

# Legal Insight!

CHAMBERS INITIATIVES

1

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 TOOK PLACE IN THE LAST SIX MONTHS IN BANGLADESH AND 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

Due to increase of demand, shipping rates have more than quadrupled on many routes. Businesses and other parties in the supply chain are suffering huge disruption to the movement of goods by container shipping. The importer is receiving goods after long delay. Number of disputes are increasing. Often importers do not have any choice but to wait for the cargo because cancellation is not an option for them. Delay is causing loss, increase of expenses, business loss and it is impacting other participants in the supply chain. Due to volatile dollar market the situation is more complex now as the price of the products is fluctuating. The number of international trade dispute is increasing. Buyers and sellers are now seeing each other in court on claims involving loss and damages suffered from delay. Due to shortage of dollar reserve, commercial banks are more stringent on settling LC payment. LC applicants often tries to stop the payment of LC by filing petition to the court.

Under this volatile situation it is extremely important to make sure that that sales contract or proforma invoices have the relevant terms and conditions for the protection of sellers and buyers. On the other hand, exporters are required to be very selective on accepting LC opening banks, and check their rating, compliance record with UCP and other international trade norms and best practices.

## Construction

Complex construction disputes involving infrastructure projects are in rise. Responsibility of the employer and the bidder and successful tenderer on conducting pre-bid feasibility study of the project site is often confusing as the tender document often do not clearly address the issue. If a major flaw is found at later stages on selection of site etc, both employer and contractor tend to blame each other. Parties or their legal representatives are required to meticulously read the terms and condition of the tender document and identify their duties and obligations. Any vagueness is required to be resolved at initial stages.

2

Our honorable company bench, in a recent decision involving an infrastructure project, set aside the arbitral award of an international arbitration on the ground that the arbitral tribunal reached the award based on perverse fact, which is contrary to our law. The honorable court also confirmed that a majority award is binding so long as the award provides a reason why the third arbitrator failed to consent. This will speed up the delivery of arbitral award, as in practice the tribunal tends to wait for a consensus award and often cause unnecessary delay. On the other hand, parties are also required to pay attention to the selection of arbitrator as local arbitrator for international arbitration often preferable as they are more aware of local customs and practices, this often helps in the fact-finding exercise.

## Corporate

Under the new Budget, shareholding percentage has been amended for amalgamation. Now shareholders holding at least 75% (previously 90%) of the value of shares in the amalgamating company (which now includes foreign company, where there is foreign shareholding in a Bangladeshi company) become shareholders of the amalgamated company. Also, capital gain arises from any transfer of capital asset in a scheme of amalgamation is now tax exempted. Any consideration received by shareholders of amalgamating company in any manner other than shares of amalgamated company shall be subject to applicable tax. Also, the amalgamated company is now allowed to carry forward the accumulated loss and depreciation of the amalgamating company.<sup>i</sup>

Offshore indirect transfer rules are also amended by bringing detailed valuation rule for capital gain to ensure that profits taxable in Bangladesh from indirect share transfer of a foreign shareholding company are not transferred to foreign countries.

As happening in many countries over the world, our Securities and Exchange Commission has not yet brought any new rule bringing ESG disclosure for listed companies, however, the corporations are required to keep in mind that the same may happen soon and they will require people and professionals to deal with such disclosure.

For the first time, minimum wage structure fixed by the Bangladesh Bank for bankers.

## Dispute resolution

The Honourable Appellate Division of Supreme Court of Bangladesh in a recent judgment confirmed that a summary suit is required to be filed in the District Court and not in the High Court. In a summary suit the court pass judgment without hearing the defence. The procedure of Summary suit only applicable to limited commercial matters e.g., in any transactions where the parties exchanged negotiable instruments like bills of exchange, hundis, and promissory notes. The objective is to avoid unnecessary delay in the class of cases where speedy judgments are desirable.

As there is no justification of allowing the defendant to contest, there is limited scope for defendant to defend his case. The defend is required to obtains leave from the court. If the court refuse to do so or in default of his obtaining such leave or of his appearance, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for the principal amount as per the instrument with interest and cost as prescribed by law.

A summary procedure is a fast-track and speedy solution to help prevent an unwanted prolonged lawsuit. The claimant must decide whether it wants to file the summary suit or a regular suit. Due to lack of awareness, confusion as to which court to file the suit, such suit is extremely rare. Since the ambiguity is not resolved by the Hon'ble court as mentioned above, summary suit without any doubt shall save significant amount of time required in several interlocutory matters, framing of issues, examination of witness and documents, argument etc, in a suit filed under regular procedure. The said procedure takes two third of the total time as required for a suit.

Where the related contract does not provide any arbitration clause, the companies, businessperson who need to recover dues from their customers arising from supply of goods or service, loan etc, where bill of exchange, promissory note is taken as a collateral, may prefer to file summary suit to get a quick judgement.

## Shipping

### Shipping

An incident like Beirut took place in an ICD depot in Chottogram. The consignment that caught fire and exploded in an ICD container depot had arrived at least five days before the accident which killed more than forty-nine people. No shipping company was willing to transport the chemicals which is around 240 tonnes of hydrogen peroxide in sixteen containers, with 50 percent concentration, in plastic jars. As a result, the consignment remained in the depot alongside other non-hazardous containers, not in separate shed, waiting to be shipped.

The incident exposes the owners of the cargo, ICD despot, shipping lines, relevant government departments etc. to several risks and liabilities. The relevant questions are for example, is hydrogen peroxide a dangerous cargo under the Dangerous Cargo Act-1953? Whether the liquid was declared

as dangerous cargo at the time of import? Whether clearance from NAVY was taken? Should the operator of the depot keep it separate from other goods? Should there be multiple caution signs? Whether the International Maritime Dangerous Goods (IMDG) Code on safe carriage of dangerous goods and the International Ship and Port Facility Security (ISPS) Code as issued under of SOLAS Convention for detecting and deterring acts that pose threats to maritime security inside their facility, were complied with? Whether clearance from the environment department and fire service etc. were duly taken? Whether industrial safety measure for workers were duly taken? Whether all directives and guidelines under the license and permits were complied with? Was there strong monitoring from govt department to ensure compliance? Whether sufficient rules and regulations were framed to avoid such incident in a private ICD depot? Can the cargo owner claim against the ICT depot for negligence? can they claim against any government department for similar failure? What are the possible criminal liabilities for the death and violation of rules frame under dangerous cargo act 1953, if any? What are the contractual liabilities involved? Does the ICD depot liable for the consequential losses? Can the shipping companies claim for the loss and damages of the container directly against ICT depot?

As per news report, over eight hundred TEUs (Twenty-Foot Equivalent Units) of containers loaded with export items, RMG products and frozen foods, around five hundred imported goods-laden containers and 3,000 empty containers went down in flames<sup>ii</sup>. The cargo owners will face several risks involving breach of contract, delay in delivery, delay in procuring raw material etc.

### **Insurance**

That above incident may give rise to several insurance claim and related questions. Whether the cargo was insured? If so, were it all risks insurance related to cargo? Can the insurance companies exclude the claim on the ground of wilful misconduct of the cargo owner as they kept the cargo in a non-compliant ICD depot? Whether the ICD depot is required to insure the cargo so long as cargo is within its premises?

## **Taxation and Banking**

### **Taxation**

#### **Tax**

Contribution to the Workers' Profit Participation Fund will be no longer considered as deductible expenditure and will be taxable at the regular rate. Filing of returns not mandatory for a recognised provident fund, approved gratuity fund, pension fund and approved superannuation fund. The changes seem to be in line with legal position and clarification provided, will reduce the possibility of potential disputes.

On the other hand, no enquiry will be made on the source of income in case of voluntary disclosure of undisclosed foreign assets is made and tax is paid at the rate of 7% to 15% before filing the income-tax return, subject to fulfilment of conditions. This may contradict other established legal principles and may be source of potential disputes.

Tax at higher rate is deductible at source at the time of making payment to a non-resident for any income generated in Bangladesh. This raises the question for non-residents whether they need to apply for a certificate of exemption under double taxation treaty if any signed with their country of residence. On the other hand, due to the changes made in the section 75 and section 184A by the Finance Act 2022, a non-resident companies working in a project with no permanent establishment in Bangladesh may still require filing tax returns as it may require a proof of submission of tax return for receiving payments etc. It is also required to review from legal perspective whether a separate TIN is needed/beneficial under double taxation treaty for the projects companies which are already filing tax returns through their branch/liaison office.

Hon'ble High court Division made a fine distinction between employed director and non-employed directors regarding their salary vs remuneration for the purpose of deducting tax at source.

Allowability of 'Research and Development' expenses clarified to include expenses on systematic, investigative, and experimental study that involves novelty or technical risk carried out in the field of science or technology for acquiring new knowledge and clearly excluded other forms of expenses which could have been interpreted as expenses under this heading. The definition leave limited scope for interpretation hence there should be less disputes involving determining allowable expenses.

Section 117A extended the power of the authority to verify and enforce deduction or collection of tax, access to any information, code or technology which has the capability of retransforming or unscrambling encrypted data even by breaking through password protection, analyse any data, books of accounts, documents, images, or inputs. This may give rise to several other legal issues as it will involve leakage of confidential and classified information.

## VAT

Finance Act 2022 amended the VAT Act 2012 in respect of pre-deposit amount required for filing of appeal before Tribunal, Commissioner. The calculation will be based on the disputed demand of VAT only excluding penalty, if any. This will surely be extremely helpful for the appellants as often, the total amount with penalty is so big that appellant cannot afford to pay the pre-deposit amount. Appellant is often required to file petition for hardship to make the amount tolerable.

## Customs

The First Schedule of the Customs Act, along with the Bangladesh Customs Tariff, has been aligned with World Customs Organisation revises the Harmonised Commodities Description and Coding System (HS code) by revising, amending, and creating new codes. This updating is a challenging work and if not properly implemented it may give rises to several disputes due to conflict, confusion involving selection of HS codes by the exporter and importer. This also creates variation between local and international practice. Importers and exporters may review and analyse the impact of the changes for their related products.

6

Our apex court decided in a recent case that once a hardship application is submitted involving deposit of percentage of duty or issuance of Bank guarantee instead, such application is required to be disposed of judiciously. Discretion does not mean arbitrary exercise of power, discretion have to apply judiciously. This decision will be helpful for the importers as there may be more option to invoke writ jurisdiction based on this ground in case of arbitrary refusal to accept bank guarantee.

Similarly, our apex court decided that in case of failure of the customs authority to complete provisional assessment within the statutory period of 120 working days as prescribed under section 81 (2) of the Act, or failure to extend the period for final assessment from the Board, the provisional assessment made by the customs authority on the basis of declared value/ HS Code shall be deemed to be treated as final.

Penalty for contravention of various provisions of the Customs Act increased. Hopefully, this will reduce the number of disputes increased after pandemic involving fraudulent documentation and mis-delivery etc.

## Finance

Bangladesh bank, BRPD issued a new circular revising its circular issued in 1991 on waiver of interest. The waiver of interest on written off loans must be approved by the board of the respective bank. There are exceptional circumstances need to be considered before approving waiver. Since the existing bankruptcy law is not effective, this is circular will provide some respite for banks and customers in the exceptional circumstances. There are several litigations pending in this regard. Our apex courts often tried providing equitable remedies. It is expected that commercial banks will conduct due diligence before exercising its discretion to avoid more litigation.

The Cabinet approved the draft of the Secured Transactions (Movable Property) Act on providing movable assets e.g., Vehicles, machinery, furniture, electronic appliances, software, agricultural products, minerals, processed fish, and livestock etc. as collateral.



Our apex court held that certification of statement of accounts made under Bankers' Books Evidence Act, 1891 is in addition to the Arta Rin Adalat Ain, 2003 and not in derogation, hence, evidence need not be certified in view of the provision of the Bankers' Books Evidence Act, 1891.

Our apex court also decided that under Section 33(9) of the Ain, 2003 the word 'final' is not absolute. Mere issuance of certificate under sections 33(5) and 33(7) of the Ain, 2003 is not enough to finally dispose of the execution case. The main purpose of the Ain, 2003 is to realize the outstanding loan of the Bank or any other Financial Institutions but not to snatch away the mortgage or any other property of the borrower.

7

## International

Government of Bangladesh has clearly taken the LDC graduation seriously. Finance Act 2022 clearly indicates that significant changes were brought in shifting revenue collection target from traditional custom duty, trade VAT to income tax. Steps are taken to address the double origin requirement of European Union, by eliminating barriers, taxes applicable between contractor and subcontractor. A new policy has been framed namely, Regional Trade Agreement (RTA) Policy, 2022 indicting different government departments on how to move forward with the LDC graduations related issues.

It is worth mention here that international organization like WTO, EU are rules-based organizations as they operate under the prevailing international laws, WTO rules. Negotiators are required to be well versed with the rules applicable as all members countries are required to operate with the rules. LDC countries face several issues while they graduate. There are also scope for waiver and exemptions. Governments and parties interested are required to explore all viable options for their mutual benefits.

## Information Technology

The World Trade Organization at its ministerial meeting decided not to impose any customs duties until the next meeting on international e-commerce transactions<sup>iii</sup>. This may be beneficial for the business however this introduction would have been helpful for the government as it is gradually shifting its collection of revenue from traditional custom duties and trade vat to income tax and other taxation system.

No other hand, combating with fraud involving e-commerce transaction remains a challenge for the government. Central Bank regulation, allowing escrow payment mechanism, came under question since several allegations raised against Foster, a payment gateway for e-shopping platforms like Ealy, Eorange, Dayan Mart and Qcoom.<sup>iv</sup> Under the escrow payment system, money paid by customers for ordered goods from e-commerce companies is deposited in third-party payment gateways like Foster. The companies receive the money after submitting related documents proving the goods have been delivered.

To overcome the regulatory barriers under the present law against contractual and third-party operators like Foster through Central bank and so on, Government have decided to enact new law, Payment and Settlement System Act 2022 yet to be promulgated by the Parliament. The law will bring forty-six types of financial transactions, including insurance and trading at the capital market including internet banking operations, debit and credit cards and electronic funds transfer, mobile banking etc. under regulatory regime. However, although electronic money have been added cryptocurrency is yet to be included in it.

Globally, the number of cases of involving digital asset fraud and manipulation in increasing. Bangladesh is seeing rapid growth of MFS transactions and new regulatory guidelines on the operations of full-fledged digital banks is in the pipeline. Government and corporations are increasingly required engaged resources to navigate rapidly evolving regulatory landscape.

## Investment

Several tax benefits are provided under the Finance Act 2022, for the mobile manufacturers. Besides, the Companies with less than Tk. 100 crore turnover and so on, who are working towards deployment or commercialization of new products, process or service driven by innovation, development and technology or intellectual property are given start up status who will be taxed at a lower rate and are eligible for other tax benefits like carrying forward of loss etc, during the growth year<sup>v</sup>. On the other hand, VAT registration is made mandatory for branch office, liaison office and projects.

Regarding capital market investment in bond, when a company issues bonds, the bond issuer is required to pay regular interest to bondholders and repay their principal investments once the bonds mature. If a company fails to maintain the obligations, either missed interest payment or a missed principal payment, the BSEC is considering adding provision in the Debt Securities Rules, 2021, to consider the company as bond defaulter categorize bond issuers into three stages, substandard, doubtful and defaulter following the provision of defaulting borrower's list under the Bank Company Ain 1991 with several sanctions attached to such classifications. Consequently, the "bond defaulters" list may be subject matter of judicial review and may face same issues as the CIB list or defaulting borrower's list faces e.g., confidentiality, error reporting etc.

© All rights reserved.

<sup>i</sup> PwC | Bangladesh Key Budget Proposals 2022 | Moving ahead with resilience

<sup>ii</sup> The Financial Express

<sup>iii</sup> The Wall Street Journal

<sup>iv</sup> The Financial Express

<sup>v</sup> PwC | Bangladesh Key Budget Proposals 2022 | Moving ahead with resilience