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Project Finance 2021

Bangladesh: Law & Practice
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BANGLADESH

Law and Practice

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1. PROJECT FINANCE PANORAMA

1.1 Sponsors and Lenders

Sponsors

In public sector projects, state-owned entities usually act as sponsors. In the power sector, both state-owned companies and private independent power producers (which may be partly or wholly owned by foreigners) act as sponsors. There are instances of a project company being owned by both a state-owned entity and private sector investors. In the private sector, project companies can be owned by local nationals, or can be joint ventures between local and foreign entities, or owned fully by foreign nationals.

Lenders

The following types of institutions typically act as lenders in project financing.

- State-owned financial institutions (eg, IDCOL and BIFFL) usually provide long-term financing for infrastructure projects.
- State-owned commercial banks – there are currently six such banks in Bangladesh, which are allowed to finance local projects.
- Specialised banks – there are currently three specialised banks, which were established with specific objectives like agricultural or industrial development. These banks are fully or substantially owned by the government.
- Private commercial banks – there are currently 42 local licensed banks, and nine licensed branches of foreign banks operating in Bangladesh.
- Non-bank financial institutions – there are currently 34 non-banking financial institutions operating in Bangladesh.
- Multilateral and foreign agencies – multilateral financial institutions, such as the International Finance Corporation, the Asian Development Bank and the Islamic Development Bank are active in providing financing in Bangladesh.

Foreign development assistance providers, such as Japan International Cooperation Agency and Agence Francaise de Développement, also provide financing in infrastructure projects.

- Foreign banks/financial institutions are allowed to finance local projects without setting up any presence in Bangladesh.
- Government funds – the government has set up funds to help public-private partnership (PPP) projects with short-term economic problems, such as Viability Gap Financing and the Bangladesh Infrastructure Finance Fund under the Public Private Partnership Authority.

1.2 Public-Private Partnership Transactions

PPPs in Bangladesh are primarily regulated by the Bangladesh Public-Private Partnership Act, 2015 (PPP Act 2015), which established the Public Private Partnership Authority (PPPA) to act as a catalyst to proactively realise PPP projects in Bangladesh. The PPPA has power to issue policies, guidelines, regulations and directions in relation to PPPs.

A number of guidelines have been issued by the PPPA, including the PPP Screening Manual 2013, the Guidelines for PPP Projects 2016, the Guidelines for Unsolicited Proposals 2016 and the Policy for Implementing PPP Projects through Government to Government (G2G) Partnership 2017. The PPPA also issued the Rules for PPP Technical Assistance Financing 2018 and the Rules for Viability Gap Financing for PPP Projects 2018 to facilitate financial support to PPP projects that were socially and economically beneficial but not viable financially.

According to the provisions of the PPP Act 2015, the powers of the PPPA include the following:

- issuing, promulgating, approving and publishing PPP-related policies, regulations, directions and guidelines in the gazettes;
- providing decisions on the financial participation and provision of incentives for PPP projects by the government;
- providing necessary direction to the contracting authorities and resolving any constraints or difficulty in the implementation of PPP projects;
- framing technical and best practice requirements, pre-qualifications and bid documents;
- developing model PPP contracts and obtaining vetting;
- giving consent on PPP projects;
- determining the process for the selection of private partners;
- approving the selected bidder for PPP projects;
- approving the termination of PPP contracts, where applicable;
- approving model PPP contracts;
- assisting in PPP project activities;
- executing and signing PPP contracts, from time to time, for projects assigned to the PPPA;
- determining and approving the organogram of the officers and employees;
- approving a separate salary structure for the officer and employees, and making payments accordingly;
- determining the terms of reference and appointment process;
- appointing and fixing the fees of advisers or specialists or both;
- arranging and approving study tours, training, seminars, etc, on PPP matters at home and abroad;
- ensuring the implementation of PPP-related rules, regulations and directions;

- reviewing and monitoring the PPP programmes;
- supervising and co-ordinating the progress of PPP projects;
- conducting and monitoring the selection process of private partners; and
- performing any functions relating to PPPs.

PPP projects may be awarded on the basis of either competitive bidding or unsolicited proposals. Competitive bidding is governed mainly by the Public Procurement Act 2006 and the Public Procurement Rules 2008. If there is any inconsistency between these public procurement laws and the PPP Act 2015, the latter prevails. Unsolicited proposals are processed and considered under the Guidelines for Unsolicited Proposals 2016.

1.3 Structuring the Deal

Borrowing from abroad by private sector industrial enterprises in Bangladesh requires prior authorisation from the Bangladesh Investment Development Authority (BIDA). As the regulator, BIDA has the power to determine the rate of interest and the fees that can be charged by a foreign lender. Therefore, in negotiating financing agreements with Bangladeshi borrowers, foreign lenders should be aware of recent transactions so as to ensure consistency with BIDA's approach on these issues.

The security package against foreign borrowing would also have to be consistent with the security packages that have recently been approved by BIDA. While security over movable and immovable properties can be taken, foreign lenders would have to engage a local bank to hold the securities created on assets situated in Bangladesh as an agent of the lenders.

Apart from a mortgage over the project land and hypothecation over the movable properties of the borrower, the security package may include

a pledge over the shares of the project company granted by the sponsors. As a part of the security package, personal guarantees from the directors of the borrower company and a corporate guarantee from a financially sound affiliate of the borrower company can also be obtained.

The government issues sovereign guarantees on behalf of companies that are either fully or partly owned by the government.

The enforcement of security through court proceedings is not efficient in Bangladesh, and is a time-consuming process.

1.4 Active Industries and Sectors

Like many other countries, Bangladesh is currently facing the challenge of recovering from the setback caused by the COVID-19 pandemic. While the pandemic is not yet fully over, sectors such as fintech, e-commerce, digital marketing, pharmaceutical, LPG, LNG and renewable energy are expected to be more active in Bangladesh in the coming years.

2. GUARANTEES AND SECURITY

2.1 Assets Available as Collateral to Lenders

Companies incorporated in Bangladesh typically offer the following assets as collateral:

- immovable properties (freehold or leasehold), such as land and buildings;
- movable assets, such as plant, machineries and other movable assets;
- shares in a company;
- bank accounts;
- intellectual properties; and
- contractual rights and receivables.

The following types of security are commonly used in Bangladesh.

- **Mortgages** – these are most commonly used for immovable assets, such as land and buildings. The Transfer of Property Act, 1882 (the 1882 Act) governs the creation of mortgages. Under the 1882 Act, a mortgage of immovable property must be perfected by registration with the office of the relevant land registrar. Under the Companies Act 1994 (the 1994 Act), if a mortgage is created by a company incorporated in Bangladesh, the particulars of the mortgage are required to be recorded in the prescribed manner with the Registrar of Joint Stock Companies and Firms (RJSC) within 21 days of the date of its creation. If an immovable property subject to mortgage is a leasehold property, the prior consent of the lessor is required.
- **Hypothecation by way of charge** is commonly used for taking security over movable assets of the borrower. Fixed charges grant control over the asset, whereas floating charges allow the borrower to continue to deal with the charged assets until crystallisation. Floating charges are commonly used to create security over the bank accounts of the borrower. Under the 1994 Act, if a deed of hypothecation is executed by a company incorporated in Bangladesh creating a charge over its movable assets, the particulars of such hypothecation/charge are required to be recorded in the prescribed manner with the RJSC within 21 days of the date of its execution.
- **Pledge or lien** – shares in a borrower company are commonly pledged by the shareholders of that company in favour of the lenders. Under a share pledge agreement, the pledgor typically delivers to the pledgee all original certificates and other documents of title in respect of the shares, undated share transfer instruments (Form 117) and duly executed affidavits in support of the transfer of shares.

In a pledge of dematerialised shares, a notice in the prescribed format needs to be submitted to the Central Depository Bangladesh Limited. Security over shares in a borrower company may also be created by way of lien.

- Assignment – receivables, contractual rights of a company under the project documents, insurance policies, intellectual properties, licences and approvals can be secured by way of assignment. The assignment of such rights usually requires notification to the relevant counterparty.
- Power of attorney (POA) in support of the security documents – each of the aforementioned security documents is usually accompanied by a POA authorising the lender to enforce the security in the event of default by the borrower. If such a POA is executed by the borrower, the lender would be able to enforce the security without initiating a legal proceeding before the court. The land registrar often shows reluctance to register a POA in favour of a foreign lender in relation to the enforcement of a mortgage on immovable property. Such difficulties may be avoided by executing the POA in favour of a security trustee/agent located in Bangladesh.

2.2 Charges or Interest over All Present and Future Assets of a Company

There is no legal provision that would prevent the creation of security over all present and future assets of a borrower company. As a result, it is possible for a company to create security over all future assets without specification. The position in Bangladesh is similar to the position in England, where the courts have held in various decisions that assets acquired subsequently by a company may be made subject to the original security agreement without entering into a new security agreement.

There are precedents in the power sector where deeds of hypothecation cover future assets that

the borrower may acquire subsequent to the execution of the deed of hypothecation.

2.3 Registering Collateral Security Interests

The execution of security documents (such as a deed of mortgage, deed of hypothecation or charge, share pledge agreement, letter of lien, assignment agreement and the related POAs) attracts stamp duties, at rates determined based on the nature of the instrument. Such stamp duties are generally required to be paid to the relevant government authorities before or at the time of execution of the relevant security document.

Registration fees are also required to be paid for registering mortgages with the relevant land registrar. Separate fees are payable for the registration of a mortgage, hypothecation or charge with the RJSC.

2.4 Granting a Valid Security Interest

Under Bangladesh law, a general description of the movable assets subject to security (such as the nature, character and/or location that are essential for identification of the assets) would be sufficient for creating a valid security. However, immovable properties are required to be identified specifically in the security document for the creation of a valid security thereon.

2.5 Restrictions on the Grant of Security or Guarantees

Under the 1994 Act, a company (the “lending company”) cannot make any loan nor provide any guarantee or security in connection with a loan made by a third party to the following:

- any director of the lending company;
- any firm in which any director of the lending company is a partner;

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- any private company of which any director of the lending company is a director or member; or
- any public company whose managing agent manager or director is accustomed to acting in accordance with the directions or instruction of any director of the lending company.

The above restriction would not apply to the making of a loan or the provision of any guarantee or security by a lending company in the following circumstances:

- if such company is a banking company or a private company that is not a subsidiary of a public company, or if such company as a holding company makes the loan or provides the guarantee or security to its subsidiary; and
- if the loan is sanctioned by the Board of Directors of the company and approved by its general meeting, and there is a specific mention of the loan, guarantee or security, as the case may be, in the balance sheet. However, the total amount of the loan cannot exceed 50% of the paid-up value of the shares held by such director in his or her own name.

The creation of security in favour of foreign lenders would require prior permission from Bangladesh Bank. If BIDA approves a foreign loan and also the security package against the borrowing, separate permission from Bangladesh Bank is not required.

2.6 Absence of Other Liens

A lender may ascertain whether there are any previous charges on the assets to be secured by conducting searches in the following:

- the RJSC, for mortgages or charges filed by the borrower prior to the date of security creation;

- the relevant land registrar office and/or the Assistant Commissioner (Land) office, for mortgages created on immovable properties;
- the Central Depository Bangladesh Limited (CDBL), in respect of pledges of shares/securities that are in dematerialised form; and
- the register of mortgages or charges maintained by the borrower in accordance with the company law of Bangladesh.

2.7 Releasing Forms of Security

The procedure for the release of security depends on the type of security being released.

In the case of a mortgage of immovable property, a deed of redemption/release needs to be executed between the mortgagor and the mortgagee. It must be registered with the relevant land registrar where the deed of mortgage was originally registered. The particulars of said deed of redemption/release also need to be filed in the prescribed form (Form XIX) with the RJSC.

For charges created over any movable assets, a deed of release needs to be executed, and the particulars of said deed of release need to be filed in the prescribed form (Form XIX) with the RJSC.

In the case of intangible assets such as intellectual property, a deed of release is required to be executed and filed with relevant offices (eg, the registrar of patent, design and trade marks), in order to terminate the security interest.

With respect to pledges of shares, where the shares are in physical form, the share certificates and the undated share transfer instrument are required to be returned to the pledgor. If the shares are in dematerialised form, the necessary documents should be filed with the CDBL for release of the shares.

Additionally, the POA issued under the deed of mortgage, pledge agreement or deed of hypothecation is required to be cancelled.

3. ENFORCEMENT

3.1 Enforcement of Collateral by Secured Lender

Generally, a lender may enforce its security upon the occurrence of an event of default. Depending on the nature of security to be enforced, certain regulatory approvals/formalities may need to be complied with for enforcement. The process to be followed for enforcement of the security is briefly set out below.

Mortgage Over Immovable Property

In order to enforce a mortgage on immovable property, the lender would need to obtain an order from the court. Once the court passes a decree in favour of the lender, the lender will then have to initiate execution proceedings. If the proceedings are contested, the enforcement of security may take four to five years, assuming none of the parties file interlocutory applications during the proceedings or appeal against the judgment of the trial court.

However, the security documents may be accompanied by a POA authorising the lender to enforce the security in the event of default by the borrower. If such a POA is executed by the borrower, the lender would be able to enforce the security without initiating a legal proceeding before the court. The land registrar often shows reluctance to register a POA in favour of a foreign lender in relation to the enforcement of a mortgage on immovable property. Such difficulties may be avoided by executing a POA in favour of a security trustee/lender's agent located in Bangladesh.

Security over Shares of a Bangladeshi Company

In order to enforce a security created over shares of a Bangladeshi company, the lender would need to obtain an order from the court. Once the court passes a decree in favour of the lender, the lender will then have to initiate execution proceedings.

However, a share pledge agreement is generally accompanied by a POA authorising the lenders or their agent to enforce the security created over the shares in the event of default by the borrower. If such a POA is executed by the borrower, the lender would be able to enforce the security created over the shares without initiating a legal proceeding before the court. Such POA usually contains provisions authorising the lenders or their agent to take all necessary steps to sell, transfer or dispose of the pledged shares in the event of default by the borrower.

If the security in the shares is created in favour of a non-resident lender (or a local security agent who is holding the security for the benefit of a non-resident lender) with appropriate approvals, the subsequent sale of such shares to another non-resident would not be prohibited, although some formalities may need to be complied with. For example, under Paragraph 2(B), Chapter 9 of the Guidelines for Foreign Exchange Transactions 2018, for the transfer of shares of private/public limited companies that are not listed in the stock exchanges, either from non-resident to resident, from non-resident to non-resident or from resident to non-resident, the Foreign Exchange Investment Department of Bangladesh Bank (ie, the central bank of Bangladesh) should be informed within 14 days of such transfer.

Additionally, in the case of a sale of shares to a resident, the prior approval of Bangladesh Bank would be required for a non-resident to repatri-

ate the sale proceeds of shares of a Bangladeshi private/public limited company. This approval is required to be obtained after the sale/transfer of the shares, but prior to the repatriation of the sale proceeds of shares. See **4.4 Restrictions on Payments Abroad or Repatriation of Capital**.

Security over Bank Accounts

In order to enforce a security created over bank accounts of a Bangladeshi company, the lender would need to obtain an order from the court. Once the court passes a decree in favour of the lender, the lender will then have to initiate execution proceedings.

However, a charge over accounts agreement is generally accompanied by a POA authorising the lender to enforce the security created over the bank accounts in the event of default by the borrower. If such a POA is executed by the borrower, the lender would be able to enforce the security created over the bank accounts of the borrower without initiating a legal proceeding before the court.

Security over Movable Assets

In order to enforce a security created over movable assets of a Bangladeshi company, the lender would need to obtain an order from the court. Once the court passes a decree in favour of the lender, the lender will then have to initiate execution proceedings.

However, a deed of hypothecation is generally accompanied by a POA authorising the lender to enforce the security created over the movable assets. If such a POA is executed by the borrower, the lender would be able to enforce the security without initiating a legal proceeding before the court.

Assignments of Contracts and/or Insurances

Since assignment agreements are usually accompanied by an acknowledgement and consent agreement with the counterparts of the relevant contracts and/or insurances, lenders would be able to enforce the security by serving a notice on the relevant counterparts.

If the lender is a bank or financial institution licensed in Bangladesh, or is one of the multi-lateral financial institutions named in the Money Loan Court Act 2003 (MLCA 2003), the lender would be able to use the fast-track loan recovery process under MLCA 2003, which provides for an expedited process for loan recovery. Under the MLCA 2003, the securities furnished in favour of the lender must be auctioned by the lender before a loan-recovery suit is filed. If the auction is not successful or if the proceeds of the auction fall short of the outstanding loan, the lender has to file a suit for realisation of the outstanding amount of the loan.

3.2 Foreign Law

In Bangladesh, parties to a contract are free to choose the governing law of the contract. Therefore, the choice of a foreign law as the governing law of the contract would be upheld by a court in Bangladesh.

3.3 Judgments of Foreign Courts

Judgment by a Foreign Court

According to Section 44A of the Code of Civil Procedure, 1908 (the CPC), a judgment passed by a foreign superior court, subject to Section 13 of the CPC, may be executed directly in Bangladesh if the jurisdiction in which the judgment is passed is a “reciprocating territory” declared by the Bangladesh government. “Reciprocating territory” means any country or territory the government may declare to be a reciprocating territory, from time to time, by notification in the official gazette, and “superior courts”, with reference to any such territory, means such courts as may be

specified in said notification. Therefore, a judgment passed by a court in a foreign jurisdiction that is a reciprocating territory would be directly enforceable in Bangladesh. Currently, Bangladesh has reciprocating arrangements only with India.

In order to enforce a judgment passed by a court in a foreign jurisdiction that is not a reciprocating territory, a fresh civil suit is required to be instituted in Bangladesh. In a suit instituted on the basis of a foreign judgment of a non-reciprocating territory, the foreign judgment itself becomes admissible as evidence, and the court does not require evidence to be adduced on the basis of which the foreign judgment was passed.

However, since the procedure for the disposal of a newly instituted suit applies to a suit filed on the basis of a foreign judgment, and since proceedings before the civil courts in Bangladesh usually take several years to be disposed of due to a backlog of cases, a suit of this nature is also likely to take several years.

Foreign Arbitral Award

Bangladesh is a party to the New York Convention. The Arbitration Act 2001 of Bangladesh (the 2001 Act) provides for the enforcement of foreign arbitral awards in accordance with the New York Convention. Chapter X of the 2001 Act relates to the recognition and enforcement of foreign awards.

Section 45 of Chapter X provides that, notwithstanding anything contained in any other law for the time being in force, subject to Section 46, a foreign arbitral award shall be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bangladesh. Section 45(1)(b) also provides that, on an application made by a party to the award, a for-

foreign arbitral award is enforceable by execution by the court under the CPC, in the same manner as if it were a decree of the court. The application for the execution has to be accompanied by the original arbitral award or an authenticated copy, the original or an authenticated copy of the agreement for arbitration, and evidence proving that the award is a foreign award.

Grounds for refusing the recognition or execution of foreign arbitral awards are set out in Section 46 of the 2001 Act and include the incapacity of any party, the invalidity of the arbitration agreement, inadequate notice of arbitration to the party against whom the award is invoked, the subject matter of the dispute not being capable of being settled by arbitration, and the award being in conflict with the public policy of Bangladesh. These are exactly the same as those provided in Article V of the New York Convention.

As foreign arbitration awards are directly enforceable in Bangladesh under the 2001 Act, it is not essential to have the seat of arbitration in Bangladesh in order to ensure the enforceability of an award. The parties to an arbitration clause are also free to choose the rules of arbitration. However, having the venue of arbitration in Bangladesh would be useful in terms of obtaining interim orders from Bangladesh courts in support of the arbitration. Furthermore, if the seat of arbitration is outside Bangladesh, it may be possible for the counterparty to initiate parallel local court proceedings in Bangladesh. However, in a recent judgment, the Appellate Division of the Supreme Court of Bangladesh (the highest court of Bangladesh) suspended a parallel local court proceeding and directed the parties to participate in the foreign arbitration.

3.4 A Foreign Lender's Ability to Enforce

As mentioned in **2.5 Restrictions on the Grant of Security or Guarantees**, the creation of secu-

ity in favour of foreign lenders would require permission from Bangladesh Bank. Bangladesh Bank has granted general permission under which an “authorised dealer” (ie, a bank licensed in Bangladesh) can act as the security trustee/agent to hold securities on behalf of foreign lenders.

There is uncertainty as to whether a local security agent can have recourse to the process under the MLCA 2003 if it is not itself a lender. This is due to a lack of clarity in the provisions of the MLCA 2003. There is not yet a judicial precedent on this issue.

4. FOREIGN INVESTMENT

4.1 Restrictions on Foreign Lenders Granting Loans

Private sector industrial enterprises in Bangladesh that wish to borrow from abroad (including supplier’s credits, financial loans from institutions or individuals and debt issues in capital markets abroad) require prior authorisation from BIDA. An application in the prescribed form for approval of the proposal for borrowing from abroad would need to be submitted to BIDA along with the necessary supporting documents. In each supplier’s credit/loan from abroad approved by BIDA, a copy of the loan agreement should be forwarded by the authorised dealer concerned to the Foreign Exchange Policy Department (FEPD), the Foreign Exchange Investment Department (FEID) and the statistics department of Bangladesh Bank.

Entities that do not fall within the category of “industrial enterprise” would be required to apply to Bangladesh Bank, as opposed to BIDA, for special permission to avail borrowing from abroad.

Foreign-owned/controlled industrial enterprises in Bangladesh that have urgent occasional need for short-term borrowing for business other than input procurements, for which working capital financing from the local market has not yet been lined up, may access interest-free loans from parent companies/shareholders abroad for up to one year without any prior approval, subject to post facto reporting through their authorised dealer banks to the FEPD of Bangladesh Bank within one week of availing the loan. Repayments of these loans will likewise require no prior approval, but will have to be reported to the FEPD of Bangladesh Bank through authorised dealer banks.

Bangladesh Bank has issued a general permission under which industrial enterprises owned or controlled by foreign shareholders and engaged in manufacturing activities in Bangladesh may avail short-term loans, with interest payable on the loan proceeds, from parent companies/shareholders based abroad for emergency business needs for which working capital financing from the local market has not yet been lined up. However, according to the Bangladesh Bank notification concerned, such facility cannot be availed for the purpose of input procurement.

In medium or long-term foreign borrowing by industrial enterprises in Export Processing Zones or Economic Zones, applications and related documents would need to be submitted in the prescribed form to the authorised dealer banks for onward referral to the Bangladesh Export Processing Zones Authority or Bangladesh Economic Zones Authority and Bangladesh Bank.

The authorised dealer banks through their respective head office will have to submit a consolidated quarterly statement in the prescribed format of all foreign loans received by their clients to the FEID of Bangladesh Bank within 15 days of the end of each quarter.

4.2 Restrictions on the Granting of Security or Guarantees to Foreign Lenders

Foreign lenders are not required to obtain any licence or qualification, nor to establish a presence in Bangladesh, in order to arrange or participate in project financing. However, under Section 5 of the Foreign Exchange Regulation Act, 1947, creation of security in favour of foreign lenders would require prior permission from the Bangladesh Bank.

In light of this, and subject to Bangladesh Bank approval, foreign lenders can hold the security granted by the borrower in respect of project facilities. However, Bangladesh Bank has issued a general permission to authorised dealers to hold collaterals on behalf of overseas banks, branches or correspondents in respect of external borrowing by industrial enterprises as approved by BIDA/Bangladesh Bank. Accordingly, an onshore security trustee or an onshore security agent (ie, an authorised dealer) would be able to hold security (created over the assets of the borrower) on behalf of the foreign lenders without obtaining any permission from Bangladesh Bank.

4.3 Foreign Investment Regime

Foreign investors are free to make investments in Bangladesh in industrial enterprises in all but a few reserved sectors (arms and ammunition and other defence equipment and machinery; forest plantation and mechanised extraction within the bounds of reserved forests; the production of nuclear energy; and security printing and mining), as mentioned in the government's "Industrial Policy". An industrial venture may be set up in collaboration with local investors, or may even be wholly owned by the foreign investors. No permission from Bangladesh Bank is needed to set up such ventures if the entrepreneurs use their own funds. However, to avail the facilities and institutional support provided by

the government, entrepreneurs/sponsors may obtain registration with BIDA. For investment in Export Processing Zones and Economic Zones, such registration shall be done with the Bangladesh Export Processing Zones Authority and the Bangladesh Economic Zones Authority, respectively.

Prior permission from Bangladesh Bank is not required for the issue of shares in favour of non-residents against foreign investment by freely convertible foreign exchange remitted in favour of the company or against the export of capital machineries.

The Foreign Private Investment (Promotion and Protection) Act, 1980 provides protection to foreign private investment in Bangladesh, including the fair and equitable treatment of foreign investment and protection against discrimination and unlawful expropriation.

4.4 Restrictions on Payments Abroad or Repatriation of Capital

The remittance of sales proceeds or returns of non-residents' investment in Bangladesh is generally permissible under Bangladesh law, except in the following cases:

- foreign investment in certain specific sectors (eg, power sector) that have a lock-in period; and
- the sale of shares in a Bangladeshi company to a Bangladeshi resident, which requires prior approval of Bangladesh Bank for the purchaser to remit the sale proceeds of such shares to the non-resident seller. The application for the remittance of sale proceeds of shares is required to be submitted to the FEID of Bangladesh Bank with a valuation certificate issued by an independent chartered accountant or merchant banker. Bangladesh Bank accepts the "fair value" of the shares as the amount that can be remit-

ted, and the “fair value” is determined on the basis of an appropriate combination of three valuation approaches (ie, net asset value (NAV) approach, market value approach and discounted cash flow approach), depending on the nature of the company.

Bangladesh Bank issued a notification on 18 June 2020 stating that the requirement of prior approval from Bangladesh Bank for a non-resident to repatriate the sale proceeds of shares and the requirement to submit a valuation report issued by an independent chartered accountant or merchant banker would not apply if:

- the fair value of the shares is determined by the management of the target company on the basis of the NAV approach, based on the latest audited financial statements of the company together with tax returns;
- the target company issues an undertaking, countersigned by its auditors, to the effect that in the NAV approach the audited financial statements have not contained any revalued assets or intangible assets, and that no expenses/losses have been shown as assets;
- the target company’s certificate specifies that the impairment of assets has been adjusted in arriving at the NAV; and
- the authorised dealer is satisfied that there is no abnormal growth in total assets in any of the last three years, particularly in the last year.

The above provisions would apply regardless of the size of the transaction and the value of the shares. If the NAV approach is adopted and the transaction value of the shares does not include intangible or revalued assets, and if the other conditions summarised above are satisfied, the authorised dealer can remit the transaction price abroad without Bangladesh Bank’s prior approval and without any maximum threshold on the amount.

However, if the intended transaction value is to include any intangible/revalued assets, then the previous requirement of a Valuation Report by an independent chartered accountant or merchant banker and the requirement of prior approval from Bangladesh Bank would apply.

Sale proceeds of up to BDT10 million may be repatriated without an independent valuation report, and sale proceeds of between BDT10 million and BDT100 million can be remitted by complying with the requirement of a valuation report to be issued by an independent chartered accountant or merchant banker.

The repayment of principal, interest or premiums on foreign loans or debt securities must be carried out through an authorised dealer bank in compliance with the terms and conditions set out in the relevant BIDA approval of the loan.

4.5 Offshore Foreign Currency Accounts

Prior permission from Bangladesh Bank is required for a company to maintain offshore foreign currency accounts. Opening and operating offshore project accounts would involve periodic reporting to Bangladesh Bank.

In the power sector, the implementation agreement between the government and the project company usually contains an obligation on the government to allow the project company to maintain offshore project accounts. This is not common in other sectors.

5. STRUCTURING AND DOCUMENTATION CONSIDERATIONS

5.1 Registering or Filing Financing of Project Agreements

Generally, financing or project agreements are not required to be registered with any government entity. However, foreign loans approved by BIDA would require the submission of an executed loan agreement to BIDA.

Depending on the nature of the security, certain registration and perfection formalities would need to be complied with in order for the security to be enforceable. For further details, please see **2.1 Assets Available as Collateral to Lenders** and **2.3 Registering Collateral Security Interests**.

In a mortgage over immovable properties, the relevant deed of mortgage must be perfected by registration with the office of the relevant land registrar. If a mortgage is created by a company, the particulars of the mortgage are required to be recorded in the prescribed manner with the RJSC.

In a charge or hypothecation over movable assets of a company, the particulars of the charge or hypothecation are required to be recorded in the prescribed manner with the RJSC.

5.2 Licence Requirements

Generally, no licence would be required for the ownership of land, nor for undertaking the business of ownership or the operation of assets. Foreign nationals are not eligible to register ownership over land in Bangladesh. However, a company incorporated in Bangladesh with 100% foreign ownership would be able to register land in its name.

5.3 Agent and Trust Concepts

It is possible to have a trust or agency arrangement in Bangladesh whereby security can be granted in favour of a security trustee or security agent for the benefit of a pool of beneficiaries or principals. The terms of appointment of a trustee or an agent are usually captured in a security trustee/agent agreement. A trust arrangement will be governed by the Trusts Act 1882, and an agency arrangement would be governed by the Contract Act 1872. The use of a security trustee or security agent is common in syndicated finance transactions. Local banks usually prefer to accept the role of an agent instead of a trustee.

5.4 Competing Security Interests

Secured creditors would generally have priority over unsecured creditors. Security may be created as a first charge, and other securities may be subordinated to the senior security. Within a class of secured creditors, there may be an arrangement to share the security on a *pari passu* basis. Please see **6.3 Priority of Creditors** regarding the priority and rights of the creditors in an insolvency.

5.5 Local Law Requirements

Generally, for the development of projects, a project company is required to be incorporated in Bangladesh. The most preferred legal form is a limited liability company with a share capital. Project companies are usually organised as special purpose vehicles incorporated for the purpose of developing and owning a particular project.

6. BANKRUPTCY AND INSOLVENCY

6.1 Company Reorganisation Procedures

The Bankruptcy Act, 1997 (the 1997 Act) deals with the bankruptcy of both individuals and corporate entities. Under Section 43 of the 1997 Act, the bankruptcy court has discretion to allow a scheme of arrangement to be put in place between the debtor and the creditors, provided that two-thirds of the creditors (in terms of the value of the outstanding debts) consent to such scheme.

The issue of the reorganisation of a company is governed by the Companies Act 1994 (the 1994 Act). Under Section 228 of the 1994 Act, if a compromise or arrangement is proposed between a company and its creditors or any class of them, and if a majority representing three-quarters in value of creditors agree to such compromise or arrangement, the compromise or arrangement becomes binding on all the creditors or the class of creditors, provided it is also sanctioned by the court. In the case of a company that is being wound up, the liquidator may apply to the court for approval of the compromise or arrangement. Section 311 of the 1994 Act provides that any arrangement entered into between a company that is about to be – or is in the course of being – wound up and its creditors binds the company, if sanctioned by an extraordinary resolution, and also the creditors, if acceded to by three-quarters of majority in number and value of the creditors.

It is not common in Bangladesh for companies to be subjected to bankruptcy under the 1997 Act, nor is it common for companies to be reorganised under the 1994 Act; the common form of reorganisation is amalgamation between solvent companies under the 1994 Act.

There are also provisions under the Securities and Exchange Commission (Substantial Share Acquisition, Takeover and Taking of Control) Rules 2018 (the 2018 Rules) for the taking over of a distressed company. Under the 2018 Rules, a financial institution or a scheduled bank or any other persons or institutions may, individually or jointly, acquire or purchase substantial shares in any financially weak company with the intention of rehabilitating it (bailout takeover), but such bailout takeovers are not common in Bangladesh.

6.2 Impact of Insolvency Process

Under the 1997 Act, if a bankruptcy proceeding is initiated in respect of a company, the bankruptcy court may appoint a receiver (including a provisional receiver). Once a receiver has been appointed, the management of the company's assets and liabilities vests in the receiver, subject to the supervision of the bankruptcy court. The lenders' entitlement would also be subject to the supervision of the court at the instance of the receiver. Generally, the receiver has an obligation to perform contracts that had been entered into by the company prior to the inception of the bankruptcy proceedings, provided that such contracts did not include any fraudulent preference.

6.3 Priority of Creditors

According to Section 75(1) of the 1997 Act, the order of priority of the distribution of assets in the event of bankruptcy is as follows.

The administrative expenses for the bankruptcy proceedings (including the expenses incurred by the receiver and the receiver's fees) will be paid first, prior to payments to creditors. The remaining payments shall be made in the following order of priority:

- all taxes and other debts due to the government;

- all wages or salaries not exceeding BDT2,000 due to any clerk, servant, labourer or worker in respect of services rendered to the debtor during the six months immediately before the date of filing the bankruptcy proceedings;
- all bank debts;
- all unsecured claims; and
- any subordinated claim.

Section 75(1) of the 1997 Act does not contain any reference to secured creditors, nor does the 1997 Act define the term “secured creditor”. However, Section 31(4) of the 1997 Act provides that an order of the court adjudging a debtor as a bankrupt does not affect the right of any secured creditor to realise or otherwise deal with its security. Accordingly, the legal position under the 1997 Act is that the debts of the creditors as set out in Section 75(1) of the 1997 Act are subject to realisation of the security by the secured creditors.

Section 325(1) of the 1994 Act sets out the priority for preferential payments in the winding-up of a company. The order of priority of the debts, as provided in Section 325(1), is as follows:

- all revenue, taxes, cesses and rates, whether payable to the government or to a local authority due from the company;
- all wages or salary not exceeding BDT1,000 for any clerk and other servant in respect of service rendered to the company;
- all wages of any labourer or workman not exceeding BDT500, whether payable for the time or piece-work, in respect of services rendered to the company;
- compensation payable under the Workmen’s Compensation Act, 1923, in respect of the death or disablement of any officer or employee of the company; and
- the expenses of any investigation of the affairs of the company held in pursuance of clause (c) of Section 195 of the 1994 Act.

Subject to preferential payments as stated above, according to Section 307 of the 1994 Act, the property of a company will be applied to satisfy its liabilities to its creditors on a pari passu basis. Any surplus will be distributed among the company’s shareholders according to their rights and interests in the company.

6.4 Risk Areas for Lenders

Bankruptcy proceedings can be time-consuming and cumbersome. There is only one bankruptcy court and, as such, there is a risk of delay in the disposal of a bankruptcy proceeding.

In Bangladesh, there is no organised system for tracing assets owned directly or indirectly by a person; as a result, there are practical difficulties in the identification and disposal of assets of a person who is subject to a bankruptcy proceeding.

6.5 Entities Excluded from Bankruptcy Proceedings

According to Section 11 of the 1997 Act, the following classes are exempt from the scope of bankruptcy proceedings:

- any government organisation, including the Parliament and judicial bodies;
- any charitable or religious body;
- statutory bodies whose principal object is not financial gain; and
- any autonomous body established by or with financial assistance from the government.

7. INSURANCES

7.1 Restrictions, Controls, Fees and/or Taxes on Insurance Policies

Under the provisions of the Insurance Act, 2010 (the 2010 Act), any company, society or statutory body incorporated or registered under the law of Bangladesh or the law of any other country that

is registered with the Insurance Development and Regulatory Authority (IDRA) is permitted to undertake insurance business in Bangladesh and provide risk covers for assets located in Bangladesh.

According to Section 19 of the 2010 Act, no person is allowed to insure outside Bangladesh any risk in respect of any property or interests in Bangladesh, unless a certificate has been obtained from IDRA to the effect that such risk cannot be covered in Bangladesh. IDRA may grant an exemption to any person from the provisions of Section 19 in respect of such property or interests and for such period as it may deem fit.

Insurance policies attract stamp duties, the rates of which are determined based on the type of the policy and the nature of the assets covered under the policy.

7.2 Foreign Creditors

As part of the enforcement proceedings undertaken by or on behalf of foreign creditors, foreign creditors may enforce the security created over the insurance policies and obtain the benefit of the policies.

8. TAX

8.1 Withholding Tax

Generally, any income generated by a non-resident from interest paid by the borrower is taxable under Section 18(4) of the Income Tax Ordinance, 1984. Non-resident lenders are liable to pay, and resident borrowers are responsible for withholding income tax at the rate of 20% on the income generated from interest paid by the borrower, unless exempted by the National Board of Revenue (NBR). However, the government of Bangladesh has granted certain sector-specific tax exemptions – for example, the NBR

has granted foreign lenders exemption from the payment of income tax for a specific period in respect of their income from interest arising from loans extended to any private power generation company in Bangladesh.

8.2 Other Taxes, Duties, Charges

Apart from the taxes payable on the interest as noted in **8.1 Withholding Tax**, no taxes, charges or tax considerations are relevant to lenders making loans to entities incorporated in Bangladesh. Please see **2.3 Registering Collateral Security Interests** regarding the payment of stamp duties and registration fees on the loan documentation.

8.3 Limits to the Amount of Interest Charged

As mentioned in **4.1 Restrictions on Foreign Lenders Granting Loans**, prior approval from BIDA is necessary to avail of a foreign loan. There is no specific ceiling on the amount of interest that can be charged on foreign loans. BIDA (formerly the Board of Investment) issued a Notification dated 10 December 1998 setting out the guidelines for borrowing from abroad, according to paragraph 2(d) of which the interest rate and other charges related to borrowing from abroad should be reasonable compared to the prevailing lending rates in the international markets (eg, LIBOR) in the currencies concerned for the relevant tenure. Usually, the interest rates are based on the prevailing government treasury bond rate in that currency for that tenure plus a reasonable country risk premium.

For BDT loans by local banks, Bangladesh Bank has fixed a maximum 9% interest rate on all loans except credit cards, by its notification dated 24 February 2020.

9. APPLICABLE LAW

9.1 Project Agreements

Project agreements are typically governed by Bangladesh law in cases where the parties are Bangladeshi residents. If there are one or more foreign counterparties (eg, in the case of foreign investors), project agreements may be governed by foreign law. English law is usually preferred as the governing law of project agreements entered into with foreign counterparties.

9.2 Financing Agreements

Financing agreements are typically governed by Bangladesh law in cases where the borrower avails a loan from a domestic lender. However, in the case of foreign borrowings, English law is usually preferred as the governing law. For security created over assets situated in Bangladesh, the relevant security documents are usually governed by Bangladesh law.

9.3 Domestic Laws

Generally, the creation and enforcement of security interest on assets situated in Bangladesh are governed by Bangladesh law.

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Dr Kamal Hossain and Associates was established in 1980 and is one of the largest law firms in Bangladesh specialising in commercial law. The firm provides a comprehensive range of legal services for both local and international clients. Its strength lies not only in the breadth of the individual expertise, but also in more than 40 years of institutional experience. Assisting and advising on project financing is one of the firm's key practice areas; other practice areas include admiralty and shipping, arbitration, banking and

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