

2012

Legal Alert 2012

Guideline & Regulation for Off-Shore Banking Unit (OBU)

An Off-Shore Banking Unit (OBU) of a schedule bank as per Bangladesh Bank Circular No. **BCD(P) 744 (27) dated 17.12.1985**, has the authority to borrow in foreign currency from abroad, take deposit from non-resident and also may provide loan to non-resident. Further, OBU are also allowed to do “**permissible transactions**” in foreign currency to any EPZ company including type A company (100% foreign owned).

On the other hand, as per **volume 1 Chapter 16 Section 2 Para 17** of the Guideline for Foreign Exchange Transactions of Bangladesh Bank, the Type A industries of EPZ are allowed to take short term loan from abroad.

Schedule banks are allowed to maintain foreign currency account of Type A companies of EPZ and also allowed to provide facilities like L/C, guarantee etc. provided any payment in foreign currency are met out of the proceeds of export and/or any foreign currency deposited in the FC account. [Chapter 7 section 3 of the Guideline]

The difference between the OBU and schedule bank should be that OBU are allowed to give short term foreign currency loan like any foreign bank **volume 1 Chapter 16 Section 2 Para 17** of the Guideline for Foreign Exchange Transactions, whether or not any fund is lying and/or any export proceed is about to be credited in FC account.

The OBU are treated as non-resident, hence it should be made clear that “**permissible transactions**” means lending in foreign currency to the Type A industries. Due to absence of clear guideline, there are differences of practices and weakness in regulation amongst the schedule banks having OBU license. Further, few OBU are taking security of the assets of Type A industries under volume 1 Chapter 16 Section 2 Para 17(3) of the Guideline although in case of shortage of supply of foreign currency, they are not allowing other OBU and/or foreign banks to join hand on pari passu basis. This is clearly not helping the foreign investment and/or business of Type A industries.

Since OBU are non-resident and are allowed to borrow from abroad and/or take deposits and/or lend to non-resident, foreign exchange regulation with a view to maintain FOREX reserve are not strictly applicable. It should be made clear that OBU, are allowed to give syndicated loan to Type A industries on pari passu basis out of their own foreign currency deposits collected from abroad. Further, separate regulation on money laundering, terrorist finance is required for OBU.

Liquidity Crisis vs. Duty to Report

Money is not circulating in the stock market. On the other hand, the Banks are suffering from serious liquidity crunch. The central banks regulation is targeting towards curbing inflation by controlling CRR and SLR, which means more reserve and less liquidity and cash flow.

Besides, there is money laundering laws, which impose duties on the listed reporting authorities to “Know your Customer (KYC)” and report any suspicious transaction to the regulators. Since the regulation on the listed reporting authorities is not even, the money which is not strictly “white” are not circulating in the visible financial system and are finding its place elsewhere. Few institutions are more regulated and are busy with reporting and others are not regulated at all although there laws impose such duties to all reporting authorities.

Recently, the government has promulgated a new Money Laundering Prevention Ordinance incorporating laws to prevent stock market manipulation, and a provision that says documents provided by foreign governments will be admissible in court for bringing back siphoned off money from abroad.

It has expanded the list of “Predicate Offence”. The new law has made it criminal offence to take advantage of price-sensitive information about the stock market before its public disclosure commonly known as insider trading, and also it is an offence to attempts to control the market individually or institutionally. Therefore, money earned by means of predicate offence through stock trading is a now money laundering.

The new law has also expanded the list of reporting organisations that must submit reports to Bangladesh Bank about suspicious transactions using them. Stock dealers and brokers, portfolio managers and merchant bankers, security custodians, fund managers, real estate developers, cooperatives, non-profit organisations, trusts, and company service providers have also been newly included in the said list.

In the new law the definition of money laundering has been widened as well. It included laundering off money abroad through over invoicing or under invoicing.

The above amendments are appreciable. Although enforcement of which would require institutional capacity and skilled manpower. In particular, all listed reporting authorities should be equally monitored whether they are regularly reporting any suspicious transaction. This will not only reduce commission of predicate offence but also improve liquidity situation.

LEGAL ALERT: WINNING THE BATTLE OVER MARITIME BOUNDARY

Bangladesh has filed its maritime suit on October 8, 2009 (registered on 14 December, 2009) against Myanmar, which was filed by Bangladesh to the International Tribunal for the Law of the Sea (ITLOS), an Arbitration Tribunal after failure to obtain any mutual ending in last 38 years as case no-16, to resolve a longstanding dispute over the maritime boundary.

After long proceeding over two years the tribunal has proclaimed its landmark verdict of 151 pages on December 14, 2012 which sustained Bangladesh's claim to 200-nautical-mile exclusive economic and territorial rights in the Bay of Bengal rejecting the claims of Myanmar. It is to be noted that it was the first by any court or tribunal to delimit the maritime area beyond 200 miles, known as the "outer continental shelf". The tribunal mentioned in paragraph-391 of the judgment as follows:

"A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive efficient operation of the to the Convention."

Bangladesh claims to resolve the dispute under a principle based on "equity" while India and Myanmar favors "equidistance" system to get larger maritime areas. Under a UN charter, the principle of "equity" takes into account a country's population, economic status and needs, GDP growth, and other issues, while the "equidistance" system marks the boundary through geometric calculations. The tribunal in paragraph-239 of the judgment states as follows,

"The Tribunal finds that in the present case the appropriate method to be applied for delimiting the exclusive economic zone and the continental shelf between Bangladesh and Myanmar is the equidistance/relevant circumstances method."

However, the Tribunal while passing the Judgment has taken into account, Bangladesh's population, economic status and needs, GDP growth, and other issues. The credit goes to Bangladesh and concerned personnel who has taken bold and visionary decision to seek a binding judicial resolution of this longstanding dispute and placed convincing argument on equity, which was taken as relevant circumstances, before the tribunal through an eminent legal team, including deputy agent Rear Admiral (retd.) Md. Khurshed Alam, attorneys James Crawford, Philippe Sands and Alan Boyle of the United Kingdom, Paul Reichler and Lawrence Martin of the United States, and Payam Akhavan of Canada and others. Myanmar also deserve full admire for its willingness to resolve this matter by legal means and for its acceptance of the tribunal's judgment.

The verdict of the tribunal which is final and cannot be appealed against according to Article-33 of the Statute of the International Tribunal for the Law of the Sea is significant because it finally resolves, peacefully and according to international law, a problem that had hampered the economic development of both states almost four decades.

The judgment would now allow Bangladesh to explore oil and gas for Bangladesh in deep-sea areas previously marked disputed. It also opens the horizon to resolve the dispute of same nature pending between Bangladesh and India.