts (REITs) is currently ambiguous. Investors investing through certain countries such as Mauritius may choose to avail benefits under the DTAA and not pay capital gains in India.

10 Foreign investors

What form of entities do foreign investors customarily use in your jurisdiction?

The most common entity used for foreign investment is a limited liability company. Certain investors prefer to invest in private limited companies to get tax benefits under their parent country's laws. Foreign investors are not permitted to invest in unincorporated entities.

11 Organisational formalities

What are the organisational formalities of creating the above entities?

What requirements does your jurisdiction impose on a foreign entity?

What are the tax consequences for a foreign investor in the use of any particular type of entity, and which type is most advantageous?

A company may be incorporated upon submission of requisite documents and forms that must be filed with the appropriate authority (Registrar of Companies) as prescribed under the Companies Act 1956. FIIs and FVCIs need to be registered with the Securities and Exchange Board of India (SEBI).

While India may not enjoy favourable DTAAs from important investor jurisdictions such as the US, it has favourable DTAAs with

countries such as Mauritius, Cyprus and Singapore and investments into India may be structured to take advantage of the same.

Currently, dividends are exempt from income tax in the hands of the shareholders. However, the company distributing the dividends is required to pay dividend distribution tax (DDT). The DDT payable by the Indian company is in addition to the corporate income tax payable by such company.

The transfer of capital assets situated in India is subject to capital gains tax. Capital gains tax may be long-term or short-term depending upon the period for which the capital asset has been held. There is no tax payable on long-term capital gains arising from transfer of securities whose purchase and sale is subject to securities transaction tax (applicable to securities traded over a recognised stock exchange).

12 Documentation

Does your jurisdiction or customs recognise a non-binding form of agreement? Is there a form of non-binding agreement before a contract? Is it customary to take the property off the market while negotiation of a contract is ongoing?

Non-binding agreements are recognised in India. The parties enter into non-binding term sheets to record the commercial understanding prior to entering into definitive agreements. The intention of the parties is considered important to ascertain the binding or non-binding nature of the agreement. Parties may choose to make certain provisions (such as confidentiality and exclusivity) of such non-binding agreements enforceable. It is not unusual for parties to agree on exclusivity periods in the term sheet (during which the property is taken off the market).

13 Contract of sale

What are typical provisions in a contract of sale?

A sale transaction usually involves execution of various documents at different stages. A preliminary document called an agreement to sell is executed to record the understanding of the parties to enter into a sale transaction, the agreed terms including restrictions on the seller's ability to deal with third parties. The purchaser is provided with an opportunity to arrange for the balance payment. The sale is concluded by the execution and registration of a duly stamped document (the sale document). The sale document records the entire understanding among the parties including the description of property, nature of rights possessed and transferred, terms of payment, antecedent flow of ownership, representations, warranties and covenants.

14 Environmental clean-up

Who takes responsibility for a future environmental clean-up? Are clauses regarding long-term environmental liability and indemnity that survive the term of a contract common? What are typical general covenants? What remedies do the seller and buyer have for breach?

Typically, land transactions happen on an as-is-where-is basis. Depending upon the nature of the land being purchased and the previous activity carried thereon, appropriate representations may be taken in relation to environmental liability. However, the ability to claim indemnity may be limited to only the period contractually agreed.

There is statutory liability of clean-up for the owner for an accident caused by a hazardous activity; however, it not clear whether the owner at the time of discovery would be considered as the owner for this purpose.

The common covenants in an agreement to sell relate to:

- procurement of necessary lender and governmental consents (if required);
- not entering into a competing transaction;

- payment of all taxes and levies that are due; and
- mutation of land records along with execution of sale deed.

There are limited covenants in a sale deed, since it is executed contemporaneous with the closing of the sale.

The risk of loss prior to closing is typically borne by the seller. Depending upon the facts, injunction, specific performance or damages may be sought for a breach.

15 Leases

What are typical representations and covenants regarding leases?

Do they cover brokerage agreements and do they survive closing? Are estoppel certificates customarily required and can estoppel certificates substitute for representations?

The typical representations and covenants of the lessors relate to:

- title, ownership and authority to lease;
- uninterrupted and peaceful possession;
- legality of construction and contemplated usage on the property;
- encumbrances, liens, third-party claims, etc;
- payment for consumables such as electricity and water;
- litigation; and
- refund of security deposit, etc.

The lessee's representations and covenants relate to:

- timely payment of rentals and security deposit;
- vacation of premises on expiry of lease term;
- restrictions on subletting, assignment, transfer, alteration in the property, etc;
- usage in accordance with the purposes envisaged in the lease; and
- non contestation of title.

The survivability of the representations is an issue of negotiation; however, it is common for representations to survive closing.

Estoppel certificates are not common in India.

16 Leases and mortgages

Is a lease generally subordinate to a mortgage pursuant to the provisions of the lease? What are the legal consequences of a lease being superior in priority to a mortgage upon foreclosure? Do lenders typically require subordination and non-disturbance agreements?

The mortgagors have a right to lease for a period not exceeding three years and such leases are binding on mortgagees, subject to certain other conditions. Except as foregoing, determination of whether a lease is subordinate to a mortgage or vice versa would be dependent on which document is prior in time. Where the lease is superior in priority to the mortgage then the lessee in the absence of anything contrary, may be entitled to enjoy the property. Lenders do not insist on subordination agreements in India.

17 Delivery of security deposits

What steps are taken to ensure delivery of security deposits to a buyer?

How common is it to get a security deposit under a lease? Do leases customarily have periodic rent resets?

While there may be holdback amounts that are put in escrow, it is not usual for the seller to provide security deposit for any representations it has made regarding the property. It is usual to see provisions for security deposit under lease agreements. Security deposits are paid simultaneously with the execution of the lease deed and may be paid by cash or by way of a bank guarantee. Rent resets after the expiry of three years are usual in long-term lease agreements. However, local laws may govern escalation of rent in certain areas.

18 Due diligence

What is the typical method of a title search and is it customary to order searches? Is there something akin to title insurance and opinion letters? Does your jurisdiction provide statutory priority for recorded instruments?

The purchaser is required to ensure reasonable care is taken to ascertain any material defects with regard to property. Under the law, there is no prescribed procedure for conducting a title search and the same is conducted by lawyers in consonance with the nature of the property and requirement of the purchaser. Generally, the process entails reviewing current and antecedent title documents, and land revenue records and records maintained by registering authority for a period of 12 to 30 years. There is no title insurance in India. Conveyance of an immoveable property may be effected only by a duly registered written document. Registration of a document is deemed public notice of the same.

19 Reviews

Is it customary to arrange an engineering or an environmental review? What are the typical requirements of such reviews? Is it customary to get representations or an indemnity? Is environmental insurance available?

Large industrial projects may require engineering or environmental review. An environmental impact assessment is required to be conducted for setting up certain projects. It is customary to obtain representations relating to compliance with applicable environmental laws. Installations handling hazardous substances must procure mandatory public liability insurance in order to provide minimum relief to any victims. Environmental insurance may also be arranged for.

20 Review of leases

Do lawyers usually review leases or are they reviewed on the business side? What are the lease issues you point out to your clients?

Lawyers are closely involved with review and negotiation of lease agreements, including drafting and negotiating of the rights, representations and warranties, indemnities, termination events and advising on issues such as compliance with local laws, stamp duties and registration charges.

Where there is no third-party maintenance agency, the property management aspects are also dealt with in the lease agreements. Furthermore, dues under a management agreement unless provided otherwise, are unsecured debts, and hence subordinate to the mortgages.

21 Other agreements

What other agreements does a lawyer customarily review?

Lawyers are usually involved from the initial stage of transaction structuring, and are then involved with documenting the commercial agreement between the parties. Lawyers review the term sheet, the preliminary agreement to sell and the sale deed. In addition to brokerage agreements and service contracts, lawyers also review agreements such as tender documents, escrow agreements, sale and lease-back contracts, joint development agreements and financing documents. Further, where the property is held by a single-purpose entity (SPE), share purchase and shareholders agreements may need to be drafted and negotiated.

22 Closing

How does a lawyer customarily prepare for a closing?

A closing checklist is drawn up, which enumerates the actions to be taken and the documents that are required to be delivered. The deliverables typically would include the title documents and other documents such as corporate or other authorisations, consents from lenders, legal opinions, tax receipts and other documents such as

share certificates (in case the SPE is bought) that may be required in terms of the transaction documents.

Financing**23 Form of lien**

What is the method of creating and perfecting liens?

The following are the most common kinds of security interests stipulated by lenders:

Mortgage of immoveable property

The charge on immoveable property may be created by a mortgage of such property. A mortgage is a transfer of an interest in the specific immoveable property for the purpose of securing the payment of loan. The two most common mortgages are:

- legal mortgage (also called English mortgage): a legal mortgage may be created by execution of a mortgage deed; and
- mortgage by deposit of title deeds (also called an equitable mortgage): an equitable mortgage may be created by the deposit of title deeds coupled with the intention to create mortgage.

Hypothecation of moveable property

Moveable property (including bank accounts) may be secured by execution of a deed of hypothecation. The possession of the property under hypothecation remains with the borrower.

The charge on the moveable property could be a floating charge or a fixed charge.

Pledge or mortgage of shares

The shares in the borrower or any other company may be pledged or mortgaged by the promoters or borrower. A pledge is created by delivery of goods coupled with the intention to create security. In case of dematerialised shares, certain filings need to be made with the depository participants and upon noting of pledge by the depository, the pledge is created.

Assignment

Security over purchase agreements or project contracts and actionable claims is commonly created by way of a security assignment.

Perfection of a mortgage may be achieved by registration under the provisions of the Registration Act 1980, and in the case of an equitable mortgage, by the act of deposit of original title deeds. Perfection in pledge is achieved by delivery of goods. Security assignment of a contract or book debt may be perfected by notice to the counterparty. A security interest created over registered intellectual property rights must be registered with the patent or other appropriate authority. The Companies Act 1956 requires every company to file particulars of certain types of charges created by the company over its assets with the Registrar of Companies. It is considered advisable that the borrower or security provider procure a no-objection certificate from the income tax authorities to ensure that the charge does not become subordinate to income tax dues.

24 Legal requirements

What would be the ramifications of a lender from another jurisdiction making a loan secured by collateral in your jurisdiction? What is the form of lien documents in your jurisdiction? What other issues would you note for your clients?

External commercial borrowing (ECB) is currently not permitted for the real estate sector. However, ECB is permitted for setting up industrial parks. There are other conditions for making an ECB that need to be complied with.

Subject to certain conditions, the borrower can create security on: immoveable property; pledges of shares of the borrowing company held by promoters, as well as in domestic associate companies of the borrower; or issuance of personal or corporate guarantees for the benefit of ECB lender, by obtaining a 'no objection' from its authorised dealer.

Lien documents

Different kinds of security documents may be required to be executed (as discussed earlier) depending upon the nature of the security interest sought to be created and the assets sought to be charged.

Mortgages

As discussed above, security interest over an immoveable property may be created by way of mortgage. In certain states in India, the stamp duty payable on assignment of loans, and underlying security, is ad valorem, while in others it has been reduced substantially or has been capped.

25 Interest

Is interest charged on a spread over LIBOR, Euribor or an equivalent? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

The ECB guidelines prescribes 'all-in-cost' ceilings linked to LIBOR for ECB borrowings. All-in-cost ceilings include rate of interest, fees and expenses in foreign currency except commitment fee, pre-payment fee and fees payable in Indian rupees. The said ceiling is prescribed by the RBI from time to time. In the domestic loan market, the loans are linked to the prime lending rates of the lending bank.

26 Enforcement

How are remedies enforced in your jurisdiction? Is one action sufficient to realise all types of collateral? What is the time frame for foreclosure and in what circumstances can a lender bring a foreclosure proceeding?

The rights upon the occurrence of an enforcement event depend upon the nature of security created and the contractual terms. Enforcement of certain common types of securities is discussed hereunder.

- **Mortgage:** a mortgage over immoveable property generally requires intervention of the court for enforcement. However, in the case of English mortgage, subject to certain conditions, the mortgagee can take enforcement action without the intervention of court.
- **Hypothecation:** if the charge is created by way of hypothecation, and where the deed of hypothecation provides for taking possession of the hypothecated assets, then the hypothecatee may take possession of the charged assets without the intervention of a court after giving a reasonable notice.
- **Pledge:** if the pledgor defaults, the pledgee may either initiate court proceedings against the pledgor to recover the debt and retain the pledged goods as security, or sell the pledged goods upon giving the pledgor a reasonable notice, without any reference to the court proceedings.

Certain categories of lenders, have rights under special statutes for enforcement of security.

Further, in certain cases repatriation of proceeds of enforcement to an offshore lender, may require prior permission of the RBI.

The time taken in enforcement proceedings varies from case to case. Special debt recovery-related laws have speeded up the enforcement process and it is possible for certain secured lenders such as banks and public financial institutions to sell the secured assets within a few months of the occurrence of an event of default. However, a dispute in a civil court could take, on an average, between three and five years.

27 Protection of collateral

What actions can a lender take to protect its collateral until it has possession of the property?

A mortgagee or hypothecatee usually has a right under the security document to have a receiver appointed for the preservation of the secured asset. Further, the lender may require that upon notice of an event of default, the lessee would pay lease rents directly to the lender or the security trustee appointed by it.

A mortgagee (who has a power of sale of the mortgaged property without intervention of the court) has a right to appoint a receiver of the income of the mortgaged property or any part thereof.

28 Recourse

Do the security documents provide for recourse to all of the assets of the borrower? Is recourse typically limited to the collateral and does that have significance in a bankruptcy filing?

Depending upon the security package, the lenders may agree to have security only on certain assets of the borrower. Nevertheless, the lenders retain an unsecured claim against the borrower.

29 Cash management systems

Is it typical to require a cash management system and do lenders typically take reserves?

Generally, lenders regulate the inflow and outflow of money through a trust and retention account mechanism (TRA) or an escrow mechanism. In such cases, the lenders stipulate, inter alia, the debt service cover that the borrower would need to maintain and the application for inflows for maintenance of the same.

30 Credit enhancements

What other types of credit enhancements are common? What about forms of guarantee?

Indemnity holdbacks are at times seen in purchase transactions. Credit enhancements, such as corporate guarantees or personal guarantees, are widely prevalent in India. Courts usually do not interfere in the invocation of bank guarantees.

31 Covenants

What are commonly used covenants in loan documents? What is the difference depending on asset classes?

Indian loan agreements have the usual covenants for financing transactions relating to, inter alia, use of facility, incurrence of other indebtedness, change of control, filing of taxes, financial ratios, information covenants, security creation, insurance and corporate reorganisation, mergers and winding up.

Generally, depending upon the nature of the security created and the asset class secured, the creditor would want appropriate covenants in the security documents, which would prevent the dilution of the value of the secured asset or create a competing interest.

32 Financial covenants

What are typical financial covenants?

The financial covenants would typically be for maintenance of certain debt service coverage ratio (DSCR), current ratios (current asset to current liabilities), total debt-gearing ratios (total outstanding liabilities or tangible net worth), security margin. Further, the borrower may also be required to maintain a minimum net worth and limit its capital expenditure in accordance with an approved plan.

Update and trends

The Indian real estate market is in a high growth curve. With a robust domestic economy, Indian real estate market has metamorphosed into an attractive investment destination. However, as a result of the global liquidity crunch, Indian real estate companies are also facing a severe shortage of resources. Indian banks are required to limit their exposure to real estate at 15 per cent of the total deposit resources. Further, banks do not give loans for acquisition of land and bank funding is available only for construction purposes.

In an effort to develop new sources of funding for the real estate sector and provide previously unavailable investment opportunities, the SEBI has proposed draft guidelines for launch of schemes by REITs. However, the draft guidelines may be some distance away from being implemented as several issues including the tax liability are yet to be resolved. More recently, SEBI announced a set of guidelines for launch of schemes by REMFs. However, no REMFs have been launched so far.

33 Bankruptcy

Briefly describe the bankruptcy system in your jurisdiction?

A company may be subject to winding up in the following ways:

- voluntary winding up;
- winding up subject to the supervision of the court; or
- winding up by the court.

A company may be wound by the court, inter alia, if the company is unable to pay its debts. Where a winding up order has been made or the official liquidator has been appointed as the provisional liquidator, no suit or legal proceeding may be commenced, or where pending, proceeded with except by leave of the court and subject to such terms as the court may impose.

A secured creditor may choose to stand outside the winding up process and realise his security independently. Alternatively, a secured creditor may choose to relinquish his security and prove its debt.

Where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator, as the case may be, is required to take into its custody or control all the property to which the company is or appears to be entitled.

34 Secured assets

What are the requirements of creation and perfection of a security interest? Is a 'control' agreement necessary to perfect a security interest and, if so, what is required?

Creation and perfection of security interest is discussed above in question 23.

35 Single-purpose entity (SPE)

Do lenders require that each borrower be an SPE? What are the requirements to create and maintain an SPE? Is there a concept of an independent director of SPEs and, if so, what is the purpose? If the independent director is in place to prevent a bankruptcy filing, has the concept been upheld?

In real estate lending transactions, it is not uncommon for banks to lend at the holding entity level. The law does not recognise a special purpose entity as a different class of companies. Where the intent is that the borrower function as an SPE, a lender may contractually require that the company engage in no other business except as expressly permitted. An Indian company may carry on such business operations that are covered within the scope of its objects, as stated in its memorandum of association. From an operational perspective, a company may be incorporated as an SPE by having a limited purpose in its objects in its memorandum of association.

Under Indian law, listed companies are required in terms of the listing agreement to have certain prescribed number of independent directors on its board for the purpose of good corporate governance. Further, the law requires that the remuneration committee of companies with a paid-up capital of 50 million rupees or more should consist of at least three non-executive independent directors. The independent directors have no special privileges to prevent a winding-up petition.

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