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Passage To India: Chadbourne Turns Its Energy To The Indian Market

The Editor interviews Rohit Chaudhry, Partner at Chadbourne & Parke LLP, who focuses on energy and project finance transactions, project restructurings as well as on sales and acquisitions of energy and independent power projects.

Editor: Please describe your education in India at Delhi University and later as part of the Faculty of Law at Delhi University.

Chaudhry: I grew up in New Delhi, India where I attended high school and college. After that I attended Delhi University Law School. During law school I thought I'd be a litigator but became fascinated with corporate law upon joining Chadbourne & Parke.

Editor: What was your reason to come to the U.S. to study for a law degree at Harvard Law School?

Chaudhry: This was not a difficult decision since Harvard Law School is a premier institution. What made my path easier was the receipt of a scholarship from the Inlaks Foundation which sealed my decision to come to Harvard.

Editor: What differences in legal education did you experience at Harvard Law School from what you had experienced at Delhi University?

Chaudhry: Both the Indian and the U.S. legal systems are based on British common law, so the differences were not dramatic. Harvard Law School is more rigorous and intellectually challenging than Delhi University. There's a greater emphasis on the Socratic method of teaching at Harvard Law School than at Delhi University, which makes the style of legal education more

interesting and more interactive. Harvard teaches you not just to learn the law but actually to think about the law.

Editor: Not only are you admitted to practice in India and New York, but also in England and Wales and the District of Columbia. Do these admissions assist you in an international practice?

Chaudhry: They are very helpful in my practice. Almost half my work is international deal work, and most of these deals involve multiple jurisdictions. For instance, right now I'm working on projects in Russia, the Ukraine, India and Argentina. The projects in Russia and the Ukraine have aspects governed by English law, Cypriot law, Guernsey law and the local law where the project is located. Aspects of the project in India are governed by English law, Indian law and Singapore law. Being admitted both in England and in New York and, for Indian deals, being admitted in India, is a real asset. Having this background helps not only when we are pitching for deals to demonstrate our expertise in different jurisdictions but, even more so, when we are actually doing the deal. Being admitted in these different jurisdictions makes one more adept at spotting issues than others who are not familiar with local law.

Editor: You have been heavily engaged in project finance – ranging from two power projects in New Jersey to major financings in Latin America and the Indian sub-continent. What underlying principles are common to all these projects?



Rohit
Chaudhry

Chaudhry: Each deal is unique to some extent but all of them have certain common underlying features. All of these deals were done on a non-recourse basis, i.e., lenders were lending hundreds of millions (or billions) of dollars to these projects without having recourse to any credit-worthy entity for repayment. The lenders were simply relying on a special purpose entity that owns the project to generate a revenue stream to repay debt once the projects are operational. In order for these types of financings to be successful it is important to consider all the possible risks that could jeopardize the revenue stream and then allocate these risks to the entity that is best suited to manage them. This involves allocation of risks such as construction risk, operational risk, political risk (especially in developing countries), credit risk, regulatory risk, etc. Lawyers play a key role in analyzing and mitigating these risks and ensuring that the transaction documents deals are structured in a way that makes these projects financeable. These are the common features that apply across all of the deals mentioned above.

Editor: You also represented the developer on the financing of a 235-megawatt GVK power project in India, one of the “fast track” projects. What types of governmental approvals were required for the “fast track” projects?

Chaudhry: The idea of “fast track” projects came about when the Indian economy was first liberalized in 1991. While the Indian government was heavily promoting investment in power projects, one major hurdle to financing the projects was that none of the utilities that were the off-takers of these projects were creditworthy entities. To overcome this problem the government offered state government guarantees for the off-tak-

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ers' obligations to ensure that the revenue stream would be available. But even the states were not considered creditworthy enough to support large financings. So the Indian government went the extra step of offering its own guarantees. The idea was that once these guarantees were in place they would help the project move on a "fast track." The irony was that not even the Indian government guarantee was enough to speed up the implementation of these projects – only two or three of the eight "fast track" projects reached closing.

Editor: When drafting documents for a project in either India or Bangladesh, where do you provide that any arbitration dispute should be handled and under the laws of what country?

Chaudhry: Dispute resolution is a huge issue in doing projects in most developing countries, certainly in India. The way this issue has been addressed has actually changed over the years. When these projects were done in the '90s, the standard way to address this issue was to provide for either ICC or UNCITRAL arbitration in London governed by the laws of England. Much time was spent analyzing arbitration provisions to make sure that they were enforceable. One test for these arbitration provisions was the Dabhol workout. Dabhol was a large 2,000-megawatt power project developed by Enron in India – the largest foreign direct investment in India at the time. This project closed in the mid '90s and then ran into all sorts of problems in the late '90s. It was in the Dabhol workout that these arbitration clauses were tested. The project company commenced arbitration in England in accordance with the arbitration provision, but then the counter parties to the project documents obtained injunctions from Indian courts that prevented the arbitration from proceeding in England. The matter didn't really get fully resolved because the workout was settled in a different manner, but it showed the vulnerability of some of these arbitration provisions in practice. There has been recent case law by the Supreme Court of India which mandates that two Indian entities (e.g., a special public entity formed for a project financing and an offtaker) may not elect foreign arbitration. Nowadays most of the deals that are being done in India are being done by Indian developers who are more accustomed to the risk of Indian dispute resolution, unlike the foreign developers of the '90s. Consequently, Indian dispute resolution is becoming more common in project documents.

Editor: In most project financings outside

the U.S. and Western Europe, do you generally insert an arbitration clause that directs the parties to the courts of one of the established venues – London, New York, Singapore – for final settlement?

Chaudhry: In the '90s when these deals were being done that was certainly the case. People are still trying to attempt to do this nowadays in financing documents at a minimum. But if both parties that are involved are Indian entities, recent case law has made it more complicated for them to agree to international arbitration. In contracts that do provide for international arbitration, New York, London or at times Singapore are the more popular venues for arbitration.

Editor: How is the market for corporate and project finance deals in India different today from what it was in the early '90s when the Indian market first opened up?

Chaudhry: It's dramatically different. For one, it is a much larger market now. In the '90s the market for international investment was really limited to infrastructure and project finance transactions; now the market is much larger and more mature. Today the sectors that are active in India are private equity, capital markets transactions, real estate, and M&A. As Indian companies are becoming larger and more confident, they are seeking to acquire companies and assets outside of India, causing a huge spurt in outbound M&A activity from India. In terms of the core sectors that were active in the '90s – infrastructure and project finance – the market has evolved substantially. One key development is that most of the developers that are doing these deals tend to be Asian, either Indian or from the region, who have a different risk appetite than U.S. and European companies that formerly did these deals. Another new aspect of these transactions is the role that Indian institutions play in these financings. Indian banks are flush with cash, have a lot of liquidity (or at least had until the recent financial crisis) and are leading the financing of many of these transactions.

Editor: What was unique about the \$4.3 billion Mundra ultra mega power project financing on which you recently worked?

Chaudhry: Mundra was the first of the many ultra mega power projects that have been announced by the Government of India. This is the new initiative launched by the Government of India in response to the failed "fast track" power projects that were launched in the '90s. The government is

seeking to have developers bid competitively for massive coal-fired power projects in the 4,000 megawatt range, which is staggering in scale compared to the size of power projects elsewhere in the world. Mundra, which recently closed, is the single largest foreign direct investment in India, the largest limited recourse financing ever done in India.

Editor: Who is the developer?

Chaudhry: The developer is an Indian developer, Tata Power, which is one of the leading developers in the world. Because Mundra was such a massive project there were a whole range of risks that needed to be addressed – construction risks, fuel procurement and transportation risk, and other risks.

Editor: What financing institutions were in the transaction?

Chaudhry: The lending consortium was extremely varied in this transaction. Roughly half of the total financing was provided by Indian banks led by the State Bank of India. The dollar financing component was split among multilateral institutions such as International Finance Corporation, part of the World Bank, Asian Development Bank and export credit agencies like the Korean Export Import Bank and Korea Export Insurance Corporation. As a result of the varied interests of the different lenders, there were extremely complicated intercreditor discussions among the lenders.

Editor: Were there other law firms besides Chadbourne involved?

Chaudhry: Chadbourne was the only international law firm involved. The other law firms were Indian firms.

Editor: How is the recent turmoil in the credit markets likely to impact transactions in India?

Chaudhry: The turmoil in the international credit markets has had an impact on India but is by no means as severe as in the U.S. and in Europe. The liquidity situation of Indian banks is not as severe as international banks. For the most part Indian banks are still lending. However, the key issue for transactions in India is going to be whether international banks will lend money for Indian projects. There are some large Indian projects that are seeking financing and it'll be interesting to see if they are able to raise money in this market.