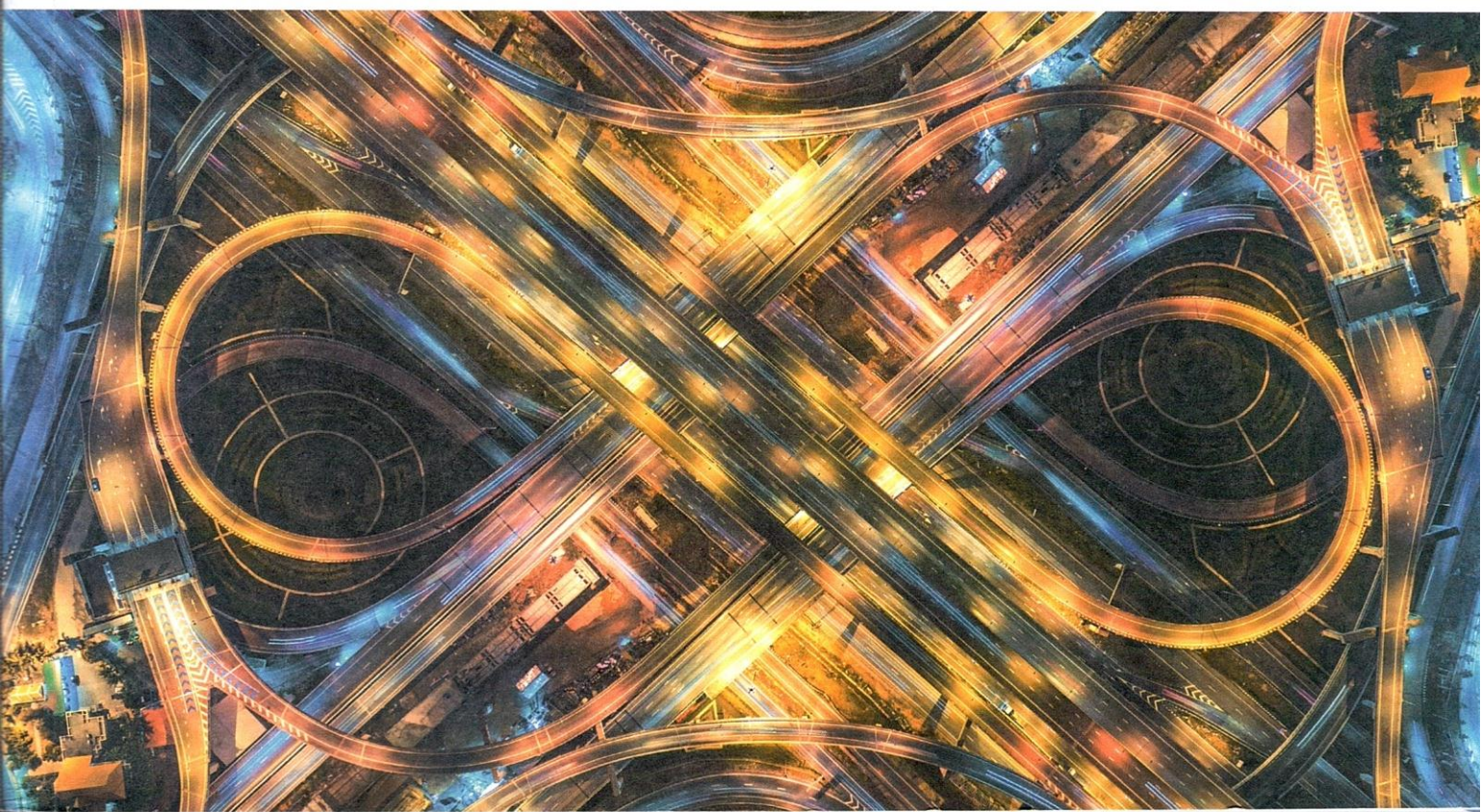




HERBERT  
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# GUIDE TO RESTRUCTURING, TURNAROUND AND INSOLVENCY IN ASIA PACIFIC

OCTOBER 2018



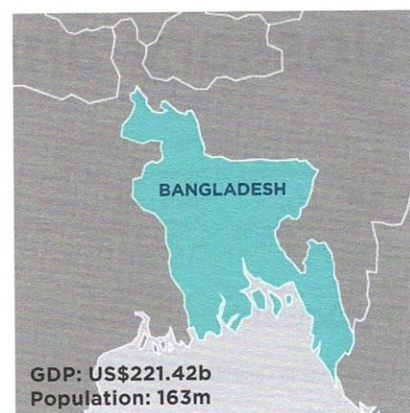


# Bangladesh

Dr. Kamal Hossain and Associates

The effectiveness of Bangladesh's insolvency and restructuring laws is often impacted by the time-consuming nature of litigation in Bangladesh.'

**DR. SHARIF BHUIYAN, DR. KAMAL HOSSAIN AND ASSOCIATES**



## Overview of Bangladeshi procedures

NAME	TYPE	CONTROL	MORATORIUM	INITIATION
<b>Compositions or schemes of arrangement under the Bankruptcy Act</b>	Reorganisation	Generally external administration	On court application, narrow	Company
<b>Reorganisations under the Bankruptcy Act</b>	Reorganisation	Generally external administration	On court application, narrow	Company
<b>Scheme of compromise or arrangement under the Companies Act</b>	Reorganisation	Debtor in possession	On court application, narrow	Company, creditor, shareholder, liquidator (in the case of a company being wound up).
<b>Winding up by the Court</b>	Liquidation	External administration	On court application, narrow	Company, creditor



World Bank  
key insolvency  
indicators

Recovery Rate  
(cents on dollar)

28.3

Time  
(years)

4

Strength of insolvency  
framework (0-16)

4



Cross-border  
insolvency

UNCITRAL  
Model Law

—

JIN  
Guidelines

—



### Key Legislation

*Bankruptcy Act, 1997*

*Companies Act, 1994*



Need to know

- Creditor enforcement actions can be lengthy
- No corporate receivership regime
- Significant court involvement in the various insolvency processes



Overview

There are various liquidation and reorganisation procedures that are available under Bangladeshi law to companies and their creditors. These procedures are governed by the Companies Act, 1994 (“**Companies Act**”) and the Bankruptcy Act, 1997 (“**Bankruptcy Act**”). The Bankruptcy Act applies to both companies and individual persons.

The Bankruptcy Act repealed the Insolvency (Dacca) Act, 1909 and the Insolvency Act, 1920 and uses the expression ‘bankruptcy’ instead of ‘insolvency’. The Companies Act repealed the Companies Act, 1913.

The corporate reorganisation and rescue procedures available under the Companies Act include ‘compromise’ or ‘arrangement’. The procedures available under the Bankruptcy Act include ‘compositions’, ‘schemes of arrangement’ and ‘reorganisations’.

As of the date of this publication, there are no reforms to Bangladesh’s insolvency, restructuring or security laws, which are currently under way.

Corporate reorganisation procedures

1. What are the main corporate reorganisation or rescue procedures?

The corporate reorganisation or rescue procedures available in Bangladesh are: (i) ‘schemes of arrangement’ and ‘reorganisations’ under the Bankruptcy Act; and (ii) ‘compromises’ or ‘arrangements’ under the Companies Act.

Overall, the corporate liquidation procedures are more commonly used in Bangladesh than the corporate reorganisation or rescue procedures.

Composition, arrangement and reorganisation under the Bankruptcy Act

Overview

An application may be made for a reorganisation of a company’s debts at any time, whether before or after an adjudication order of insolvency is made by the Bankruptcy Court.

An ‘adjudication order’ is an order that may be made by the Bankruptcy Court as part of the bankruptcy procedure set out under the Bankruptcy Act declaring the company to be bankrupt. The adjudication order may be made on the application of either the company or its creditors. A creditor may only file an application for an adjudication order (a “**Plaint**”) where (among other things) one or more creditors has a valid and matured debt (in aggregate) for an amount of at least Tk 500,000 (approx. US\$6,000). A company may not file a **Plaint** unless it specifically states in the application that it is unable to pay its debts and there is a debt outstanding of at least Tk 20,000 (approx. US\$240). If the Bankruptcy court makes an order of adjudication for insolvency, the court appoints a ‘Receiver’ from the approved list of receivers maintained by the Government. Upon appointment, the Receiver is vested with all of the property of the company, and is granted with wide powers including to carry on the business of the company so far

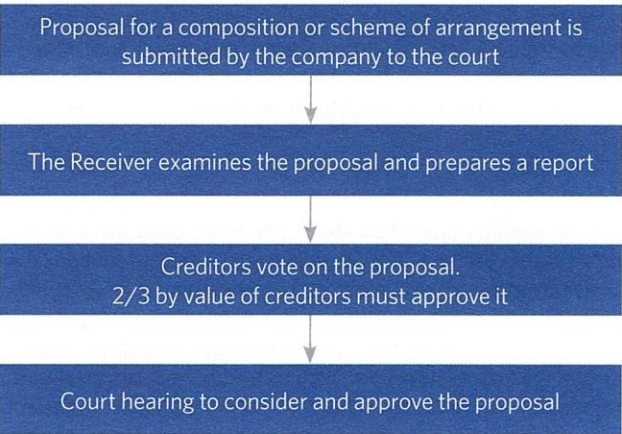
as necessary for the beneficial dissolution or sale of the company, and to administer, collect, sell and liquidate the estate and distribute the proceeds to creditors and other persons entitled to a distribution as provided for in the Bankruptcy Act. If a reorganisation, composition or arrangement under the Bankruptcy Act is proposed (as outlined in further detail below), the Receiver also has separate reporting and monitoring duties as described below. The reference to a ‘Receiver’ under Bangladeshi law therefore appears to share aspects of the role and function of a liquidator under English or Australian law.

In addition to the reorganisation process described above, after an order of adjudication of insolvency is made against a company, the company may also come to an understanding with its creditors regarding the payment of its debts through:

- a composition of the debts - this generally refers to where a company pays its creditors less than what is owed to them and the creditors agree to accept such lesser amount in full satisfaction of their claims; or
- a scheme of arrangement - this generally refers to where the company and its creditors agree to a scheme by which the relevant debts are gradually ‘liquidated’.

The composition of debts process applies to both companies and individuals, whilst a scheme of arrangement only applies to companies.

Initiation and stages – Composition and arrangement



A proposal for a composition or arrangement submitted by the company to the court is examined by the Receiver who prepares a report on it. If two-thirds in value of all creditors whose debts are proved in respect of the company resolve to accept the proposal, the court may, after hearing and considering the report of the Receiver, accept the proposal and it will be deemed that all creditors have accepted it. However, the court may refuse to approve the proposal if it is of the opinion that the terms of the proposal are not reasonable or not calculated to benefit the general body of creditors.

Initiation and stages – Reorganisation

An ‘eligible debtor’, which is any company debtor, may, before or after the adjudication for insolvency, apply to the court to reorganise its debts stating the grounds for reorganisation and proposing a plan of reorganisation. On receiving such application, the court will make an order fixing a date within 90 days for the hearing of the application and, if a Receiver or interim Receiver has not already been appointed, appoint an interim Receiver. The court receives a report on the proposal



from the Receiver and 'eligible creditors' may file a written objection or make suggestions in relation to the proposal. An 'eligible creditor' means a creditor who, individually or jointly:

- is owed a debt of at least Tk 500,000 (approx. US\$6,000);
- has served a formal demand on the company requiring the company to pay the debt or give security to the satisfaction of the creditor; and
- has failed to do so within 90 days of service of such demand.

If two-thirds in value of all the creditors whose debts have been proved give written consent to the reorganisation plan, the court may make a reorganisation order.

In determining whether to make a reorganisation order, the court will consider:

- the report of the Receiver;
- the written objections and suggestions of the creditors;
- the national interest;
- the interests of creditors; and
- the interests of the company.

In making a reorganisation order, the court may modify the plan or reorganisation and may impose conditions as may be necessary to protect the interests of dissenting creditors, various classes of creditors and the general body of creditors. The reorganisation order shall be binding on the company and all creditors so far as it relates to any debt provable under the Bankruptcy Act. On the making of the reorganisation order, the order of adjudication for insolvency, if already passed, stands annulled.

#### Supervision and control

In respect of a proposal for a composition or arrangement which is approved, the court shall specify the terms of approval by an order. If the company defaults in making any instalment payable under an approved composition or arrangement, or if it appears to the court that the composition or arrangement cannot be implemented without injustice to the creditors or undue delay, or that the approval was obtained by fraud, the court may re-adjudge the company as bankrupt and annul the composition or arrangement.

In respect of a reorganisation order, upon the making of the order, the estate of the company stands vested in the Receiver, and the company shall, subject to the provisions of the Bankruptcy Act and supervision of the Receiver, be the 'Special Manager' of the estate (including the business thereof). However, the court may on the application of the Receiver or any eligible creditor appoint the Receiver or a third party to be the Special Manager, in place of the company. The Bankruptcy Act also provides that the Receiver shall, within such period as specified in rules or as may be determined by the court, constitute a creditors committee consisting of not more than seven creditors having the highest unsecured claims and willing to be included in the Committee.

Subject to any relevant rules, the court is required to specify the following matters in a reorganisation order:

- the power and duties of, and restrictions upon, the company with respect to management of the estate and its business;

- the manner in which the Receiver shall monitor such management;
- the matters on which the creditors committee may advise the Receiver;
- the powers and duties of the Receiver with respect to management of the estate and advice received by the creditors committee; and
- the time limits and guidelines which shall apply to the implementation of the reorganisation plan.

After making the reorganisation order, if the court (either on its own motion or on application by the Receiver or any eligible creditor) decides that the reorganisation order was improperly made, or that it should be modified or withdrawn in view of changed circumstances, or if the Special Manager is unable to implement the plan within a reasonable time acceptable to the creditors and the court, then the court can modify or annul the reorganisation order.

#### Moratorium

The court may, at any time after an application for a reorganisation has been made to it, stay the commencement or continuation of any suit or proceeding against a company on such terms as it thinks fit and proper until the application is finally disposed of.

#### Operation of the business

As mentioned in "Supervision and control" above, upon the making of a reorganisation order, the company (or the court may order that the Receiver or a third person) shall, subject to the provisions of the Bankruptcy Act and supervision of the Receiver, be the Special Manager of the estate of the company including the business thereof. The reorganisation order will also specify matters relating to the powers, duties and restrictions on the company and the Receiver and time limits and guidelines to implementation of the reorganisation plan (see section "Supervision and control" above). There is no provision under the Bankruptcy Act that would prohibit a company from continuing to incur debts and sell products in the course of business. The Receiver would generally not be personally liable for such debts.

#### New money funding

The Bankruptcy Act does not prohibit a company from borrowing funds during a composition, arrangement or reorganisation. The Receiver does have the power to mortgage or pledge any part of the property of the company for the purpose of raising money for the payment of debts proved against the company.

#### Business and asset sales

The business and assets of the company may be sold as part of a composition, arrangement or reorganisation. The Receiver has the power to sell all or any part of the company's estate, including its ongoing business, goodwill and book debts due to the company by public auction or private sale. The Receiver cannot sell secured assets, except generally with the consent of the relevant secured creditors.

#### Effect on stakeholders

If the court approves a composition or arrangement proposal, the court shall specify the terms of the approval by an order, clearly specify the annulment of the order of adjudication, and



If approved by the High Court, a meeting of creditors or a class of them will be held.

At the creditors' meeting, a majority in number, which represents at least three-quarters in value of the creditors present at the meeting (in person or by proxy) must approve the compromise or arrangement. The compromise or arrangement must then be sanctioned by the High Court.

Once sanctioned, it will be binding on all the creditors or the company in the course of being wound up, the compromise or arrangement would also be binding on the liquidator and contributors of the company.

An order made by the High Court does not have any effect until a certified copy of the order has been filed with the Registrar of Joint Stock Companies and Firms ("RJSC").

Unsecured creditors who may have filed suits or obtained decrees shall be deemed to be of the same class as other unsecured creditors.

#### Supervision and control

A scheme of compromise or arrangement is a debtor in possession process. The directors of the company retain day-to-day control over the company. However the scheme of compromise or arrangement process and implementation of the compromise or arrangement is subject to the control of the High Court.

#### Moratorium

The court may, at any time after an application for compromise or arrangement has been made to it, stay the commencement or continuation of any suit or proceeding against the company on such terms as it thinks fit and proper until the application is finally disposed of. It is common for the company to apply for a moratorium after an application for a compromise or arrangement is made.

Operation of the business and new money funding

As noted above, the directors continue to operate the business during a scheme of compromise or arrangement. The Companies Act does not expressly prohibit the company from incurring debts or selling products, or borrowing new funds during the process.

Business and asset sales

The business and assets of the company may be sold as part of the approved scheme of compromise or arrangement and the sale and distribution of proceeds will be conducted in accordance with the terms of the scheme.

End of procedure

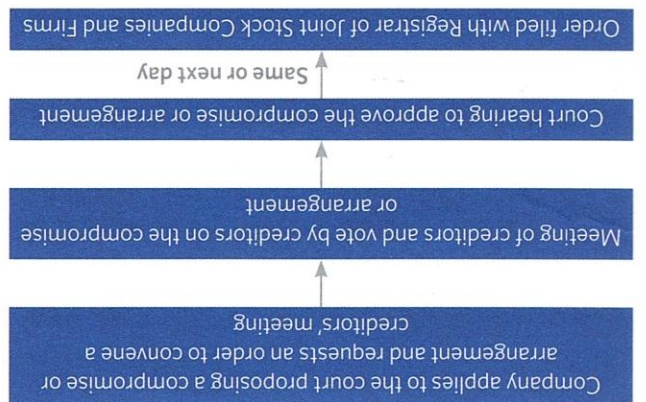
If the scheme of compromise or arrangement is successfully implemented, the company will continue to operate. If a company does not enter or fails to approve a scheme of compromise or arrangement, the creditors may need to consider winding up the company.

## Scheme of compromise or arrangement under the Companies Act

### Overview

A scheme of compromise or arrangement is ordinarily aimed at the continuation of the operations of the company so that the company might be able to discharge its obligations as a going concern, subject to such terms as may be imposed by the compromise or arrangement. A compromise or arrangement is a debtor in possession process. It is not strictly speaking an insolvency process, and is not commonly used.

### Initiation and stages



End of procedure

A reorganisation order passed by the court shall be binding on the company and all creditors so far as it relates to the debts due to them and provable under the Bankruptcy Act including any debt incurred before the date of the reorganisation order.

The approved composition or scheme shall be binding on all the creditors so far as it relates to any debt due to them from the company and provable under the Bankruptcy Act.

If the compromise, arrangement or reorganisation is successfully implemented, the company will continue to operate. In respect of a reorganisation, the Bankruptcy Act provides that the company may receive a discharge from bankruptcy pursuant to the terms of an approved plan of reorganisation and upon order of the court to that effect. However, as mentioned, the court also has the power to annul the reorganisation order or can re-adjudge the company as bankrupt and annul an approved composition or arrangement (see section "Supervision and control" above). In such cases, the company will most likely eventually enter liquidation.



## Corporate liquidation procedures

### 2. What are the main (insolvent) corporate liquidation procedures?

Under the Companies Act, the winding up of a company may be: (i) voluntary where the company is solvent; (ii) by the court; or (iii) subject to the supervision of the court where the company is insolvent. We have only outlined the insolvent winding up by the court procedure in this chapter.

The purpose of winding up proceedings is essentially for the court to determine the solvency of a company with respect to all of its creditors as a class.

Under Bangladeshi law, an external officeholder is appointed to take control of the company and its assets.

#### Court winding up

##### Initiation

Under the Companies Act, a company may be wound up by the court:

- if the company has by special resolution resolved that the company be wound up by the court;
- if default is made in filing the statutory report or in holding the statutory meeting;
- if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- if the number of members is reduced, in the case of a private company below two, or, in the case of any other company, below seven;
- if the company is unable to pay its debts; or
- if the court is of opinion that it is just and equitable that the company should be wound up.

A company shall be deemed to be unable to pay its debts:

- if a creditor to whom the company is indebted for more than Tk 5,000 (approx. US\$60) then due, has served on the company a demand requiring the company to pay the sum and the company has for 3 weeks thereafter neglected to pay it or secure it to the reasonable satisfaction of the creditor;
- if execution or other process issued on a decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- if it is proved to the satisfaction of the court that the company is unable to pay its debts (which include contingent and prospective liabilities).

The ground of inability to pay debts is based on the lack of available company assets to do so, rather than a mere unwillingness of the company to pay. If the court is satisfied that the company is unable to pay its debts, it will make a winding up order.

The winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up. Due to the time-consuming nature of litigation in Bangladesh, it may take 2-4 years to obtain a winding up order.

#### Supervision and control

Where winding up takes place by the court, an official liquidator is appointed by the court. The liquidator so appointed may, subject to any restrictions imposed by the court, exercise its powers without sanction or intervention of the court. Liquidators are appointed from a panel of lawyers. The court may also appoint an accountant from a chartered accountant firm to act as the liquidator. Liquidators may be removed by the court.

The official liquidator is required to take into his or her custody, or under his or her control, all the property, effects and actionable claims to which the company is or appears to be entitled. The property and effects of the company are deemed to be in the custody of the court as from the date of the order for the winding up of the company.

The official liquidator has the power, with the sanction of the court, to do the following things:

- institute or defend any suit or prosecution, or other legal proceeding, civil or criminal, in the name and on behalf of the company;
- carry on the business of the company so far as may be necessary for its beneficial winding up;
- sell the immovable and movable property of the company by public auction or private contract, with power to transfer the property to any person, organisation or company, in whole or in part;
- do all acts and to execute, in the name and on behalf of the company, all deeds, receipts, and other documents, and for that purpose to use, when necessary, the company's common seal;
- prove, rank and claim in the insolvency of any contributory, for any balance against his or her estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;
- draw, accept, make and endorse any bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if the bill, hundi or note had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;
- raise money on the security of the assets of the company;
- take out in his or her official name letters of administration relating to the estate of any deceased contributory or his or her estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall, for the purpose of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator; and
- do all such other things as may be necessary for the winding up of the affairs of the company and distributing its assets.

The official liquidator, within a month from the date of the winding up order, must convene a meeting of creditors of the company to determine whether a committee of inspection should be appointed. Within a week of the creditors' meeting, the official liquidator must convene a meeting of the contributories to consider the creditors' decision and must accept it, with or without modification. If the contributories do not accept the decision of the creditors, it is the duty of the



## Moratorium

official liquidator to apply to the court for directions as to whether there shall be a committee, and who shall be its members. A committee of inspection shall consist of not more than 12 members, being creditors and contributors of the company. The committee of inspection has the right to inspect the accounts of the official liquidator at all reasonable times and must meet at least once a month.

The court may, at any time after the presentation of the petition for winding up and before the making of an order for winding up, upon the application of the company or of any creditor or contributory of the company, restrain further proceedings in any suit or proceedings against the company and may also make other similar orders upon such terms as the court thinks fit.

When a winding up order has been made, legal proceedings can only be commenced against the company with leave of the court and subject to such terms as the court may impose.

## Operation of the business

Upon a winding up order being made against a company, the liquidator (with sanction of the court) may carry on the business of the company but only insofar as may be necessary for its beneficial winding up. Directors no longer have day-to-day management of the company, and the company is operated by the liquidator. The liquidator will not incur personal liability for debts incurred by the company during the liquidation.

## Business and asset sales

A liquidator (with sanction of the court) does have the power to sell the immovable and movable property of the company by public auction or private contract, with power to transfer the property to any person, organisation or company, in whole or in part.

## End of procedure

Upon the realisation and distribution of all assets of the company as part of the winding up, the court will pass a winding up order. The winding up order must be filed with the RJSC within 30 days from the date of the order. On the filing of a copy of the winding up order, the Registrar shall register a summary thereof in the books relating to the company and shall notify in the official Gazette that such an order has been made. Upon publication in the official Gazette, the company will be deregistered.

## Corporate receivership procedures

### 3. Is there a corporate receivership procedure for security enforcement?

Under Bangladeshi law, there is no 'corporate receivership' procedure whereby a secured creditor is entitled to appoint an external officeholder to take possession of and realise secured property for the benefit of the secured creditor.

## Special procedures

### 4. Are there insolvency procedures specific to particular industries?

There are insolvency procedures specific to the banking and insurance industries, under the Bank Companies Act, 1991 and Insurance Act, 2010 respectively.

## Security

### 5. What are the main types of security, and what assets can security be taken over?

It is possible to take security over the following assets in Bangladesh:

- Immovable assets (i.e. land):
  - security over land is taken by way of mortgage. The mortgage must be registered with the office of the relevant sub-registrar under whose jurisdiction the land is situated and the RJSC in order to be effective and enforceable. The office of the sub-registrar and the RJSC maintain registers, which allows any party to search for the existence of security over specific land;
  - creditors are also granted irrevocable general powers of attorney by the security provider in respect of the mortgaged assets which give the security holder the ability to deal with the property to enforce the security; and
  - the powers of attorney must satisfy certain form and legal requirements under Bangladeshi law and must be registered with the office of the relevant sub-registrar in order to be effective and enforceable.
- Movable assets (tangible and intangible):
  - security may be taken by way of a floating charge under a letter or deed of hypothecation;
  - applicable assets include inventory, stock, book debts, advance payments, plant and machinery and raw materials;
  - specific assets need not be identifiable and the security extends to present and future assets;
  - creditors will also be granted irrevocable general powers of attorney by the security provider in respect of the hypothecated assets which give the security holder the ability to deal with the property to enforce the security; and
  - the floating charge and powers of attorney must satisfy certain form and legal requirements under Bangladeshi law and the instrument creating the charge must be registered with RJSC in order to be effective and enforceable. There is a public register of charges, which allows any party to search for the existence of security over a company.
- Specific assets:
  - bank accounts by way of fixed or floating charge;
  - receivables/insurance proceeds/contractual rights by way of assignment; and
  - shares by way of charge, lien, pledge or deed of hypothecation.

### 6. Is it possible to take floating or general security over all of the present and after acquired property of a company (and is this common)?

There are no mandatory notification or recording requirements for such security. However, it is common practice to inform the company and for the company to insert a note into its share register regarding the security.

It is not possible to give floating or general security over all of the present and after acquired property of a company (including various types of assets) by means of a general security agreement due to the requirements of perfection, which involve registration, notification or recording with separate regulators or parties.



## Security enforcement

### 7. What are the main methods of enforcing security?

Bangladeshi statute does not prescribe how security is enforced in Bangladesh. Therefore, the enforcement process has to be contractually agreed between the creditor(s) and the company.

Onshore banks and financial institutions are generally required to file summary legal proceedings for recovery of debts under the Artha Rin Adalat Ain (Money Loan Court Act), 2003 ("**Money Loan Court Act**"). The Money Loan Court Act was enacted to provide fast-track remedies to banks and non-banking financial institutions providing money to borrowers.

However, the Money Loan Court Act is not applicable to foreign creditors (excluding certain financial institutions named in the Act, for example, the Islamic Development Bank, the International Development Organization, the World Bank, the International Finance Corporation, the International Bank for Reconstruction and Development and the Commonwealth Development Corporation). Therefore, foreign creditors will not be able to take advantage of the various fast-track procedures for recovery of secured amounts or remedies available under the Money Loan Court Act such as the sale of security prior to the commencement of a suit for recovery of a loan. Legal proceedings by a foreign creditor will therefore have to be filed in the civil courts of Bangladesh with jurisdiction, that is, the District Courts.

The process of enforcing a remedy or judgment (for example, the sale of mortgaged assets through the ordinary courts of Bangladesh) is a cumbersome and lengthy process which could take several years.

It has therefore become common practice for most commercial contracts to include arbitration as a dispute resolution mechanism, which is considered to be a quicker process. Under the Arbitration Act, 2001, foreign arbitral awards are enforceable in Bangladesh.

### 8. With respect to share security, is it possible for the secured creditor or an appointee to exercise the voting power of the shares?

A secured creditor does not automatically obtain the right to exercise the voting power of the shares. However, such rights may be contractually conferred with agreement by the parties.

## Trade and unsecured creditors

### 9. What forms of security or quasi-security are asserted by trade creditors or suppliers?

Bangladeshi law recognises an unpaid seller's lien over goods sold that are in the possession of the buyer. It is common for suppliers of goods to secure their position by agreeing to retain ownership over the goods supplied under the contract. A lien over assets is recognised and enforceable in a formal insolvency.

Furthermore, it is also not uncommon for trade creditors and suppliers to require buyers to provide a third party guarantee, usually in the form of a guarantee issued by a bank which is transferable into cash on demand by the creditor in the event of default.

### 10. What are the main remedies and enforcement actions available to unsecured creditors for unpaid debts?

The main remedies and enforcement actions available to unsecured creditors are as follows:

- legal proceedings before an appropriate court seeking a judgment for repayment of the debt;
- arbitration proceedings in cases where the agreement between the parties contains an arbitration clause; and
- winding up proceedings under the Companies Act.

## Insolvency distributions and priorities

### 11. When are distributions made to secured and unsecured creditors in reorganisations and liquidations?

Distributions are made to creditors as part of the liquidation process under the Companies Act and as part of the bankruptcy process under the Bankruptcy Act.

### 12. What is the priority regime for distributions in an insolvency?

If a company becomes insolvent, its secured assets will be ring-fenced from its unsecured assets and used for the purpose of discharging its corresponding related secured liabilities. This will be the case unless the security is void or unenforceable (for example, due to non-registration).

If a secured creditor does not realise its security before the date of the order of adjudication for insolvency under the Bankruptcy Act, the claims of the following creditors have priority over the claims of that company's secured creditors:

- administrative costs and expenses of the Receiver and liquidator;
- taxes and other similar debts due to the Government of Bangladesh;
- wages or salaries due to any clerk, servant, labourer or workman in respect of services rendered to the borrower during the 6-month period immediately prior to the bankruptcy petition (subject to a maximum of Tk 2,000 (approx. US\$24) per person); and
- debts of onshore banks and financial institutions.

If a secured creditor does not realise its security before the date of the order of adjudication for insolvency by a court, the court shall automatically pass an order prioritising the payment to the persons listed above in accordance with the provisions of the Bankruptcy Act. Thereafter, the remainder of the security will be vested in the receiver for distribution to the company's secured creditors after deducting the Receiver's fees and expenses (if any).



However, the court shall not nullify any payment made to a creditor in the ordinary course of business and the right of the person who in good faith and for valuable consideration has acquired title through or under a creditor of the bankrupt. The Bankruptcy Act also specifies certain bona fide transactions which are not affected by any provision of the Act.

Under the Companies Act, the following transactions can be set aside:

- **Fraudulent preference:** Any transfer, delivery of goods, payment or other act relating to property by a company, which constitutes a fraudulent preference in respect of its creditors in a winding up of the company is invalid. It is likely that the essence of fraudulent preference is the giving of an improper benefit to a few creditors leading to inequality between them and the general body of creditors. Generally, if the dominant motive in the transaction is tainted with an element of dishonesty, questions of fraud arise.
- **Unauthorised execution:** Where a company is being wound up, any attachment, distress or execution put in force without leave of the court against the company, or any sale held without leave of the court of any properties of the company after commencement of the winding up process, is void.
- **Floating charges:** A floating charge on the property of the company created within 90 days of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of, or subsequent to, the creation of, and in consideration for the charge, together with interest on the amount at the rate of 5% per annum.

### 15. Is there a 'suspect period' prior to formal insolvency during which transactions may be set aside?

Refer to the commentary at Question 14 above.

### Director liability and compulsory filings

#### 16. Are there circumstances where companies are required to commence insolvency proceedings? What are the consequences of failure to do so?

There are no circumstances where companies are required to commence insolvency proceedings.

#### 17. Can directors or management be subject to any civil or criminal liability for trading while insolvent or other analogous concepts?

The Bankruptcy Act provides that directors of a company are subject to criminal liability if the company incurs debt within 48 months immediately before filing for bankruptcy, without having any reasonable expectation of repaying the debt.

There are no specific provisions in the Companies Act regarding trading while insolvent. However, if it appears to the court in the course of a winding up that a past or present director, manager or other officer, or any member of the company has been guilty of any offence in relation to the company for which he or she is criminally liable, the court may either on the application of any person interested in the winding up or of its own motion, direct the liquidator to prosecute the offender or to refer the matter to the RJSC.

### 13. Are there any classes of unsecured creditors that have preferential treatment in a reorganisation or liquidation?

In a winding up under the Companies Act, the following are paid in priority of all other debts:

- all revenue, taxes, import or sale taxes on commodities and rates, whether payable to the Government or to a local authority due from the company;

- all wages or salary of any clerk or other servant in respect of service rendered to the company not exceeding Tk 1,000 for each clerk or servant;

- all wages of any labourer or workman, not exceeding Tk 500 for each worker;

- compensation payable under the Bangladesh Labour Act, 2006 in respect of the death or disablement of any officer or employee of the company;

- all sums due to any employee from a provident, pension, or gratuity fund, or any other fund for the welfare of employees maintained by the company; and

- the expenses of any investigation directed into the affairs of the company.

The Companies Act provides that the above debts rank equally among themselves and must be paid in full unless the company's assets are insufficient to meet them, in which case they abate in equal proportion.

### Setting aside pre-insolvency transactions

#### 14. What transactions can be set aside in a liquidation or reorganisation?

Under the Bankruptcy Act, the following transactions can be set aside:

- **Voidable transfers within 15 years:** The Bankruptcy Court may nullify any transfer of property by a company or its successors made within 15 years if it is satisfied that the transfer was made to defeat any debt owed by the company. However, the court cannot make such an order if:
  - the transfer was for proper value consisting of goods;
  - the transfer was acquired by way of inheritance; or

- the transfer was made in the 6 years immediately preceding the order of adjudication of insolvency, in favour of a person who proves that at the time of the transfer the company was able to pay, without the aid of the transferred property, all the claims made in the bankruptcy proceeding.

#### Other voidable transfers, payments or obligations: A

transfer of property, payment or obligation incurred shall be void as against the Receiver and may be nullified by the Bankruptcy Court if:

- the company was unable to pay their debts as they fell due at the time of the transfer, payment or obligation;

- the transfer, payment or obligation is in favour of a creditor and had the effect of giving a preference to that creditor;

- the company is adjudged bankrupt, or a reorganisation order is made in respect of proceedings commenced within a year after the date of such transfer, payment or obligation.



### 18. Do directors owe any duties to creditors once a company is insolvent or in financial distress?

In circumstances where a company is insolvent or in financial distress, the courts may consider that the directors' fiduciary duties would extend to the creditors of the company. Briefly, a director's fiduciary duties include the duty to act in good faith with reasonable care and diligence, and to avoid conflicts of interests.

### Lender liability

#### 19. Is there a concept of 'shadow directorship' that can lead to creditors becoming liable for actions of the company or the directors?

There is no concept of shadow directorship in Bangladesh.

#### 20. Are there any other key liability risks for creditors to consider when engaging with companies and directors in pre-insolvency restructuring negotiations?

When engaging with companies and directors in pre-insolvency restructuring negotiations, creditors must consider the risk associated with transactions being nullified by a Bankruptcy court. See Question 14 above.

### Credit bidding

#### 21. Is credit bidding possible?

There is no formal recognition of credit bidding under Bangladeshi law. However, in theory, a credit bid may be achieved through transaction structuring.

#### 22. Are there any rules regarding 'self-dealing' that restrict the ability to credit bid?

There are no rules regarding 'self-dealing' in Bangladesh.

### Pre-packaged sales/reorganisations

#### 23. Are pre-pack sales or reorganisations permitted or usual?

There are currently no formal procedures in Bangladesh for expedited or pre-packaged sales. However, there are also no express prohibitions in this regard.

#### 24. Is it possible for creditors and the company to pre-agree a restructuring prior to commencing a formal reorganisation process?

There is no statutory provision on pre-agreed restructuring or reorganisation. There are also no express prohibitions in this regard.

### Debt trading

#### 25. Is it common for the debt of distressed companies to be traded?

It is fairly common for debt of distressed companies to be traded in Bangladesh.

#### 26. Are there any legal or process restrictions on who can acquire the debt of corporate borrowers?

The transfer of debts of corporate borrowers usually takes place between banks and non-banking financial institutions.

### Debt for equity swaps

#### 27. What process is required for a debt for equity swap outside a formal reorganisation procedure?

Outside a formal reorganisation procedure, the issuance of shares to a creditor as part of a debt for equity swap would need to comply with the company's articles of association and the relevant provisions of the Companies Act.

In order to convert debt into equity by issuance and allotment of shares to the creditors, approval from the board of directors of the company would be required and shareholders exercising 75% voting rights would need to pass a special resolution.

#### 28. To what extent can a debt for equity swap be implemented without such processes in a reorganisation procedure?

A debt for equity swap cannot be implemented without satisfying the processes set out in answer to Question 27.

#### 29. Are there any foreign ownership restrictions on companies or other assets?

In general, companies may be wholly-owned in Bangladesh by foreign shareholders.

Foreign ownership is prohibited in four controlled sectors: (i) military; (ii) nuclear power; (iii) security printing and minting; and (iv) forestation and mechanised extraction within reserved forests.

Further, foreign ownership is capped at various levels in certain sectors including insurance, logistics and telecommunication industries. The levels depend on a number of factors based on the sector and type of activity.

Foreign ownership does not attract specific restrictions, controls, fees or taxes. A company wholly or partially owned by foreign shareholder(s) will experience the same restrictions, controls, fees and/or taxes as a company wholly-owned by resident shareholders.

### Informal financial restructurings and work outs

#### 30. Are informal financial restructurings of distressed companies common?

Informal financial restructurings and work outs are not common in Bangladesh.

### Cross border insolvency

#### 31. Has the UNCITRAL Model Law been adopted? Are there any significant modifications to its application?

Bangladesh has not adopted the UNCITRAL Model Law on Cross Border Insolvency.

#### 32. Have the courts adopted the JIN cross-border cooperation guidelines?

The courts have not adopted the JIN cross-border cooperation guidelines.



33. Are there any other grounds upon which assistance or recognition can be granted to foreign insolvency processes?

There are no formal regulations for providing assistance or recognition to foreign insolvency processes.

### Recent trends and developments

34. Describe any recent trends or developments in Bangladesh

The laws of Bangladesh relating to restructuring and insolvency have largely remained static. There have not been any noticeable trends or developments. We are not aware of any significant insolvencies in Bangladesh in recent years nor have we seen a rise in insolvencies or distress in any particular sector.

### Law reform

35. Is there any anticipated insolvency, restructuring or security law reform in Bangladesh?

We are not aware of any anticipated insolvency, restructuring or security law reform in Bangladesh.