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In order to engage with our readers and simplify the legal complexities of the infrastructure sector, EPC World has partnered with Rajani Associates, a full-service law firm for a series of legal Q&As. Through this Legal Q&A column, **SHISHAM PRIYADARSHINI**, Partner, Rajani Associates and **AMISH SHROFF**, Principal Associate, Rajani Associates, will endeavour to address the queries and challenges faced by our readers.

Are there any conditions to be fulfilled by the transferee to obtain such mining lease which is granted otherwise than through auction?

Yes, there are certain conditions to be fulfilled by the transferee as provided under the Minerals (Transfer of Mining Lease Granted Otherwise than through Auction for Captive Purposes) Rules 2016. Such conditions include: (i) all consents, approvals, permits, no objections obtained by the transferor shall be transferred to the transferee in entirety; (ii) acceptance of all the conditions and liabilities under any law for the time being in force which the transferor was subjected to; (iii) use of entire quantity of mineral including rejects or tailings or dumps extracted from the mines exclusively for captive purposes; (iv) no sale or

export of the remaining or unused quantity of such extracts; and (v) from the date of such transfer, adherence to all the provisions of the MMDR Act and rules made.

Are there any payment obligations on the transferee?

Yes, there are payment obligations on the transferee in the form of (i) payment of 80% royalty; (ii) payment of dead rent; (iii) upfront payment of an amount to 0.50% of the value of estimated resources; (iv) performance security in the form of bank guarantee as a security deposit adjusted every 5 years.

In the infrastructure sector, what are the forms in which business can be conducted by a foreign entity in India?

Any foreign entity can set-up a business in India by remitting funds to India. Receipt of any monies in India whether in the form of debt or equity participation is governed by the exchange control laws of India. While the advancement of debt is considered as external commercial borrowings (ECBs), the participation of equity is considered as foreign direct investment (FDI), and both these modes of advancement of monies by a person resident outside India to a person resident in India, are governed by separate regulations, namely the ECB Guidelines, and FDI Policy, respectively.

Generally, a foreign company (person resident outside India) may directly undertake business activity in India by setting up liaison office,

project office, branch office and incorporating a company, either a wholly owned subsidiary (WOS) or a joint venture (JV). The other indirect manner may be by appointing agents, distributors, franchisees and such other persons in India, which are contractual in nature.

Currently, the Government of India allows 100% FDI under the automatic route in the infrastructure sector. With the objective to provide more funding options to the company in this sector, the Government has also relaxed ECB norms, whereby, the RBI now permits the infrastructure companies to raise ECB with a minimum maturity of five years and with an individual limit of USD 750 million for borrowing under the automatic route.

What is the One Time Fund Infusion Scheme?

The Cabinet Committee on Economic Affairs (CCEA) has, with an objective to revive languishing national highway (NH) projects and to speed up construction in the sector, approved the one time fund infusion scheme. All such projects where at least fifty percent of the physical construction is complete till November 1, 2014 will be eligible for this one-time financial assistance.

NHAI will provide financial assistance to such projects from the corpus earmarked for this purpose after determining the eligibility of relevant project. The financial assistance by way of bridge loan shall be provided after ascertaining the extent of bridge fund required to complete the project at bank rate plus 2%. For projects under such scheme the NHAI shall have first charge on the revenue generated from such project under such scheme for which the senior lender, concessionaire and the authority shall enter into a tripartite agreement.

In order to avail the benefit of the scheme, the concessionaire is required

to approach NHAI with an application clearly stating the financing plan required for completion of construction of the project and also justifying the infusion of funds.

This decision of extending financial assistance will induce revival of the highway projects in the country and improve the source of generation of revenue for the project participants.

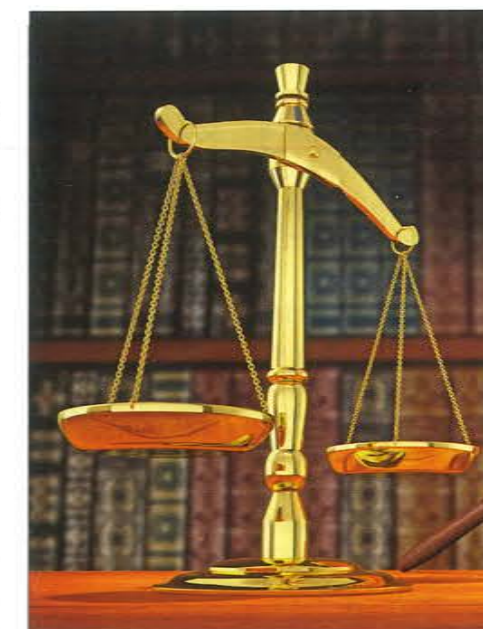
What measures have been taken by the RBI in the past to deal with the issue of stressed assets of the borrower?

The RBI, in the year 2001 introduced corporate debt restructuring (CDR) mechanism to bail out the debt-laden companies and to alleviate the adverse situation of the lenders. In December 2014, the RBI came out with 5/25 scheme where banks were allowed to extend the maturity of loans given to infrastructure companies for up to 25 years; this scheme was initially for new projects but was later extended to the existing projects. Later, in the year 2015, the strategic debt restructuring (SDR) scheme was introduced to address the issue of rising bad debt in the banking system followed by the current S4A.

What are the challenges that may be encountered under S4A?

While there are number of projects which could benefit from such a scheme, the scope of the scheme is very limited. Considering that the scheme only covers the projects which have commenced commercial operations and not those projects under construction, even those projects which have not been able to achieve commercial operations due to lack of essential clearances will not be able to derive any benefits from the new scheme.

There is a requirement on the stressed companies to service half their debt (the sustainable part of the debt)



which condition not many companies will be able to fulfil with their current cash flows.

Although the scheme makes provisions to provide upside to the lender, the value realization for the banks upon conversion into equity may be far below the market value, considering the financial condition of the stressed company. Also, the banks may be more interested in recovering their dues rather than controlling the management of the company with the increased stake in the company, hence, in what way the upside will help the banks, may well be debated.

Another concern could be the high level of equity dilution of a controlling partner of a company that may result from a scheme of this nature. This could be negative for shareholders, potential investors and may also reduce the incentive for promoters to bail out the company.

Moreover, considering that the guidelines do not allow banks to change the terms and conditions of the loan, the same would mean that not too much support can be extended by the banks to the sustainable part of the debt.

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