Real Estate

in 28 jurisdictions worldwide

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GENERAL

1 Legal system

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

The Indian legal system derives from a written constitution and a bill of rights adopted in 1950 just after independence from Britain. Although the Constitution continues the general common-law system deriving from English law, today it is a hybrid of early common-law codifications (statutes or acts, many that have been revised or amended by parliament) along with post-independence enactments overlaid with a rich tapestry of judicial decision-making that continues the common-law tradition of stare decisis, while also occasionally recognising or continuing customary and traditional law. Equity still plays an important part in the usual dispute resolution process of adversarial adjudication. The Constitution maintains a separation of powers between the state, legislature and the judiciary. The Supreme Court is the apex court of India, followed by the various high courts at the state level that also cater to union territories administered by the central government. The district courts and several tribunals and commissions are subject to the supervisory jurisdiction of the high courts.

A unique feature of the Indian constitution is that, notwithstanding the federal system of government, it provides for an integrated court system that administers both central and state laws. The Supreme Court and the high courts have constitutionally mandated (and well-exercised) writ jurisdictions and all courts are empowered to grant injunctive relief (courts have discretion to grant temporary or perpetual injunctions). A unique post-independence concept of public interest litigation (PIL) has been accepted and even encouraged, subject to some safeguards, by the Supreme Court and the high courts, mostly through exercise of the writ jurisdiction. The system also integrates administrative adjudicatory functions carried out by bureaucrats and tribunals, and these often affect real property rights. Equitable concepts such as recovery of possession, specific performance, rectification and cancellation of instruments, rescission of contracts, declarations, and injunctions are codified in the Specific Relief Act 1963. Civil courts have inherent powers to 'make such orders as may be necessary for the ends of justice' or 'to prevent abuse of the process of the court'. The Supreme Court is further constitutionally empowered to pass orders 'necessary for doing complete justice in any cause or matter pending before it'.

The right to property, previously a 'fundamental' (entrenched) right in the Constitution's bill of rights, was downgraded to a constitutionally recognised right (in article 300A) in the 1970s, but this had little effect on the continued operation of the Transfer of Property Act 1882 (TPA). The TPA is a federal law that still regulates sale, lease and other transfers of property. The act provides that a transfer of property may be made without writing in cases where a written contract is not expressly required by law (section 9), but it also requires most transfers of immoveable property to be made by registered instrument (section 54). The contents of documents cannot be proved by oral evidence and are required to be proved either by primary or secondary evidence, that is, by producing the original documents or by proving the authenticity of a copy. However, the parol evidence rule contained in sections 91 and 92 of the Indian Evidence Act 1872 is not strictly applied, following the four provisos to section 92, which serve to allow some exceptions to the rule. From a foreign investor's point of view it is relevant that foreign investment in real estate is regulated and restricted by the foreign direct investment (FDI) policy and by regulations and circulars of the Department of Industrial Policy and Promotion (DIPP), the Reserve Bank of India (RBI) and the Foreign Investment Promotion Board (FIPB). The relevant regulations are published twice a year as part of the Consolidated Foreign Direct Investment Policy.

2 Registration and recording system

Does your jurisdiction have a system for registration or recording of ownership, leasehold and security interests in real estate? Must interests be registered or recorded?

India's system of registration is based on the transfer or lease of a property. Occasionally parties register documents even when registration of such documents is not compulsory, however, if land or an interest in land has not been transferred or leased, there is nothing to compel registration of its ownership or recording of title especially where the earlier transfer has been carried out by simple handing over of possession with some title documentation that may have been technically defective. Prescriptive rights of acquisition (adverse possession) are recognised by the law of limitation under Section 25 of the Limitation Act 1963.

The Indian Registration Act 1908 requires documents relating to a transfer to be presented in the office of a sub-registrar within whose district the whole or some portion of the property relating to the document is situated. Section 17 of this Act also sets out a list of documents whose registration is compulsory and this section also covers gifts of immoveable property, non-testamentary instruments that create, declare, assign, limit or extinguish a title or interest, whether vested or contingent in immoveable property or non-testamentary instruments that acknowledge the receipt of payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right or title (in immoveable property), leases for a term exceeding one year or reserving an annual or yearly rent and non-testamentary instruments transferring or assigning a decree or order of a court or any award where such decree, order or award operates to create, declare, assign, limit or extinguish any right, title or interest, in an immoveable property. Section 17 uses the words 'documents of which registration is compulsory', but the effect of non-registration is primarily to weaken the title (not to make it non-existent). A document that is compulsorily registrable but is not registered may be used to demonstrate the (legal) character of possession and is certainly a defence against an action of trespass. An unregistered document can be treated as

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evidence of the character of possession but does not operate to create a title in rem. The document suggests the existence of a personal right (as between the seller or transferor), which may exist pursuant to an unregistered contract accompanied by the transfer of physical possession. Such an arrangement is also legally recognised under the provisions of section 53A of the Transfer of Property Act 1882 if the transfer of possession accompanies an unregistered document (as part performance), the unregistered document itself cannot be admitted as evidence in a court of law.

3 Registration and recording

What are the legal requirements for registration or recording conveyances, leases and real estate security interests?

To convey title certain municipalities levy charges in accordance with local statutes such as the New Delhi Municipal Council Act 1994 and the Mumbai Municipal Corporation Act 1888, which impose mutation charges or transfer duty. In addition to mutation of title it is necessary to pay stamp duty according to the applicable stamp duty prescribed. This duty may sometimes be charged as high as 10 per cent as a percentage of the property value or as low as 4 per cent in some states. Stamp duty is charged differently for women transferees, who are required to pay a lower stamp duty (to encourage female ownership).

Long and short-term capital gains tax is also payable to the income tax department. Service tax has been imposed for construction services whereby installments are paid to a builder. No service tax is payable if the property is fully built on the date of its transfer and has a completion certificate.

Generally or customarily the buyer is liable to pay all charges relating to the transfer itself and would also be responsible for payment of mutation charges, stamp duty and other expenses for registration or perfection of title. The law, however, (under section 80 of the Indian Registration Act 1908) does not distinguish between the buyer and the seller and only calls for payment in accordance with the law leaving this aspect to be decided by the parties by mutual agreement. The Transfer of Property Act 1882 (TPA) also does not compel one party or the other party to pay the appropriate duties or taxes, however, it outlines the obligation of a seller to disclose all material defects in the property (under section 55(1)(a) of the TPA) and his or her obligation to produce all applicable documents of title relating to the property (under section 55(1)(b) of the TPA). A seller is also under an obligation to pay all public charges, encumbrances (then existing), rent and dues such as property tax, municipal charges, electricity and water bill payments that may have accrued for the property prior to the date of sale (under section 55 (1)(g) of the TPA).

Stamp duty is reduced if the property is purchased in the name of a woman. Property taxes (which are occasionally assumed by purchasers) can be reduced if it is demonstrated that the property was vacant for a long period before the purchase (ie, vacancy remission). It is also possible to reduce the incidence of certain taxes by purchasing a property immediately after the annual taxes are charged on the assumption that the seller would have cleared the taxes just before the last date of payment (which for example is 30 September for Delhi). There is also an inducement given by the government for early payment of property taxes (which was 5 per cent in New Delhi for the financial year 2012–2013). A property purchased three years after the last registered sale is subject to the (significantly lower) long-term capital gains tax against a property sold within three years for which short-term capital gains of over 30 per cent applies. Finally, there is a benefit in purchasing a commercial property for investment purposes as it does not attract wealth tax. If a buyer owns only one residential property, the wealth tax (which is currently charged at 1 per cent of the purchase value) is waived.

4 Land records

What are the requirements for non-resident entities and individuals to own real estate in your jurisdiction? What other factors should a foreign investor take into account in considering an investment in your jurisdiction?

Non-resident entities and individuals in India are not ordinarily entitled to own real estate in India pursuant to section 6(9) of the Foreign Exchange Management Act 1999 read with the Acquisition and Transfer of Immoveable Property in India Regulations 2000 that generally forbid a person resident outside India from transferring any immoveable property in India except where special or general permission has been obtained from the Reserve Bank of India (RBI). It may also be mentioned that under regulation No. 4 of the aforementioned regulations a person of Indian origin resident outside India may be allowed to acquire some immoveable property (other than agricultural land, a farm house or plantation property) in India through funds received in India by way of inward remittance from any place outside India; or funds held in a non-resident account maintained in accordance with the provisions of the Foreign Exchange Management Act 1999 and the FEMA regulations. A person resident outside India, who has established a branch office or a place of business in India other than a liaison office, is permitted to acquire immoveable property in India, if such acquisition is 'necessary for or incidental to carry on such activity' in India, subject to compliance with all applicable laws, rules, regulations or directions for the time being in force, and subject to acquiring a declaration to the RBI in this respect within a period of 90 days from the date of such acquisition.

5 Exchange control

If a non-resident invests in a property in your jurisdiction, are there exchange control issues?

As mentioned above, a non-resident may not simply invest in immoveable property in India, the investment is governed by the Foreign Exchange Management (Acquisition and Transfer of Immoveable Property in India) Regulations 2000. Although some exceptions are made by regulations that relax the overall restriction generally for non-resident Indian citizens and persons of Indian origin, even those are regulated. A person resident outside India who has established a branch office or other place of business, excluding a liaison office, for carrying a permitted business activity in India in accordance with the relevant FEMA regulations may also acquire any immoveable property, which is necessary or incidental to carrying on such permitted activities. Acquisitions are subject to compliance with all applicable laws, rules, regulations, etc for the time being in force and the acquiring person must file a declaration in a prescribed form within 90 days from the date of acquisition. Foreign nationals who are not of Indian origin and are not permanently resident in India are not permitted to acquire immoveable property in India unless such property is acquired by way of inheritance from a person resident in India. Those foreign nationals resident in India must be in India pursuant to a long-term visa or other permanent stay documentation (such as an OCI or PIO card). Foreign nationals can, however, lease immoveable property for up to five years without permission. Conditions are also imposed with regard to the sale proceeds of immoveable properties held pursuant to permission granted for this purpose; these are available on the RBI website and place a cap on the outward remittance being not more than the price paid for the purchase in convertible foreign exchange at the time of purchase.

Pursuant to the current regulations, foreign investment is prohibited in real estate business; however, foreign investors may incorporate a company that can acquire immoveable property in India if necessary for, or incidental to, carrying on an activity in which FDI is permitted. For example, it is permissible for an overseas or foreign

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information technology company setting up a subsidiary in India to purchase office space for IT operations or administrative requirements, provided the main activity and profits are not derived from real estate business. 100 per cent FDI is permitted in:

- construction and maintenance of development projects (detailed below);
- mining and exploration of metal and non-metal ore;
- tea sector including tea plantations;
- services related to agriculture and allied sectors;
- publishing and printing of scientific and technical magazines or specialty journals and periodicals;
- greenfield airports;
- townships, build-up infrastructure;
- facilities required for the functioning of units located in industrial parks including roads, water supply and sewerage, common effluent treatment facility, telecoms networks, generation and distribution of power, air-conditioning construction, and the maintenance of vehicular bridges, toll roads and vehicular tunnels; and
- single-brand product retail trading.

Foreign direct investment in the construction sector

Construction development projects include housing, commercial premises, resorts, educational institutions, recreational facilities, city and regional level infrastructure and townships. FDI in this sector is subject to the following conditions.

Minimum area

The minimum area to be developed under each project is set as:

- a minimum land area of 10 hectares in the case of development of serviced housing plots;
- a minimum built-up area of 50,000m^2 in the case of construction development projects; and
- in the case of a combination project (ie, a project involving serviced housing plots as well as construction development projects) any one of the above two conditions must be fulfilled.

Minimum capitalisation

A foreign company can invest through a wholly owned subsidiary (incorporated under Indian law) or as a joint-venture partner in an Indian company. The foreign company is required to invest a minimum capitalisation amount of US$10 million in the case of a wholly owned subsidiary or US$5 million for joint ventures with Indian partners. The funds are required to be brought in within six months of commencement of business of the company.

Repatriation

The original investment cannot be repatriated for an initial period of three years from completion of minimum capitalisation. However, investors may be permitted to exit earlier with a prior approval of the government through the Foreign Investment Promotion Board (FIPB).

Development and infrastructure

At least 50 per cent of the project must be developed within a period of five years from the date of obtaining all statutory clearances. The investor is not permitted to sell undeveloped plots (ie, where roads, water supply, street lighting, drainage, sewerage and other conveniences, as applicable under prescribed regulations, have not been made available). The investor is required to provide this infrastructure and obtain completion certificates from the concerned local authorities before being allowed to dispose of serviced housing plots.

Compliance with applicable law

The project is required to conform to norms and standards, including land use requirements and provision of community amenities and common facilities, as laid down in the applicable building control regulations, by-laws, rules and other regulations of the state government or concerned local authorities.

Responsibility of investor to obtain approvals

The investor is responsible for obtaining all necessary approvals including those of building or layout plans, developing internal and peripheral areas and other infrastructure facilities, payment of development, external development and other charges and complying with all other requirements as prescribed under the applicable rules of the concerned state government or local authorities. The concerned state government or local authority responsible for granting approval of the building or development plans also monitors compliance of the above conditions by the developer.

Business opportunities in the sector

Under the present policy, a foreign investor is prohibited from investing in any entity, whether incorporated or not, which is engaged in or proposes to engage in the housing and real estate business in India. However, there is no restriction on foreign firms primarily involved in construction-related work engaging in business activities in the sector, either by providing services through an Indian subsidiary, or directly without making any equity investment. Thus, foreign companies can provide engineering services, architectural services, design consultancy, and so on, through a subsidiary or they can enter into service and works contracts in India.

6 Legal liability

What types of liability does an owner or tenant of, or a lender on, real estate face? Is there a standard of strict liability and can there be liability to subsequent owners and tenants including foreclosing lenders? What about tort liability?

The owner of real estate is liable to pay statutory charges such as land revenue and property tax. Ordinarily such charges are provided for in the sale deed to be the liability of the previous owner until the date of sale, that is, effective date of transfer. However, if the previous owners have not paid these charges, the new owner (or even an occupier) can be held liable for unpaid property taxes. While the owner is responsible for payment of property tax from the date of purchase of the property, some owners contractually impose such liability, or part of it, on their lessees. The owner is also liable for compliance with local/municipal and other laws that may require approvals or clearances such as fire and safety approvals, clearance from the Pollution Control Board, etc. If the owner owns a commercial property, he would be required to obtain a licence from the competent authorities for carrying out commercial activities, complying with local building by-laws on the use of the premises, obtaining an occupation certificate, etc. Owners are also liable for service tax in respect of amenities (such as air-conditioning) provided to a lessee and on the rent itself if the premises are rented for commercial or business purposes. The parties may contractually provide for the service tax to be reimbursed to the owner by the lessee.

Indian law recognises strict tortious liability. An entity engaged in a hazardous or inherently dangerous activity is subject to absolute liability in tort. The Supreme Court has held that:

> *... once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on.*

Elaborating upon the 'polluter pays' principle, the Supreme Court has further held that 'the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also of restoring the environment degradation'. Indian law does not have an Occupiers' Liability Act like that in the United Kingdom, and

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accordingly (except for nuisance or an escaping pollutant) an owner or occupier would only be liable for injury to a visitor or guest if negligence were to be proved, as it was in the case of *Klaus Mittelbachert v East India Hotels Ltd*, involving a hotel's liability to an injured guest. The owner of a property can be liable for any nuisance that may be created or perpetuated from the use of the property.

7 Protection against liability

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

Conveyance deeds for transfer of property should be drafted to contain various representations and warranties of the sellers in respect of the property. The documentation should also contain provisions whereby the previous owner is liable to indemnify the buyer for any defect in the title of the property, and an indemnity bond is commonly used for this.

Properties can be insured by owners from standard perils such as fire, lighting, explosion, earthquake, storm, flood, etc, and more recently public liability, but the latter is often considered unnecessary by owners. A lessee can obtain insurance for moveables in the premises; however, lessees cannot ordinarily insure leased premises if they do not have an insurable interest.

Public liability insurance can also be obtained for immediate relief to persons affected by an accident and claims made by members of the public who have suffered injury or damage to property.

8 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? Are contractual choice of law provisions enforceable?

Immoveable property in India can usually be transferred without infringement of Indian law to an entity based or residing in India, otherwise the arrangement would potentially be ineffective (if contrary to Indian law) under sections 28 and 29 of the Indian Contract Act 1872. Indian laws would apply to real estate and properties located in India under the lex situs principle. Properties located in two state jurisdictions covered by one master agreement would ordinarily require registration of two separate title documents. Similarly with properties located in two countries, separate sale, lease or assignment documentation would be necessary for each property to effect the agreed terms of a master agreement.

9 Jurisdiction

Which courts have subject-matter jurisdiction over real estate disputes? Which parties must be joined to a claim before it can proceed? 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?

The court within whose local limits the property is located has the jurisdiction to decide disputes arising in the context of immoveable property. It would be best if a property that spans a state boundary (within India) were to be leased or sold in two lots with the relevant transactional documents drawn up and registered separately.

Suits in respect of an immoveable property relating to recovery, partition, foreclosure, sale or redemption (in the case of a mortgage or charge), determination of any other right to or interest in immoveable property, or compensation for damage to immoveable property are required to be instituted within a court having territorial jurisdiction over the property or any part thereof. In the event that the property is situated within the jurisdiction of two different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situated. Courts may give judgment for or against one or more of the defendants found to be liable following adjudication. Courts may at any stage, either upon the application of a party or at their discretion, pass orders that the name of an improper party may be struck out and that the name of any person who ought to have been joined as a party, or whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit, is to be added as a party.

A summons may be delivered by hand (either by an officer of the court or the plaintiff) or sent by post to the office of the defendant or his agent where such defendant resides within the jurisdiction of the court. In the event that the defendant resides outside India, a summons may be sent by mail or other means as per the directions of the court. Occasionally service is effected through an Indian embassy or by publication in a foreign newspaper.

Any person, either as an individual or other legally recognised and competent juristic entity, may sue and be sued. It is not necessary for a person to be qualified to do business in India to enforce a legal remedy through the Indian courts.

10 Commercial versus residential property

How do the laws in your jurisdiction regarding real estate ownership, leasehold and financing, or the enforcement of those interests in real estate, differ between commercial and residential properties?

Properties were characterised as commercial or residential initially by reference to the urbanisation process involving land use (ie, set out in the master plan of a city). The master plan usually has demarcated zones with a detailed layout plan specifying the commercial and residential areas. Commercial areas that had existed prior to the first master plan or before the relevant regulations came into force may be allowed to continue, as for example under section 14 of the Delhi Development Act 1957 an establishment or a building may be delineated as commercial at the time of its plan approval for which the owner may be required to pay some conversion charges. As rural and agricultural land is slowly being exploited for urban use, municipalities are garnering exceptionally high amounts as the applicable conversion charges. Where an urban area is taken up for development by the government itself the process involves large swathes of land being aggregated and taken over by the government with compensation being paid for such acquisition. The land is then handed over to a development authority that auctions commercial or residential plots, shops and establishments etc, and also sells low or middle-income group housing at discounted rates subsidised by the government. These plots are already characterised as commercial or residential and are often on either a long or perpetual lease subject to conditions that can be onerous, such as restrictions on usage, transfer or occasionally terms creating reversionary rights by which the land can be reacquired by the government. Various initiatives to convert long-term or perpetually leased land to freehold have been successful in raising large amounts for the relevant municipal authorities. Land acquisition by the state is now complicated, expensive and as yet untested with a new law called the Right to Fair Compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 to come into force in early 2014 (see question 12).

11 Planning

How does your jurisdiction control or limit development, construction, or use of real estate or protect existing structures? Is there a planning process or zoning regime in place for real estate?

Development, construction or use of real estate and the protection of existing structures is achieved by appropriate local or national statutes. Municipal laws such as the Mumbai Municipal Corporation Act 1888 contain powers with the appropriate municipal authorities to define the appropriate levels of construction (such as the

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maximum height), number of staircases, construction norms etc, and most importantly the floor area ratio (FAR), which is the prime means of calculating the value of land in the relevant municipality. Multi-storey buildings can only be constructed with a high FAR after allowing for appropriate setbacks and other safety or uniformity regulations, special regulations, may be imposed for coastal areas and other specific residential colonies. New Delhi has an exceptional Lutyens Bungalow Zone (LBZ) where construction above the existing height of the main bungalow on a plot is considered the maximum permissible height for a reconstructed bungalow and in cases where the plot is vacant, the height of the main bungalow, which is the lowest in the adjoining plots, is considered the maximum permissible height. The provisions of the Ancient Monuments and Archaeological Sites and Remains Act 1958 restrict usage of such monuments and sites by the public. This Act applies to any structure, erection or monument, or any tumulus or place of interment, or any cave, rock sculpture, inscription or monolith that is of historical, archaeological or artistic interest and that has been in existence for not less than 100 years and also includes portions of any land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument. According to section 20A of the Ancient Monuments and Archaeological Sites and Remains (Amendment and Validation) Act 2010 every area, beginning at the limit of the protected area or the protected monument and extending to a distance of 100 metres in all directions, has been categorised as a protected area under the Act. Section 20C of the Act provides that any person who owns any building or structure in the protected area must make an application to the competent authorities to acquire adequate permission for carrying out any repair or renovations in those areas.

12 Compulsory purchase

Does your jurisdiction have a legal regime for compulsory purchase of real estate? Do owners, tenants and lenders receive compensation for a compulsory appropriation?

At present the Land Acquisition Act 1894 is the statute applicable in cases of compulsory acquisition of land made by the state. Similar provisions have been incorporated in the National Highways Act 1956 allowing the state to acquire land for roads and highways. Although the right to property was an entrenched fundamental right, it was shifted from article 19 to article 300-A of the Constitution making it a constitutional (but not a fundamental) right in 1978. The issue of compulsory acquisition of land remains a matter of great debate. The Right to Fair Compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013 was recently enacted to replace the Land Acquisition Act 1894 and is expected to come into force by April 2014, but much depends upon the appropriate political force to decide its fate. The new Act has been enacted with the object of offering the least disturbance to the owners of the land and other affected families so as to 'provide just and fair compensation'. The new Act seeks to ensure transparency, adequate opportunity for rehabilitation and resettlement with the buyers with the possibility of the affected persons becoming partners in the development. The new Act emphasises an overall improvement for the affected families post-acquisition in terms of raising their economic and social status. The acquisitions that currently have been kept out of the purview of regular land acquisition under the new Act by the state would continue to proceed under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act 1958, the Atomic Energy Act 1962, the Damodar Valley Corporation Act 1948, the Indian Tramways Act 1886, the Land Acquisition (Mines) Act 1885, the Metro Railways (Construction of Works) Act 1978, the National Highways Act 1956, the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act 1962, the Requisitioning and Acquisition of Immoveable Property Act 1952, the Resettlement of Displaced Persons (Land Acquisition) Act 1948, the Coal Bearing Areas Acquisition and Development Act 1957, the Electricity Act 2003 and the Railways Act 1989. However, section 105(3) of the new Act provides that the central government shall after a period of one year of the Act coming into force, make the procedure for determination of adequate compensation and uplifting of the affected families in the 2013 Act applicable for acquisitions made under the aforementioned exempted laws.

13 Forfeiture

Are there any circumstances when real estate can be forfeited to or seized by the government for illegal activities or for any other legal reason without compensation?

Although even perpetually leased land cannot be forfeited, the provisions for cancellation of a lease built into government leasehold property documents make it possible to reacquire leased property that is misused. Various municipal laws allow for seizure of property where large amounts are due to the municipality and have not been paid such as property taxes and other relevant dues. However, such powers are rarely resorted to except in rare cases such as where the owner has left India for an unusual purpose such as a war. Section 83 of the Criminal Procedure Code 1973 also provides for attachment of property in circumstances where the accused or a convict fails to appear before the appropriate court. Ordinarily such property is rarely sold on account of the payment of fines or other dues arising under the ordinary criminal laws. Properties may also be attached and sold under a judgment or decree of a civil court where the judgment debtor has failed to satisfy a court's decree under the Code of Civil Procedure 1908. It is also possible for the government to attach, seize or auction properties for non-payment of taxes. The usual mode of such recovery is treated as recovery of 'arrears of land revenue' under the Revenue Recovery Act 1890.

The provisions of sections 102 and 104 of the New Delhi Municipal Council Act 1994 (the NDMC Act) and sections 203 and 206 of the Mumbai Municipal Corporation Act, 1888 empower the appropriate authorities to issue a warrant for attachment and sale of immoveable property owned by any person who has defaulted in payment of taxes after having received notice from the council demanding payment of taxes due on his or her account after a specified period from the date of such service. Section 104(3) of the NDMC Act provides that after a warrant for attachment is issued, the defaulter shall be prohibited from further transferring or creating any charge over the property until the tax amount due with other costs of recovery is paid by him or her within a period of 15 days from the date of such attachment.

INVESTMENT VEHICLES

14 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?

A foreign company can invest through a wholly owned subsidiary (incorporated under Indian law) or as a joint-venture partner in an Indian company, or by establishing a branch office (of a foreign entity and taxed at a higher rate), a liaison or representative office (only allowed limited operations and generally not allowed to generate income) or a project office (of a foreign entity to execute projects awarded to it in India). Foreign investment may also be made through a venture capital fund and through a limited liability partnership (LLP). The restrictions mentioned above (see question 5) would have to be considered and implemented. Indirect investment is possible through portfolio investment schemes of registered foreign institutional investors that can purchase stocks of listed companies (including listed real estate companies). Taxation depends on

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the structure and the possibility of benefits deriving from reliance upon favourable double taxation relief treaties such as those with Mauritius and Singapore. Pass-through benefits are available for venture capital companies. A wholly owned subsidiary set up not to trade in real estate may, however, own or acquire property for business purposes, manufacturing, and such other purpose as necessary for or incidental to its main objectives.

15 Foreign investors

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

Foreign investors ordinarily invest through a private limited company or foreign institutional investing company. The tax benefits with respect to such companies are dependent upon the double taxation avoidance treaties executed between India and the country of origin of the foreign investor. The LLP as a means of investment is still untested, and not at present a preferred choice for business entities, especially those involving investment in the permitted construction development projects mentioned above. In January 2012 the Supreme Court of India disallowed an attempt to tax Vodafone International Holdings BV (in the case of *Vodafone International Holdings BV v Union of India and Another*) more than US$2 billion for capital gains arising from the sale of the share capital of another foreign company (one that was a non-resident tax entity in India, namely CGP Investments (Holdings) Ltd, a Cayman Islands entity) in relation to underlying Indian assets. Vodafone had thus used a foreign legal entity indirectly owning the shares of Indian subsidiaries to transfer Indian assets avoiding the incidence of capital gains tax.

16 Organisational formalities

What are the organisational formalities for 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?

Subject to the FDI restrictions discussed above, if immoveable property is to be purchased by a company in India, it must be incorporated with the relevant registrar of companies. A private limited company can be quickly set up, and once it has a bank account it can purchase a property for its business purposes. Once a company is incorporated in India, it is treated as a 'person resident in India', but such company cannot deal in real estate if it has foreign shareholding unless purchase or sale of real estate is incidental and only consequent to the company's main business.

Institutional investors and venture capital investment companies must be registered with the Securities and Exchange Board of India (SEBI). Liaison and branch offices can be set up by foreign entities by making an application to the Reserve Bank of India (RBI), whereas a project office may be set up without any approval provided that the foreign entity has secured a contract from an Indian company to execute a project in India and subject to certain other compliances. The highest aggregate investment into India is still through Mauritius and Singapore, with the United States and the United Kingdom taking third and fourth place. These countries have beneficial tax treaties with India.

A new format for reporting acquisition and sale of properties held by foreign companies and non-resident individuals has been posted in 2012 on the RBI website. In terms of the RBI Regulations, 'when a person resident outside India, who has established in India in accordance with the Foreign Exchange Management (Establishment in India of Branch Office or other Place of Business) Regulations 2000, a branch office or other place of business, excluding a liaison office, acquires any immoveable property in India in accordance with the provision of said regulation, the said person has to file with the Reserve Bank a declaration in the form IPI, not later than ninety days from the date of such acquisition'. If property is held by a foreign company that has a subsidiary in India, and if the entire business is sold, the sale of shares outside India may require reporting to the RBI and it has been common for the shares to be transacted via Mauritius, Cyprus or Singapore that are jurisdictions with favourable double taxation avoidance agreements (DTAA).

Tax efficiencies should now be structured on a case-by-case basis, depending on the property, state, purchase price, sale price and intentions with regard to repatriation of the sale proceeds, since direct investment by foreign investors in real estate has been discouraged or made difficult (with a few exceptions, such as a branch office of an airline or a bank).

ACQUISITIONS AND LEASES

17 Ownership and occupancy

Describe the various categories of legal ownership, leasehold or other occupancy interests in real estate customarily used and recognised in your jurisdiction.

Legal ownership in India follows a concept similar to that in most common law countries. It comprises a bundle of rights that range from limited licences to freehold ownership interests that are registered with the appropriate authorities. The lowest level of occupancy can be recognised by some kind of unregistered licence document such as a hotel bill or more formally recognised 'leave and licence' agreements. These are usually meant to be for 'usage' up to 11 months, but in some areas (such as Mumbai), they are used for long periods of time and are also now required to be registered with payment of stamp duty. The leave and licence agreement technically permits an owner to re-enter the premises if there is any violation or breach of terms at the end of the licence period without recourse to the courts of law to displace the occupier ('user'). The licensee is deemed to have the permissive use of the premises but not necessarily 'possession'. A better and stronger limited interest can be carved out by a registered lease for which the period can be limited to 11 months with a renewable term for the same duration, or in some cases for a longer period. The stamp duty for such agreements can be paid at the applicable rates (usually calculated as a percentage of the annual rent reserved) and the lease is then duly registered with the concerned sub-registrar's office. A registered lease is a form of conveyance. Apart from the ordinary leave and license agreements and leases that are used for limited interests in land for residential or commercial premises, the government also offers for long-term leases subject to various conditions for transferring land. Mining interests and even concessions to allottees may be coupled with the government's grant of a leasehold interest. It is not uncommon for the central or a state government to allot a particular parcel of land (granting a perpetual lease) by issuing an allotment letter and receiving some consideration in accordance with the applicable rights (often pursuant to a public auction). Subsequently, if there is an existing scheme, the government allows for conversion of leasehold to freehold by accepting further funds, under the appropriate scheme, based on notified rates and in some instances rates based on the relevant market prices in the particular region for that space. Freehold rights in land are thus the best and most marketable titles to immoveable property.

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18 Pre-sale

Is it customary in your jurisdiction to execute a form of non-binding agreement before the execution of a binding contract of sale? Will the courts in your jurisdiction enforce a non-binding agreement or will the courts confirm that a non-binding agreement is not a binding contract? Is it customary in your jurisdiction to negotiate and agree on a term sheet rather than a letter of intent? Is it customary to take the property off the market while the negotiation of a contract is ongoing?

Non-binding in-principle agreements or arrangements are used on an informal basis in various forms to record an intended transaction or a verbally agreed option open for a specified duration. However, an informal agreement that does not clearly state that it is non-binding can be misused if it is not converted into a detailed conditional letter of intent. Even a receipt, without proper language referring to a conditional sale commitment, or an in-principle arrangement intended only as a first step (possibly to ensure exclusive dealing, overcoming of a regulatory hurdle or exchange of draft documents) can and has led to prolonged litigation. Such a receipt with exchange of some consideration can result in interim injunctions from the courts to restrain sale of the property. It is recommended that all arrangements (even at the initial stage of negotiation) should be reduced to writing with an option period and opportunity for refund or partial forfeiture detailed in an agreement to sell. An arrangement involving forfeiture of a large deposit in the form of earnest money (for example, constituting 10 per cent) can be treated as a penalty (under section 74 of the Indian Contract Act 1872) and the forfeiture clause may not be fully enforceable. It is not uncommon for parties to negotiate the preliminary understanding of the terms into a letter of intent or a term sheet and then formalise the same in a definitive agreement. It is also uncommon for sellers to take the property off the market until they commit to a signed document and receive a significant deposit.

19 Contract of sale

What are typical provisions in a contract of sale?

A contract of sale in India often contains special clauses that vary from state to state. Apart from a clear identification of the property through a map annexed to the sale deed, it is customary to have detailed recitals tracing the origin of the property and the root of title. These are then followed by identification of the interest sought to be transferred and easements or other rights or duties that need to be recognised. Most sale deeds are long on title-tracing clauses and short on the actual transfer clauses, but it is recommended that appropriate title warranties and conditions be inserted in the agreement to sell even though this is still not common. Title insurance is practically unknown and the present, somewhat disorganised, property market requires careful due diligence to be undertaken before a contract of sale is executed.

A large property transaction would involve due diligence and agreed clauses tracing the root of title with consent letters from family members of the seller, or from co-directors or partners to avoid subsequent challenges. An agreement to sell must then be signed on nominal stamp paper setting out the understanding of the parties and allowing the buyer the right for further due diligence and the right to withdraw if there is a title defect (which right must also be defined). After due diligence, and usually subject to full payment, the next step would be for the parties to enter into a sale deed after paying the appropriate stamp duty and then the sale is reasonably perfected through registration of the sale deed. For a large transaction, if there is any doubt about the title, it is recommended that the proposed acquisition be advertised (without the price) in a prominent newspaper giving notice of the intended sale. A typical down payment would be 5 to 10 per cent of the purchase price. It is possible, but not common, for the deposit or down payment to be held in escrow where it involves a large property and several months to closure. The purchaser would ideally require title documents that are registered and trace the full root of title.

Title searches are done at the buyer's cost, and representations and warranties with regard to title are treated as having little value in place of due diligence. All taxes and duties are generally paid by the seller up to the date of sale and by the buyer to effect the sale and thereafter. The tax year is the same as the financial year, namely, April to March. The risk of loss or damage until closing is rarely considered or provided for, but if the property is destroyed or damaged before the final payment is made, the parties would probably rely on a force majeure clause in the agreement to sell or mutually adjust the final purchase price. It is still uncommon for any kind of insurance to be obtained to insure the premises during the period involving exchange of documents. Since possession is of particular relevance it would be recommended that at least one provision in the sale deed or agreement to sell should reflect transfer of possession thus satisfying a part-performance and implementation provision of the Transfer of Property Act (section 53A). In October 2011, the Supreme Court of India observed and clarified that 'immoveable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance' (*Suraj Lamp & Industries Pvt Ltd v State of Haryana and Another*), but the court still allowed for the 'limited extent' of section 53A to operate in respect of imperfect transfers such as agreements to sell coupled with wills and powers of attorney that avoid registration and payment of stamp duty.

20 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?

Environmental clean-ups are not yet common areas of concern in India. Again, such problems are usually discerned through a diligent examination of the land and evaluation of its usage over the past 20 to 30 years. There have been a few cases of land being used to bury waste material even resulting in public interest litigation launched by NGOs and occasionally by residents. Provisions can be inserted into a contract for an indemnity on behalf of the seller, but it is doubtful whether such an indemnity is enforceable three years after the date of sale if the seller is not the polluter, and without express wording to extend the indemnity. Environmental clean-up clauses are not common general covenants, but a representation that the seller is unaware of any environmental risks is often inserted. As explained in question 6, the 'polluter pays' principle applies and even one who has left the site of pollution and has sold the land is liable. This liability arises from interpretive orders of the Supreme Court that emerge from an assessment of the Environment (Protection) Act 1986, read in conjunction with the Hazardous Waste (Management and Handling) Rules 1987–89, and it is likely that while the occupier may be required to clean up, it would still be possible to involve the original polluter, especially if this is expressly provided for in an earlier sale deed or other agreement.

21 Lease covenants and representation

What are typical representations made by sellers of property regarding existing leases? What are typical covenants made by sellers of property concerning leases between contract date and closing date? Do they cover brokerage agreements and do they survive after property sale is completed? Are estoppel certificates from tenants customarily required as a condition to the obligation of the buyer to close under a contract of sale?

Typical representations and covenants regarding leases include:
- provisions tracing the title, references to encumbrances or litigation, delineation of the ownership rights and authority of the leasing individual or signatory;

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- covenants promising peaceful possession, compliance with applicable law (including building regulations), representations on the payment of all taxes and charges or outgoings like electricity dues, and land-use compliance confirmations. Some owners also undertake that the building is constructed safely and that there are no violations of the approved building plans;
- identification of rights granted under the lease, type of user and extent to which the premises can be used for that purpose (residential, commercial, retail, industrial, etc);
- available facilities, access, electricity load sanction, power back-up, common area repair and maintenance, responsibilities, and related charges;
- provisions setting out the rent, term and renewals with provision for rent revisions; and
- provisions for uninterrupted and peaceful possession for leases (but not necessarily in a 'leave and licence' agreement) and provisions for refund of the security deposit and what is to happen at the time of termination or expiry of the lease.

Leases are governed by the Transfer of Property Act 1882, which sets out lessor and lessee obligations. A more detailed lease prevents litigation and such leases should be properly adapted to the intended purpose and usage. All leases should be registered as required under section 17 of the Registration Act 1908. In Mumbai the concept of a 'leave and licence' agreement between licensor or owner and licensee has developed to avoid deemed transfer of possession, and this usually contains somewhat different clauses to the effect that the licensee has no exclusive right of possession. Even a 'leave and licence' agreement can be registered, and such agreements could be subject to judicial interpretation as to whether they actually amount to being leases.

At the early stages of a sale transaction, the agreement to sell would contain exclusivity clauses and provisions to ensure that the seller does not deal with third parties. Similarly, provision for forfeiture of part or the entire amount of a down payment are inserted to protect the seller from a buyer's default. Sellers rarely undertake improvement commitments just before closing, unless the sale involves a flat being sold by a builder, in which case the documentation usually comprises standard terms and favours the seller. Brokerage is usually paid by both parties to one common or two separate brokers and brokerage agreements are often based on a handshake. Brokerage agreements when executed are independently enforceable and payment is usually triggered by closure or registration of the sale or lease. It is uncommon for parties to require estoppel certificates, but detailed representations and warranties of title or certification to the effect that commercial use is permissible are commonly used across India. Estoppel certificates from tenants are not common in India.

22 Leases and real estate security instruments

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

A registered lease transferring exclusive possession to a lessee, with provisions referring to a prior mortgage, if executed without violating the terms of the mortgage or with the express consent of the mortgagor, would ordinarily not be subordinate to such a prior mortgage. A lease executed to defeat a mortgage interest or without disclosure may be subject to the nemo dat quod non habet rule (a transferor cannot transfer what he does not own or have) but eviction (especially after six months from transfer of possession) would be difficult to achieve and may take longer than the duration of the lease. Some banks require the mortgagor to seek permission before executing a lease or transferring possession and often stipulate insertion of a particular clause in the lease. The bank may also seek to collect part or all of the rent towards the mortgage.

If a lease exists prior to the mortgage and is thus superior to the mortgage, the mortgagee would only be able to step into the shoes of the owner or mortgagor upon foreclosure. In other words a pre-existing lease, especially if registered, would protect the lessee from any subsequent mortgage or even sale, especially if appropriate clauses in this regard are already set out in the lease. Requirements of lenders vary from bank to bank, but if the property is vacant, they would often require specific clauses to be inserted in any new lease.

23 Delivery of security deposits

What steps are taken to ensure delivery of tenant security deposits to a buyer? How common are security deposits under a lease? Do leases customarily have periodic rent resets or reviews?

For most property transactions, and even for large purchases, the time-honoured method is payment of an unsecured deposit to the seller (and in many cases also to a lessor), a bank guarantee for a partial or full refund may be arranged. An unsecured payment can operate as a clog on the title if there is documentation evidencing cheque payment, receipt and an agreement to sell or a receipt acknowledging the payment and the purpose. Refund of the security deposit often depends on either an honour code or on terms of the signed receipt or agreement; if it is a non-refundable deposit some buyers will claim that forfeiture is illegal being in the nature of a penalty, which would require court intervention for a refund.

In the case of a lease, security deposits equivalent to three to nine (and sometimes even more) months' rent are commonly given to cover notice for the last few months and dues relating to electricity or amenities. Leases customarily have periodic rent revision clauses and mostly provide for rent revisions after three years (two- or even one-year revisions are becoming common for commercial property).

24 Due diligence

What is the typical method of title searches and are they customary? How and to what extent may acquirers protect themselves against bad title? Discuss the priority among the various interests in the estate.

As mentioned above, full due diligence and title searches are important for any property purchase. They are also recommended for a lease that involves a large rent. Since title insurance is uncommon, a legal opinion from the seller's solicitor is often sought to protect the buyer, but this does not substitute for independent due diligence involving examination of the available original title documentation and tracing the root of title backwards until the grant of land by the state or central government. In some cases, the root of title can be traced to a period before independence (1947) to the Crown through the secretary of state on behalf of the British government. As regards protection against bad title, the conveyance deed or the lease deed (as the case may be) should include appropriate representations and warranties for any defect in the title (especially in cases where the traced title of the property does not reflect only registered instruments) along with corresponding indemnities. Title searches are carried out at the office of the local sub-registrar.

A legal opinion (although helpful as it will help to trace the root of title) does not transfer responsibility for the title onto the concerned lawyer or law firm. This is because a suit for negligent misstatement is uncommon and would be difficult to sustain; and lawsuits against lawyers also remain uncommon. India certainly provides for priority in the case of registered title documents and a transfer without registration (though often recognised in equity and to resist an inter se action in trespass), leads to complications and litigation that can take many years to determine the rights of a contesting owner or co-owner, or even an unpaid seller.

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25 Structural and environmental reviews

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

An engineering or environmental review is arranged for through consultants or in-house engineers of the developer, and most purchasers of a large property would engage a team of architects and structural engineers to review the building to determine structural stability. Representations and warranties are obtained to ensure that a pre-existing building has been properly constructed in accordance with planning approvals and has appropriate levels of anti-earthquake and fire prevention measures taken during its construction and finishing. The representations and warranties are not standard and depend on the purchaser's negotiating power – most builders simply insert one-sided terms that are now beginning to be challenged. Environmental reviews are uncommon for normal residential or commercial purchases, but an environmental impact assessment is required for medium-sized to large projects. It is necessary to ensure that the project has clearances from state agencies (such as state pollution control boards). Regulations of the Ministry of Environment and Forests (MOEF) now require impact assessment and state clearances and federal approvals for large-scale developments, townships and projects in ecologically sensitive zones. Projects resulting in destruction of forest-land or tree cover require approval of the Supreme Court-mandated Centrally Empowered Committee (CEC).

It is not customary to obtain a zoning report or legal opinion on environmental impact for ordinary property transactions in India. Conducting a legal due diligence is not a requirement for every real estate-related transaction, but is considered to be prudent for large acquisitions particularly as it enables the buyer to obtain information to be incorporated into the representations and warranties. Legal opinions are often sought to improve the prospects of a building or plot of land that is being sold or leased but, as explained above, these are not particularly useful if the title proves defective later on. Zoning reports may be useful from the point of view of purchasing or leasing of the property to ensure that such property complies with the zoning requirements.

26 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?

Many Indian companies avoid using lawyers to review business leases even for small to medium-sized commercial premises; however, most medium to large companies use either their own in-house legal departments or outside lawyers to review and possibly negotiate their leases. Typical issues that could be faced by lawyers include:

- lock-in period and termination during the lock-in period for breach by either party;
- events of material breach widely defined to cover just about anything, with heavy consequences and post-termination obligations;
- profit-sharing with minimum guarantees for retail premises but no 'low footfall' provisions;
- the terms of detailed representations, warranties and indemnity for loss/damage due to a possible title infirmity;
- lease extension procedure and percentages;
- the extent of the security deposit and how it is to be applied or refunded;
- the permitted user and assignment within the group; and
- incidence of property tax, misuse charges and so on.

Some leases have minimum guarantees coupled with revenue sharing based on retail turnover from the premises. Other issues are covered in question 21. We encourage payment of the appropriate stamp duty and that all title or lease documents be registered. Related agreements such as property management agreements are not registered and usually depend on the duration of the lease. Such agreements are independent from the main lease and include provisions for an advance and security deposit that secure the service provider.

27 Other agreements

What other agreements does a lawyer customarily review?

Lawyers usually first review a memorandum of understanding or letter of intent that may or may not be binding as the term sheet between the parties. For a sale, this is followed by an agreement to sell, usually on terms suggested by the buyer. For leases, either party will furnish a first draft lease. Clauses are negotiated carefully for a large sale or even a lease and, apart for the rent and sale price or payment plan, usually the owner of the leased property, or the buyer in a sale, drives the transaction. Leases are discussed above. For a sale, apart from representations and warranties, payment terms, indemnity clauses, future rights option clauses and clauses covering common areas are negotiated. The agreement to sell is followed by a sale deed.

Brokerage agreements are usually quite short and on standard forms. Lawyers also review escrow agreements, development agreements and financing documents. Occasionally sales are effected through sale of a special purpose vehicle (SPV), namely a company incorporated only for the purpose of purchasing a property with multiple owners. A sale then involves share transfer and shareholders' agreements, but this is likely to be difficult following the new anti-tax avoidance rules.

For government contracts, lawyers review terms of the tender and the sale is usually carried out through standard forms and tender documents that leave little scope for negotiation, but these often result in litigation initiated by unsuccessful bidders. Lawyers also review 'leave and licence' agreements, loan agreements, sublease agreements, business conducting agreements, amenities agreements, powers of attorney, banking documents and occasionally an arbitration agreement or clause (though use of arbitration for a lease or even a licence can prove problematic). For projects lawyers review development, joint venture, architecture, franchise, construction, supply, labour or services, security, consultancy and many other agreements.

28 Closing preparations

How does a lawyer customarily prepare for a closing?

The concept of closing is not common in India, but sale or lease closing is effected at registration and (usually simultaneous) payment of the balance consideration or (for a lease) the advance rent by cheque or bank draft. A closing checklist is typically prepared by the relevant lawyers and this contains actions along with the documents required for the closing of a transaction. The signatories visit the office of the local sub-registrar with documents that demonstrate payment of stamp duty and usually (for a sale) a power of attorney is also registered to make it easier for the buyer to act on behalf of the seller after he has paid the full consideration, so as to pursue amendment to the municipal records, etc. Following the 2011 Supreme Court judgment in the Suraj Lamp case (cited above), it is doubtful that a power of attorney will be commonly used to effect a transfer of a property or even to make it easier for the buyer to administer a property. Methodical procedures are followed before closing or registration for due diligence, authorisation or approvals, payments of stamp duty, complete documentation with authorisations, and so forth. If necessary a power of attorney can be employed for a sale. For a company, a board resolution authorising an officer and often a further power of attorney authorising a signatory are provided.

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29 Closing formalities

Is the closing of the transfer, leasing or financing done in person with all parties present? Is it necessary for any agency or representative of the government or specially licensed agent to be in attendance to approve or verify and confirm the transaction?

Closing is basically the process of registration at the office of the sub-registrar. It is usually carried out with all the parties present and the procedure requires them to be digitally photographed with the photographs then printed (by the concerned registry) on the registration documents. Closing can happen after full payment, or even in some cases upon handing over of a bank draft at the registration venue. Where the parties trust each other and have signed an agreement to sell, the entire consideration under the agreement to sell may be paid in accordance with its terms by cheque, wire transfer or bank draft before the parties go to the sub-registrar's office. It is possible in some instances to grant powers to another individual to carry out the necessary closing formalities on behalf of either his or her relatives or on behalf of a purchasing or selling company through execution of a power of attorney (POA) in favour of the relevant individual, but POAs have previously been misused to effect the sale of land interests (without stamp duty or registration when coupled with transfer of possession), as such are not encouraged by the courts except in the aforementioned two instances (family or relatives or company representatives).

30 Contract breach

What are the remedies for breach of a contract to sell real estate?

A contract to sell real estate in India is usually entered into either by issuance of an allotment letter or agreement to sell or even a simple receipt as an acknowledgment of some consideration (often about 10 per cent) as the initial deposit or advance payment. Specific performance can be ordered under section 10 of the Specific Relief Act 1963, but this would require the plaintiff seeking performance to demonstrate that compensation in money is not an effective alternative remedy that could afford him or her adequate relief. In the event that a contract for sale of immoveable property is not registered, it is possible for the seller to try to make reference to the provisions of section 49 of the Registration Act 1908 whereby an unregistered agreement to transfer immoveable property stands inadmissible in a court of law and is considered inoperative to convey a title on the immoveable property that it affects, but the proviso to section 49 protects such a 'contract' allowing a suit for specific performance. The breach of obligation is usually simply dealt with by the purchaser forfeiting a large deposit or by transferring possession after receipt of the greater part of the sale consideration (usually over 75 per cent). Possession is handed over subject to the payment of balance consideration that is then done before registration. It is also necessary to remark that under sections 73 and 74 of the Indian Contract Act 1872 the forfeiture of a large deposit by a prospective buyer in a falling market can be questioned and in some instances such a buyer would try and prevent a second sale from taking place until he or she has received the greater part of his or her deposit back. This may happen due to a falling market or lack of funding for the balance consideration.

31 Breach of lease terms

What remedies are available to tenants and landlords for breach of the terms of the lease? Is there a customary procedure to evict a defaulting tenant and can a tenant claim damages from a landlord? Do general contract or special real estate rules apply?

The remedy available to a licensor to evict a licensee is usually the ability to simply lock out the licensee from the licensed premises by reference to a clause in the licence that provides that the licensor has retained possession, the licensee is granted only a usage right, and the licensor can thus walk in at any time. From the tenant's point of view, it is better to have an exclusive right under a registered lease. The lessee can be evicted for breach of lease terms or upon expiry of the lease, but in such a case the lessor must approach the courts for an eviction order. This can take a long time depending on the relevant court's backlog. Provisions and the procedure for eviction after the expiry of the lease term are set out at section 106 of the Transfer of Property Act 1882. This technically requires only 15 days' notice from the last day of the tenancy month immediately occurring after expiry of the lease, but the eviction process remains cumbersome. Courts allow a few months for the response to an eviction suit, the usual adjudicatory process then effectively gives a tenant much more time than ordinary negotiations. It is customary for landlords to seek mesne profits from a tenant who had overstayed, but again the process of proving the market rent can take a long time, with the need for trial and evidence that must be tested by cross-examination. General contract rules apply if the lease is registered and some leases provide for double the rent payment if the tenant does not vacate when the lease expires, the double rent provision may be difficult to enforce through the courts as it is effectively a penalty clause, but many landlords obtain large interest-free forfeitable deposits upfront to avoid the need for a court-assisted eviction.

FINANCING

32 Secured lending

Discuss the types of real estate security instruments available to lenders in your jurisdiction.

Real estate security instruments generally involve a mortgage (defined under section 58(a) of the Transfer of Property Act 1882), an English mortgage that is discussed below and a charge on a company's assets or any of its undertakings, which can be created by registering the same under the existing Companies Act 1956 or the soon-to-be-enforced Companies Act 2013 (under section 2(16)). An English mortgage (defined under section 58(e) of the Transfer of Property Act 1882) requires a mortgagor to bind himself or herself to repay the mortgage on a certain date, and it involves a transfer of the mortgaged property absolutely to the mortgagee, with a condition that the mortgagee shall retransfer the property back to the mortgagor upon payment of the money taken against the mortgaged property.

33 Form of security

What is the method of creating and perfecting a security interest in real estate?

Various security interests are created over land and perhaps the most common one is a mortgage. The English mortgage is created by transfer to the mortgagee subject to a proviso for retransfer back to the mortgagor on payment. The English mortgage is less common than the mortgage by deposit of title deeds effected in Kolkata, Chennai and Mumbai, which often remains as an unregistered lien. Simple mortgages can also be effected without delivery of possession through a commitment to pay, and in the event of failure to pay, with provisions that enable the mortgagee to sell the mortgaged property and apply the proceeds towards the mortgage and interest. A mortgage by conditional sale is also recognised under section 58 of the Transfer of Property Act 1882. Other forms of lien include assignment. In the case of an SPV, namely a company owning only one property sought to be encumbered, the shares may be hypothecated, pledged or assigned.

It is necessary to register a mortgage under the Registration Act 1908. It is also advisable to register a charge with regard to any company assets under section 127 of the Companies Act 1956.

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34 Valuation

Are third-party real estate appraisals required by lenders for their underwriting of loans? Must appraisers have specific qualifications?

Third-party real estate appraisals are carried out by approved government valuers before a loan is underwritten by a bank or another financial institution. Although approved valuers can be fairly accurate in their assessment of the market value, the most accurate means of determining the market value is the latest (preferably within the last six weeks) registered transaction for similar land, or commercial or residential space.

35 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?

Pursuant to the external commercial borrowing (ECB) guidelines, ECB is not permitted for investment in the stock or capital market or in real estate (other than for integrated townships). ECB loans (subject to various regulatory compliances) can be raised only for permitted purposes such as import of capital goods, new projects and modernisation or expansion of existing production units (which may incidentally involve purchase of real estate). Borrowers can offer immoveable property, a pledge of their shares, personal or corporate guarantees, etc, as security, subject to compliance with RBI ECB-related guidelines. Standby letters of credit or letters of comfort are not normally permitted, but applications by SMEs are considered on the merits. Private equity funds (with foreign investment) for real estate projects are no longer uncommon.

As discussed, a security interest over an immoveable property may be created by way of mortgage. Common clauses in mortgage deeds cover interest and default with occasional provision for automatic waiver on payment of a penalty or higher interest. Prepayment provisions and provisions allowing borrower flexibility are easier to find in documentation offered by government or nationalised banks. In certain states in India, the stamp duty payable on assignment of loans and the underlying security is ad valorem (based on the value secured), while in others it has been reduced substantially or has been capped.

36 Loan interest rates

How are interest rates on commercial and high-value property loans commonly set? What rate of interest is unreasonably high in your jurisdiction and what are the consequences if a loan exceeds the reasonable rate?

Periodically revised maximum interest rates for moneylending have been proposed but not yet centrally legislated, and some banks prescribe an internally set limit (such as benchmark prime lending rate (BPLR) plus 5 per cent including penal interest). Such rates are treated as 'agreed' once imposed through a loan agreement, but an excessive rate could qualify as a penalty, especially if imposed by default, and then such clause would have to be 'read down' to a reasonable level by a court.

As per the ECB guidelines, at present interest rate limits on ECB for project financing (ie, non-recourse financing) allow interest spreads above LIBOR or US Treasury to be higher than for normal ECB. The ECB guidelines prescribe 'all-in-cost' ceilings, which include the rate of interest, fees and expenses in foreign currency (except commitment fee), prepayment fee and fees payable in rupees. The ceilings are linked to LIBOR for ECB and are currently 3 per cent above six-month LIBOR for three- to five-year loans and 5 per cent for loans over five years.

37 Loan default and enforcement

How are remedies against a debtor in default 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? Are there restrictions on the types of legal actions that may be brought by lenders?

The enforcement of remedies against a debtor in default depends upon the nature of the security interest, the asset and the terms of the contract or relevant transactional document. Non-judicial remedies can be effected when the lender is in deemed or actual possession accepted as such by the borrower. It is relatively easy to use non-judicial means for moveables that are pledged or hypothecated, but for immoveable property this is more difficult. It is commonly necessary for a mortgagee to file legal proceedings to enforce a mortgage but this situation has eased with the enactments mentioned below. A defaulting debtor may seek some time to rectify the default and obtain a waiver of the penal interest charges. Mortgagees commonly grant waivers to speed up proceedings and to arrive at court-assisted settlements that are easier to enforce than a contested lawsuit. For an English mortgage, a mortgagee can act without court intervention if a right of sale is expressly conferred upon him and the appropriate conditions have been satisfied both under the mortgage deed and under the Transfer of Property Act 1882. Special enforcement rights have been given under the Recovery of Debts Due to Banks and Financial Institutions Act (DRT) 1993, and also under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI Act) 2002. This latter act allows a lender to sell secured assets expeditiously (within a few months) while the former also assists in quick enforcement.

In contrast, most civil courts in India are much slower to enforce securities or to transfer possession, but enforcement of a bank guarantee or some other similar security is rarely interfered with (except in a plausible case alleging fraud). Special debt recovery-related laws have speeded up the enforcement process and it is possible for certain secured lenders such as banks and financial institutions to sell the secured assets within a few months of the occurrence of an event of default.

38 Loan deficiency claims

Are lenders entitled to recover a money judgment against the borrower or guarantor for any deficiency between the outstanding loan balance and the amount recovered in the foreclosure? Are there any limitations on the amount or method of calculation of the deficiency?

Lenders are entitled to seek a money judgment against the borrower or a guarantor for any deficiency between the outstanding loan balance calculated on the basis of the applied and agreed interest rate and the amount recovered in the foreclosure, since the contract for loan of money is an independent contract from the security interest created to protect the lender. The only applicable limitation on the amount or the method of calculation of the deficiency are the usual regulations that apply with regard to loans under the appropriate financial statutes and regulations imposed either pursuant to provisions contained in the Banking Regulation Act 1949 or the Reserve Bank of India guidelines.

39 Protection of collateral

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

Indian courts are quick to grant relief in the form of injunctions or restraining orders to prevent sale of a property that is subject to a dispute, or which is sought to be realised as collateral under an appropriate financial agreement. Such grants by the court would protect the interests of the lender until a decree is passed. In certain circumstances, the court may appoint a receiver to hold a property,

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Update and trends

The property market in India has not seen the usual frenetic activity in 2013 as it did earlier, but most property investments have continued to yield higher-than-inflation returns on investment, showing between 12 to 25 per cent gains, yet this has been described as a 'sluggish market'. Builders have heavy inventories and new developments are being cautiously pursued with a focus on the upcoming tier-II cities. The trend towards safer title transfers and more balanced builder-buyer agreements is also responsible for cautious investor sentiment, and builders are notoriously obstinate. As India progresses towards digital land-registry traceable titles over paper-trail due diligence, Parliament has been debating a new law for the registration of documents relating to the transfer of immoveable property, insisting on registration of even short-term leases and recording the old mortgage by deposit of title deeds as compulsorily registerable 'transfers'. Even the flexible power-of-attorney (criticised as a means of transfer by the courts) will be compulsorily registerable now. Apart from this, the recently enacted Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act 2013 is working towards overthrowing the old land acquisition system and imposes a (generally better) system of determining market value while also making provision for jobs, subsistence allowance, housing, transportation, health centres, roads etc, and even a social impact assessment in consultation with municipal or other appropriate authorities. The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act has been enacted prior to the 2014 general elections, but its implementation and much more will depend on the outcome of the election and the new government's land-related policies.

especially if it might deteriorate and if the borrower is not capable of looking after it. Such orders can cover collection of rent or any other income from the property during the period of dispute until sale is permitted. The court's jurisdiction is relevant if the lender is not in possession, or if the lender cannot assert possessory and exclusionary rights. Courts occasionally assist the borrower by granting injunctions if there is a clear intention to pay and only some further time is sought for payment.

40 Recourse

May 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 or insolvency filing? Is personal recourse to guarantors limited to actions such as bankruptcy filing, sale of the mortgaged or hypothecated property or additional financing encumbering the mortgaged or hypothecated property or ownership interests in the borrower?

Depending on the nature of the security document, recourse may be had to all the assets of the borrower, unless the security documents limit the recourse to the assets on which the lien is created. If the loan agreement is restricted to the relevant asset, then only that asset may be used as security; however, after obtaining a money decree in favour of the lender, other assets can be brought into the execution proceedings and income can be garnished or immoveable property attached to satisfy the decree. Sometimes the borrower may be restrained from selling another asset if there is a risk of his acting to defeat the interests of the plaintiff in a pending suit. Although recourse in most cases is limited to the assets on which a lien is created, if a personal guarantee has been executed, the personal property of the guarantor can also be attached and brought to sale. Following default, a lender can have recourse against the guarantor.

41 Cash management and reserves

Is it typical to require cash management system and do lenders typically take reserves? For what purposes are reserves usually required?

A cash management system is occasionally adopted for regular dealings between lenders and borrowers, with different mechanisms adopted to protect the lender and to occasionally maintain a minimum reserve that can be appropriated for a particular project or property with specified debt-service cover built into the arrangement.

42 Credit enhancements

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

Credit enhancements do not ordinarily figure in the usual course of dealings for sale of property in India, since the primary method of controlling a sale is documentation that effectively encumbers the seller from dealing with third parties and possession of that documentation which the seller retains until he is paid in order to prevent the buyer from defaulting (until full payment is made or guarantees provided). Bolstering of a credit rating by creating senior priorities and hence credit enhancement is not a recognised practice and even a segregation of funds (as in *Barclays Bank v Quistclose Investments*, 1970 AC 567) is not undertaken to achieve a higher rating, implied purpose trusts are not recognised. Corporate guarantees are often simply used to show a better rating. Recourse carve-back guarantees are not known as such, but it is not uncommon for a private company to be required to furnish similar protection through a director's personal guarantee. Personal guarantees are enforceable against the personal assets of a guarantor, and a court may occasionally (and very quickly) restrain sale of specific personal assets to protect the interests of the lender. India still follows the old-school commercial real estate loan structuring to provide the lender with a first lien mortgage secured by real property, and a personal guarantee from a principal of the borrower, or its creditworthy affiliate, from whom the lender could seek full repayment in the event of a default.

43 Loan covenants

What covenants are commonly required by the lender in loan documents? What is the difference depending on asset classes?

Apart from the usual covenants contained in loan documents, it is common to separate the concerned assets from the pool and, in the case of a company, to have a charge registered under the Companies Act 1956 (this will soon be the new Companies Act 2013). Typically some of the important covenants of the borrower are:

- to repay the loan within a specified time as per the loan document;
- to pay interest in case of default and sometimes at a floating rate;
- maintain insurances on and in relation to its business and assets and properties with an insurance company; and
- not to create or permit to subsist any encumbrance, mortgage or charge over all or any of the present or future properties, assets or revenues other than the already existing charges in favour of other financial institutions and banks without the prior written consent of the lender.

Clauses covering indemnities to protect the lender from property tax and other levies are also common. A variety of boilerplate covenants are used by banks for regular loan documentation, but these can be varied subject to policy guidelines if the loan amount is large, and sometimes depending upon the nature of the project. Force majeure is usually excluded as a ground for non-payment, but in practice banks generally vary the covenants and timelines on account of extenuating circumstances.

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44 Financial covenants

What are typical financial covenants required by lenders?

Typical financial covenants require reporting of all changes in the use, rent or other aspects affecting the value of charged property; lenders also require maintenance of a specified debt-service coverage ratio (DSCR), asset-to-liability ratio, a minimum standard of tangible net worth and sometimes security margin based on property value. Borrowers may also be required to conform to a specific initial business plan, or seek lender approval for amendment to the business plan and some lenders seek or require board representation.

45 Bankruptcy and insolvency

Briefly describe the bankruptcy and insolvency system in your jurisdiction.

A company can be wound up if it is unable to pay its debts or if it becomes 'sick' and its net worth exceeds the accumulated losses following a determination by the relevant court or tribunal. Once a winding-up order has been passed and the official liquidator is appointed to oversee sale and consolidation of company assets, all suits or other civil proceedings cannot proceed except with the leave of the court on such terms as the relevant high court may impose. It is the duty of the official liquidator to take into custody or control all the property to which a company is entitled and then to distribute the proceeds of the sale. The liquidator can and is required to collect all rents due and payable to the company facing a winding up. A voluntary winding-up or bankruptcy involves the passage of a winding-up resolution passed by the company under sections 425(1)(b) and 433(a) of the Companies Act 1956. Once a company proceeds towards a voluntary winding-up, the court would consider whether a winding-up order is to be passed; once a winding-up order has been passed, no suit or other legal proceedings can be commenced or proceeded with, except with leave of the court.

46 Secured assets

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

A security interest in moveable property can only be exercised through a clear and identified execution process by which the moveable property (even property not in the possession of the lender) is isolated either in the stores of the borrower or in some other warehouse or location. A floating charge can be registered under section 127 of the Companies Act 1956 and the same is now required to be registered under section 77(1) of the Companies Act 2013 (soon to be enforced). A control agreement is necessary to perfect a security interest if the lender does not have possession. For example, with regard to cars an endorsement is made on the registration documents, but for stock in trade it would be necessary to identify the relevant stock, its location, a usual minimum (stock) and other factors that make it sufficient security to cover the amount that is advanced by the lender.

47 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 or insolvency filing, has the concept been upheld?

While companies may be incorporated as SPEs in India, there is no legal requirement to create an SPE or SPV. It can be beneficial for tax purposes and to facilitate the sale of some assets to sell the shares of a property holding company. There is no requirement for borrowers to be an SPE or SPV, and banks prefer to lend funds at the level of the company that either holds the relevant asset or all the shares of the SPE or SPV.

Occasionally lenders can be restricted by covenants in the loan documentation from engaging in business other than the key business mentioned in the original company incorporation documentation or even in the loan document. Independent directors on the board of an SPV are uncommon, but they are often engaged at the level of the borrowing (main) company, especially if it is a listed company.

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