



Herbert Smith

Guide to lending and taking security in Asia

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Bangladesh

Dr Kamal Hossain and Associates

Lending

1 Does a lender require a licence to lend money to a company based in Bangladesh (the “borrower”)? Are there any exemptions available?

Yes. Section 8 of the Moneylenders Act 1940 (the “1940 Act”) provides that “no moneylender shall carry on any business of money-lending unless he holds an effective licence”. Local banks and local financial institutions can carry on a business of lending under the banking and financial institution licence and do not need a separate licence under the 1940 Act. In respect of foreign loans, the borrowers must obtain approval of the loan transaction from the Board of Investment (the “BOI”), unless the borrowing company is located in an Export Promotion Zone (“EPZ”); is a government entity; or is an authorised dealer, which are generally banks. If BOI approval is granted to the borrower then the foreign lenders are not required to obtain any further licence under the 1940 Act.

Section 4 of the Foreign Exchange Regulations Act 1947 (the “FER Act”) prohibits Bangladesh residents from borrowing in foreign exchange without a general or special permission of the Bangladesh Bank (the central bank of Bangladesh). The Bangladesh Bank has issued instructions under the FER Act which are summarised in the Guidelines for Foreign Exchange Transactions (the “FER Guidelines”). Under Chapter 23 of the FER Guidelines, the BOI is the relevant authority for purposes of section 4 of the FER Act. Accordingly, approval of foreign loans by the BOI amounts to approval under the FER Act.

The rules governing approval of foreign loans mainly depend on how the borrower is classified under Bangladesh law. The four classifications are:

1.1 Private sector companies outside EPZ

Under Chapter 15 of the FER Guidelines, all proposals for borrowing from abroad by private sector industrial enterprises in Bangladesh (including supplier’s credit, financial loans from institutions or individuals and debt issues in capital markets abroad) shall require prior authorisation from the BOI. In each case where the supplier’s credit/loan is approved by the BOI, a copy of the loan agreement should be forwarded by the concerned authorised dealer to the “External Debt and Grant Section” Foreign Policy Department, Bangladesh Bank, Head Office, Dhaka. However, short term credit terms up to one year in duration given by suppliers/buyers abroad are subject to the guidelines/instructions issued by the Bangladesh Bank in regards to settlements for commercial transactions.

1.2 Entities established in the EPZ

The EPZs were established under the Export Processing Zone Authority Act 1980. The following types of industrial units operate in the EPZs:

- Type A: 100% foreign owned including those owned by Bangladesh nationals ordinarily resident abroad;
- Type B: Joint Venture projects between foreign and Bangladesh entrepreneurs resident in Bangladesh; and
- Type C: 100% Bangladesh entrepreneurs resident in Bangladesh.

Type A industries located in the EPZs may obtain short-term foreign currency loans from overseas banks and financial institutions subject to the following conditions:

- the loan shall be received through an authorised dealer in Bangladesh and the loan proceeds will be credited to a Foreign Currency Account maintained by the authorised dealer in the name of the Type A unit, to be used for financing import of capital machinery and raw materials, payment of interest/service charges, repayment of loans and for crediting a local currency account for meeting local expenses;

- only assets fully owned by the Type A industry may be lodged as collateral for such a loan;
- repayment of principal and interest on such a loan can be remitted from balances available in the Foreign Currency Account without prior Bangladesh Bank approval. No funds can be provided from the AD's own resources for such repayment except with prior approval from the Bangladesh Bank;
- in cases where the loan is called up by the creditor, the assets charged to a foreign lender will be allowed to be sold only in foreign exchange, and proceeds, after paying off all local liabilities in Bangladesh, may be remitted abroad with Bangladesh Bank's approval; and
- no local currency loan against repatriable short-term foreign currency loan will be allowed to Type A industries.

Type B industries may also obtain foreign currency loans from overseas banks and financial institutions subject to the conditions applicable to Type A industries as noted above. The only exception is that Type B industries are not permitted to grant security over their fixed assets or raw materials to non-residents.

The FER Guidelines issued by the Bangladesh Bank do not contain express provisions regarding obtaining credit facilities by Type C industries from foreign lenders. Under the current interpretation of the Foreign Exchange Guidelines, Type C industries are subject to the same terms, conditions and restrictions on foreign credit facilities that apply to private sector industries located outside the EPZ.

1.3 Non-banking Financial Institutions

Non-banking Financial Institutions operating in Bangladesh licensed under the Financial Institutions Act 1993 may obtain loans from abroad subject to prior approval of the Bangladesh Bank under the following terms and conditions:

- for obtaining such loans, the effective rate of interest will have to be consistent with foreign loans availed by residents with prior approval of the Bangladesh Bank;
- the repayment period (including any grace period) will not be less than five years; and
- loans thus obtained (in foreign currency) from abroad shall be used as security to obtain a Taka loan from any bank in Bangladesh. Taka loans so obtained shall be used for lending to "manufacturing industries and infrastructure sector" (other than real estate) only.

1.4 Government entities

Borrowing abroad by public sector entities requires approval from the Government. All borrowing on commercial (non-concessional) terms requires specific approval from the Hard Term Loan Committee of the Ministry of Finance.

2 What are the consequences of making a loan to a borrower in Bangladesh without a licence?

If a lender advances a loan without prior approval from the relevant government authorities, as required under the FER Act, the lender would be unable to recover the principal or interest or enforce the agreement made or security taken unless such approval is obtained subsequently. There is also the possibility of the security being confiscated on the grounds of violation of the FER Act.

3 Will a borrower based in Bangladesh have to deduct amounts for withholding tax on interest payments made to an overseas lender?

There are currently no laws in Bangladesh requiring withholding tax on interest payments made to an overseas lender to be deducted.

4 Is there any limit to the level of interest that can be charged on loans made in Bangladesh?

The Bangladesh Bank determines the limits on interest that can be charged on loans made in Bangladesh. The FER Guidelines do not set out any limits as to the level of interest that can be charged on loans made in Bangladesh. However, as a matter of practice, the BOI would not approve any foreign loans if the rate of interest exceeds LIBOR +4%.

5 Is it possible for one lender to agree that a second lender may be preferred over the first lender for repayment of debt irrespective of when that debt was incurred? If it is possible, how would you document such an arrangement?

Yes. It may be possible to subordinate debt in Bangladesh whereby the junior creditor(s) agrees not to be paid by a borrower until the senior creditor(s) has been paid.

This may be done by an arrangement whereby the parties agree to a set of pre-arranged rules in a contract (typically by way of an intercreditor deed or subordination deed) governing payment and priority. Generally, under this arrangement, the junior creditor undertakes not to collect the junior debt until the senior debt has been paid.

Taking security

6 Does a lender have to be licensed or registered in order to take security over assets in Bangladesh or a guarantee from an entity incorporated in Bangladesh?

A lender does not have to be licensed or registered to create security over assets in Bangladesh or a guarantee from an entity incorporated in Bangladesh. However, as noted above, the supplier's credit/loan agreement must be registered with the BOI.

7 Does the taking of security in Bangladesh result in a lender being liable to tax in Bangladesh?

Taking of security in Bangladesh does not result in the lender being subject to tax. However, stamp duty is payable and the amount payable depends on the nature of the security.

8 Can a security interest be taken in Bangladesh over the following assets?

8.1 Land

Yes. Security can be taken in Bangladesh over land by way of mortgage.

8.2 Shares in a Bangladeshi company

Yes. Security over shares can be taken in Bangladesh by way of pledge, charge or hypothecation.

8.3 Bank accounts

Yes. Security over bank accounts may be taken in Bangladesh by fixed charge or floating charge.

8.4 Receivables (rights under contracts)

Yes. Subject to any restrictions contained in the contract (in respect of assignment and the creation of security) an assignment of receivables/rights under the contract may be made in favour of an assignee.

8.5 Insurance

Yes. Subject to any restrictions stipulated in the insurance policy (in respect of assignment and the creation of security), rights under insurance (including the payment of the insurance proceeds) may be assigned to an assignee by way of security. However, the Guidelines for Foreign Exchange Transactions, Volume 1, provides that insurance policies may not be assigned by a Bangladesh resident to a non-resident, or by one non-resident to another non-resident, without the prior approval of the Bangladesh Bank.

8.6 Floating charge over all assets

Yes. A floating charge over assets can be created in Bangladesh. Please see paragraph 8.2 above for an explanation on the creation of floating charges over shares.

9 Can a company incorporated in Bangladesh (the “guarantor”) give a guarantee for the debt of the borrower? If the borrower is incorporated in a different country, would the guarantor still be able to give the guarantee?

Yes. The guarantor can give a guarantee for the debt of the borrower. In a transaction involving a foreign lender: (1) a Bangladesh company may only guarantee the debt of a foreign company with the approval of Bangladesh Bank; and (2) a Bangladesh company may guarantee the debt of another Bangladesh company without the approval of the Bangladesh Bank.

10 If the borrower becomes insolvent, will the secured assets be protected from the general creditors of the borrower? What claims would have priority over the security?

If the borrower becomes insolvent, the secured assets are protected from general creditors unless the security is invalid or unenforceable as a result of failure to register or other factors. Under the Insolvency Act 1996, the following claims have priority over secured lending:

- administrative expenses including the costs of the receiver, liquidators and/or administrators;
- government taxes;
- wages or salaries, not exceeding BDT2,000 (about USD300), due to any clerk, servant, labour or workmen in respect of any services rendered to the debtor during the six months immediately prior to the Bankruptcy Petition; and
- debts of local banks and financial institutions.

11 Can a lender enforce its security or claim under the guarantee freely after default by the borrower or does a lender need a court order to enforce its security or claim under the guarantee? If a court order or court involvement is required for security enforcement or a guarantee claim, how long will it approximately take to complete an enforcement of security?

In the event of default, the lender can enforce the security or guarantee after obtaining an order from the court. To enforce a security, the lender must initiate proceedings in the trial court. Once the trial court passes a decree in favour of the lender, whether *ex-parte* or otherwise, the lender must initiate execution proceedings.

If the proceedings are contested, enforcement of security may take five to six years, assuming none of the parties file interlocutory applications during the proceedings or appeal against the judgment and decree of the trial court.

Section 12 of the Artha Rin Adalat Act 2003 (Money Loan Court Act) (the “2003 Act”) provides that any financial institution, defined in section 2 of the 2003 Act, holding valid power of attorney authorising enforcement of security without intervention of the court must enforce that security before initiating a claim to recover the loan amount. Where section 12 is applicable, the lender must enforce the security, for instance, by selling the secured property before initiating recovery proceedings.

It should be noted that the provisions of the 2003 Act do not apply to foreign lenders.

12 Can a liquidator or creditor of the borrower or guarantor prevent the enforcement of a security or guarantee?

A liquidator or creditor may prevent the enforcement of security if it can be shown that the security was created to defraud the creditors or if the security is invalid as it has not been registered.

13 Are there any laws which prevent a company which has been acquired by the borrower from providing financial assistance, granting security or giving guarantee to secure the loan used by the borrower to acquire such company?

Section 58 of the Companies Act 1994 (the “Companies Act”) prohibits a company limited by shares, other than a private company or the subsidiary of a public company, from giving, either directly or indirectly, a loan, guarantee, providing security or other financial assistance for the purchase of shares in the company. However, this does not prohibit a company from lending money where money-lending is part of the ordinary business of the company.

14 Does any security given by the borrower or guarantor or guarantee granted by the guarantor have to be registered or filed with a governmental body/court? What is the time period for such filing or registration to be made and what is the consequence if it is not made?

As a matter of general Bangladesh law, failure to register any security required to be registered with the appropriate authority will render the security invalid and void.

Section 159 of the Companies Act provides that every mortgage or charge created by a company after 1994 is void against the liquidator and any creditor of the company unless the particulars of the mortgage or charge and the instrument, if any, by which the mortgage or charge was created or evidence, or a copy thereof verified in the prescribed manner, are filed with the Registrar of Joint Stock and Companies (the “RJSC”) within 21 days after the date of its creation. Any contract or obligation for repayment of the money thereby secured is not prejudiced and when a mortgage or charge becomes void under section 159, the money that was secured is payable immediately.

A security interest in land must be registered with the office of the relevant Sub-Registrar. As noted above, any security created over land which belongs to a company must also be registered with the RJSC within 21 days after the date of its creation. Failure to register will result in the security being void against the liquidator and any creditor of the company.

Guarantees do not need to be registered or filed with any governmental body/court.

15 Does any security or guarantee give rise to any stamp duty/taxes/registration fees?

Under the Stamp Act 1899 (the “Stamp Act”), certain types of security including agreements relating to deposit of title deeds, pawns, pledges, bills of exchange, mortgage deeds, promissory notes, releases, settlements and insurance guarantees are liable for stamp duty/taxes. The Stamp Act specifies the rate of stamp duty payable and the party liable to pay the duty.

16 Is it possible to grant a lender security over an asset which has already had security granted over it to another person? If it is possible, how would you normally document such an arrangement?

Yes. It may be possible to subordinate debt in Bangladesh whereby the junior creditor(s) agrees not to be paid by a borrower until the senior creditor(s) has been paid.

This may be done by an arrangement whereby the parties agree to a set of pre-arranged rules in a contract (typically by way of an intercreditor deed or subordination deed) governing payment and priority. Generally, under this arrangement, the junior creditor undertakes not to collect the junior debt until the senior debt has been paid.

Regulated industries

17 Are there any laws preventing the acquisition of companies or assets in the following industries?

17.1 Oil/gas

There is no statutory prohibition regarding the acquisition of companies or assets in the private/non-government oil or gas industry. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

17.2 Electricity

There is no statutory prohibition regarding the acquisition of companies or assets in the electricity sector. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

17.3 Natural resources/mines

There is no statutory prohibition regarding the acquisition of companies or assets in the natural resources/mining industries. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

17.4 Telecommunications

There is no statutory prohibition on the acquisition of a telecommunications company or assets in the telecommunications industry. Under section 37 of the Telecommunications Act 2001, prior approval must be obtained from the Bangladesh Telecommunications Regulatory Commission for any change in the share capital or ownership of a telecommunications company which has the effect of transferring control of the activities permissible under the licence, or where the licence holder company is merged with another company. In addition, specific prior approval requirements may apply depending on the nature of transactions on a case by case basis.

18 Are there laws preventing the taking of or enforcement of security in relation to shares in or assets of companies in the following industries?

18.1 Oil/gas

There is no specific statutory prohibition regarding taking of or enforcement of security in relation to shares in or assets of oil/gas companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.2 Electricity

There is no statutory prohibition regarding taking of or enforcement of security in relation to shares in or assets of electricity companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.3 Natural resources/mines

There is no statutory prohibition on taking of or enforcement of security in relation to shares in or assets of natural resources/mining companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

18.4 Telecommunications

There is no statutory prohibition on taking of or enforcement of security in relation to shares in or assets of telecommunications companies. However, specific prior approval requirements may apply depending on the nature of the transactions on a case by case basis.

Governing law

19 On the basis that the loan agreement and/or guarantee are governed by English law is an English law judgment in relation to the loan agreement enforceable in Bangladesh?

Under section 44A of the Code of Civil Procedures 1908 (the "CPC"), foreign judgments (including English law judgments) are directly enforceable in Bangladesh only if the judgments are rendered by the courts of reciprocating territories. The CPC defines "reciprocating territory" as any "country or territory as the government may, from time to time, by notification in the official gazette declare to be reciprocating territory" for the purposes of section 44A of the CPC.

An alternative procedure for enforcement of foreign judgments is set out in sections 13 and 14 of the CPC in respect of judgments originating from non-reciprocating jurisdictions. Under section 13, a foreign judgment is conclusive as to any matter adjudicated upon between the parties except where:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of Bangladesh in cases in which such law is applicable;
- the proceedings in which the judgment was obtained are opposed to natural justice;
- it has been obtained by fraud; and
- it sustains a claim founded on a breach of any law in force in Bangladesh.

Section 14 of the CPC states that the courts of Bangladesh would presume a judgment to have been pronounced by a court of competent jurisdiction upon production of a certified copy of the judgment unless proved to the contrary. To enforce a foreign judgment the decree-holder must institute a suit in Bangladesh. Once the local court passes a judgment in the suit, a separate execution proceeding must be instituted to realise the sum claimed or the security sought to be enforced.

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The firm, established in 1980, is one of the largest law firms in Bangladesh. It provides a comprehensive range of legal services for both national and international clients. Its strength lies not only in the breadth of individual expertise available, but also in thirty years of institutional experience of advice and representation in key practice areas which include admiralty and shipping, arbitration, aviation, banking and financial regulation, commercial and corporate law, constitutional and administrative law, employment law, energy, human rights law, intellectual property, revenue law, taxation and telecommunications.

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