

Legal Insight!

CHAMBERS INITIATIVES

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THIS IS OUR HALF YEARLY LEGAL WRITINGS KNOWN AS "LEGAL INSIGHT", A PART OF OUR LEGAL INITIATIVE. WE HAVE ANALYSED THE MAJOR EVENTS AND CHANGES IN LAWS THAT TOOK PLACE IN THE LAST SIX MONTHS IN BANGLADESH OR GLOBALLY HAVING IMPACT ON BANGLADESH. WE HAVE ORGANISED IT UNDER NINE HEADINGS AS PER OUR NINE PRACTICE DEPARTMENTS COVERING OUR THIRTY ONE [PRACTICE AREAS](#).

Commercial

Pharmaceuticals export from Bangladesh grew rapidly due to production of anti-coronavirus drugs and cash incentives of the government. A number of essential drugs are now manufactured and exported abroad, e.g., malaria, tuberculosis, cancer, penicillin, kidney dialysis, etc. The process of registration for such drugs for local use is often slow impacting public health.

Pharmaceutical companies that entered the foreign market are required to be very cautious as they will be meeting ever increasing consumer expectation and are required to be prepared to respond to brand crises, which may arise due to the prevailing risk factors like supply chain disruption, pharmaceutical fraud, cybersecurity threats during the pandemic. Such risks must be understood from local and international law perspectives.

On another note, about 20 percent of the drugs produced in the country are generic versions of patented drugs that have particularly benefitted from the TRIPS flexibilities. On graduation, in 2026, Bangladesh will cease to enjoy the derogations from the TRIPS disciplineⁱⁱⁱ. However, the LDC flexibilities provided in WTO agreements will continue to be in force till the end-2032 subject to granting extension. To make the relevant policies WTO compatible, Bangladesh will need to change its patent laws and license granting procedures that are currently in place. At the same time, Bangladesh should actively pursue the proposal for extension of TRIPS flexibility for the graduated LDCs till end-2032.ⁱⁱⁱ From now on, pharmaceutical manufacturing companies and government are required to work together to modernize patent law and unlicensed granting procedure.

Construction

Historically amongst all infrastructure projects, most foreign investment took place, in power and energy sector. Other infrastructure sectors did not receive similar attention. However, in recent years, non-PPP and G2G basis investment in other infrastructure projects are taking place for example, American Tower Corporation (ATC), one of the top wireless tower operators in the world, has acquired 51% stake of a Bangladeshi tower company, a wireless tower infrastructure project^{iv}.

On the other hand, Bangladesh has set an ambitious goal of generating more than 4,100 megawatts of electricity from renewable energy sources by 2030 as the country looks to cut greenhouse gas emissions significantly. Besides, at the COP26 summit in Scotland important agreement like eliminating financing for coal-fired power plants concluded. More local and foreign investment in renewable energy sector is likely to increase.

It is very important to evaluate the company document from legal perspectives and review the local laws and regulations impacting the project before investing. Besides, many projects largely dependent upon land lease or ownership, legal due diligence of which is a must.

Corporate

Globally multinational companies are pouring billions of dollars into AI software to increase efficiency. Tech mergers are taking place at such a pace that regulators are often finding it difficult to keep pace with them by screening merger with competition and antitrust laws.

In Bangladesh Steel Re-Rolling Mills Limited and Ors. vs. The Registrar, Joint Stock Companies and Firms, Dhaka and Ors. Reported in LEX/BDHC/0120/2020, honorable Mr. Justice Muhammad Khurshid Alam Sarkar, allowed merger of a listed and a non-listed company by fixing the ratio of shareholding between transferor and transferee company and also public shareholding. The honorable court also imposed restriction upon the sponsor directors and shareholders on transfer of shares in the merged company within three years' time. The judgment clearly provided a guideline for merger involving a listed and a non-listed company.

The English version of Bangladesh EPZ Labour Act, 2019 is now available. There are new features which are different from BLA 2006, e.g., group insurance in accordance with the existing insurance laws; establishment of EPZ Minimum Wages Board; Workers' Welfare Association along with CBA; EPZ Labour Court; mandatory provident fund for workers; Employer-buyer-worker Participatory Fund for the welfare of workers employed in the EPZ; Retirement benefits instead of gratuity, etc.

Sooner or later corporations will be following mandatory climate change and sustainability compliance and disclosure standard. Due diligence, early preparation and adaptation may help the companies to manage the cost.

Dispute resolution

In Banu vs. Bangladesh and Ors. (31.12.2020 - BDHC): LEX/BDHC/0031/2020, hon'ble High Court bench comprising Mr. Justice Md. Mozibur Rahman Miah and Mr. Justice Mohi Uddin Shamim, JJ. held that detainee is entitled to have compensation at Taka 20,00,000/- (Taka Twenty lakh only) for his wrongful confinement. There has been no standard policy to measure the amount of compensation, however Hon'ble court fixed the amount keeping in mind the surrounding circumstances particularly based on earning per week. Applying the principles of vicarious liability, the Hon'ble court also held that compensation for the detainee to be borne by the highest authority of police force because subordinate police

officials were found responsible for the wrong confinement of the detainee. It is now becoming increasingly possible to get compensation for the negligent liability of an authority from the honorable High court.

Shipping

Shipping companies are making huge profit due to global supply strains that have pushed up ocean freight rates near record levels. The strain caused partly due to container dislocation, with empty boxes severely out of place since pandemic-driven lockdowns and a sudden increase of demand.

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On the other hand, authorities are working hard in an effort to ease cargo bottlenecks that have led to shortages and higher consumer costs. To enhance the capacity of container handling in the port and ease congestion the National Board of Revenue (NBR) allowed establishing private inland container depots (ICDs). The off docs must have auction yard, bank and infrastructure facilities as well as connectivity with ASYCUDA World of customs. At the beginning, the ICD will be allowed to handle empty and export goods-loaded containers. Currently, there are some 19 ICDs in the Chattogram Port, handling all export goods and 38 import goods, a few non-RMG import products.

However, at Chattogram port several containers are tied up with disputed cargo, due to several delay caused by customs authority, in holding auction of such cargo, to adjust unpaid duties with the sale proceeds. It might be possible to get intervention of admiralty court to speed up auction process and get release of the container.

Taxation and Banking

Taxation

Income Tax

The Organisation for Economic Co-operation and Development (OECD) in its website states “Major reform of the international tax system finalized today at the OECD will ensure that Multinational Enterprises (MNEs) will be subject to a minimum 15% tax rate from 2023. The landmark deal, agreed by 136 countries and jurisdictions representing more than 90% of global GDP, will also reallocate more than USD 125 billion of profits from around 100 of the world’s largest and most profitable MNEs to countries worldwide, ensuring that these firms pay a fair share of tax wherever they operate and generate profits. The global minimum tax agreement does not seek to eliminate tax competition, but puts multilaterally agreed limitations on it, and will see countries collect around USD 150 billion in new revenues annually.

Pillar One will ensure a fairer distribution of profits and taxing rights among countries with respect to the largest and most profitable multinational enterprises. It will re-allocate some taxing rights over MNEs from their home countries to the markets where they have business activities and earn profits, regardless of whether firms have a physical presence there. Specifically, multinational enterprises with global sales above EUR 20 billion and profitability above 10% - that can be considered as the winners of globalization - will be covered by the new rules, with 25% of profit above the 10% threshold to be reallocated to market jurisdictions.



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Under Pillar One, taxing rights on more than USD 125 billion of profit are expected to be reallocated to market jurisdictions each year. Developing country revenue gains are expected to be greater than those in more advanced economies, as a proportion of existing revenues.

Pillar Two introduces a global minimum corporate tax rate set at 15%. The new minimum tax rate will apply to companies with revenue above EUR 750 million and is estimated to generate around USD 150 billion in additional global tax revenues annually. Further benefits will also arise from the stabilization of the international tax system and the increased tax certainty for taxpayers and tax administrations.” It is also stated that countries are aiming to sign a multilateral convention during 2022, with effective implementation in 2023. The OECD will develop model rules for bringing Pillar Two into domestic legislation during 2022, to be effective in 2023.

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This will certainly bring more certainty and help ease trade tensions in particular regulators will be less worried about transfer pricing issues and many BLT provision and requirements will be replaced by the said MLT. Bangladesh is yet to become signatory to the convention. Draft Income Tax Act-2022 aiming to include domestic pricing and anti-avoidance rules particularly for MNC operations, is required to be revisited. MNCs operating in Bangladesh are required to review the impact of both.

Customs

Hon'ble Mr. Justice Syed Refaat Ahmed and Hon'ble Mr. Justice Sashanka Shekhar Sarkar passed a judgement on complex issues involving legal interpretation of GRI, NBR orders involving HS code classification of a new AI-based data processing machine for an RMG (dyeing) manufacturing unit in GAB Ltd vs Customs. The judgment addressed the issues like the process to be followed by customs in determining HS code etc. It is a landmark judgement because it affirmed for the very first time in our jurisdiction a set procedure to be followed by customs while determining the HS code of imported goods. This will certainly reduce arbitrary determinations as often applied by junior officers of customs. Mr. Mohammed Forrukh Rahman of Rahman's Chambers along with another lawyer conducted the hearing for the petitioner.

Finance

FOREX

Bangladesh bank confirms that regulations involving export proceeds need to be repatriated within the statutory period, are equally applicable for repatriation of export proceeds against services as defined at Section 2(bbb) of the Foreign Exchange Regulation (FER) Act, 1947. GFET outlines operational modalities on services delivered in non-physical form relating to ICT and other businesses.

ADs may allow their service exporter-customers to enter into arrangements, including maintenance of merchant accounts, with international marketplaces/platforms. In addition to such accounts, service exporters may maintain notional accounts, without limiting to licensed OPGSPs, with internationally reputed payment service aggregators, payment facilitators, digital wallets or other legitimate payment systems licensed by the regulatory authorities concerned. Accordingly, ADs shall facilitate repatriation of service income deposited in their nostro accounts by international marketplaces/platforms including eligible foreign payment operators, regardless of having arrangements and maintaining separate nostro collection accounts.



Non funded facilities

Letter of Commitment for Bank's, undertaking to finance issued for a bidder involving govt tender cannot be withdrawn without the permission of Procuring Entity.

Classification, loan reschedule

BRPD, relation to previous COVID-19 relaxation circulars, issued circular in December 2021 confirming that for regular borrower 25% (15% for CSME) deposit is required to avoid CIB classification.

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Incentives

FEPD confirmed by issuance of circulars that following incentives will be applicable, subject to detailed terms and conditions as per said circulars:

Zone	Category	Product	Rates
Economic Zones	C	Bicycle, Sandal, bag	4
EPZ	C	Textile	Continuation of existing Rates
EPZ	B & A	Agro	4
High Tech Park	C	Software, ITEH, hardware	4
All	All	All (export)	1

International

As reported in WSJ, "The deal struck at the COP26 summit in Scotland asks governments to strengthen their emissions-reduction targets by the end of next year to keep them in line with the Paris accord objective of keeping global warming close to 1.5 degrees. Governments had failed to agree to cuts sufficient to hit that target ahead of the summit..."

"The deal leaves unresolved how wealthy nations will provide a big increase in funding in the coming years for poorer nations to adopt renewable energy and protect themselves from the effects of global warming. Rich countries have so far failed to meet a promise to provide \$100 billion a year of climate funding. The split was over money, in particular the commitments by rich countries to help poorer ones fund the transition away from carbon and to mitigate the impacts of climate change."

However some important agreements were signed, e.g., cutting methane emissions, eliminating financing for coal-fired power plants and ending deforestation. Besides, most of the world's major banks, financial regulators have for the first time signed up to a coordinated del that will incorporate carbon emissions into their most fundamental decisions

MNCs and big corporations, looks like, will be in the middle of the hazardous regulations for some time. Country specific due diligence and compliance will be required as there will be no common standard for all.

Information Technology

Companies are now wanting to put data to work, not just store data, by driving real-world business decisions via analytics and, more recently, artificial intelligence. Artificial intelligence is also transforming our daily life for example urban people are now habituated with navigational app like google map. Although very slowly, AI enabled machines in manufacturing sector is improving production, supply chain, warehouse management in Bangladesh. As predicted by National Strategy for AI 2019-2024, it can significantly improve healthcare, finance, agriculture, education, transport sector. In the more developed market AI is bringing significant changes e.g., capital market trading house function in few places are now fully automated as the task is almost entirely carried out by the machines. Importing AI enabled machines often pose a challenge as determination of HS code, valuation etc. seems complex requiring expert assistance. HS codes and operation manuals are required to be updated to ease the customs process.

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Investment

UN upgraded Bangladesh to a group of developing nation. "LDC graduation is expected to generate dividends in the form of global branding and positive image, lower risk perception, and credit rating attracting more investment".^v On the other hand, World Bank cancelled its doing business series.

The government has framed rules to allow local firms to set up subsidiaries or buy shares in companies in other countries with a view to facilitating investment abroad. In order to qualify, exporters will need to have an adequate balance in their Export Retention Quota (ERQ) accounts, where entrepreneurs keep a portion of their export proceeds in foreign currency. ("Govt drafts guidelines on investing abroad - theworldnews.net")

The impact of such changes is yet to be reviewed.

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ⁱ Bangladesh transitioning to developing country – Mustafizur Rahman, Distinguished Fellow, Centre For Policy Dialogue (CPD)

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^{iv} The Financial Express Bangladesh

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