



Happy Place by Andrea Edwards

TAKING SECURITY IN BANGLADESH

WHAT TYPES OF SECURITY INTERESTS CAN BE TAKEN IN BANGLADESH?

The security interests commonly seen on financing transactions are:

- **Mortgages:** mortgages are usually taken over immovable assets like land. They can also be taken over assets such as ships and aircrafts. It is customary for mortgagees of a mortgage to be granted a power of attorney by the security provider to allow the mortgagees to sell the mortgaged assets in case of default without intervention of the court.
- **Charges:** charges are usually taken over both fixed and floating assets. The instrument used to a charge is called a “letter of hypothecation”. Floating assets that can be secured under a charge include amongst others plant, machinery, equipment, raw-materials, work in progress, finished goods, inventory and receivables. As for mortgages, the creditors are customarily granted a power of attorney to sell the charged assets without intervention of the court.
- **Pledges:** are usually taken on shares. Typically, the share certificates for the pledged shares are deposited with the creditor as security. As a matter of practice, signed undated share transfer forms are also given to the creditor along with the share certificates. However, enforcement of a share pledge will require the physical

presence of a duly authorized representative of the pledgor, which may complicate the enforcement of a pledge.

- Assignment: assignments are usually taken over the borrower's receivables, insurance proceeds, and other contractual rights.

ARE THERE ANY ASSETS THAT CANNOT BE SECURED?

Most assets can be secured. If security is taken on rights arising under contracts or permits, the beneficiary of the security will want to review the underlying instrument to confirm that such rights can be assigned.

DO SECURITY INTERESTS NEED TO BE REGISTERED?

Mortgage deeds and the associated power of attorney must be registered with the local land registry office and the RJSC (central repository of companies in Bangladesh). Letters of hypothecation creating pledges and the associate power of attorney must be registered the RJSC. There are no registration requirements for other security documents.

DO SECURITY DOCUMENTS NEED TO BE NOTARISED?

The powers of attorney granted to the creditors in relation to charges, pledges of shares and assignment are required to be notarised by a notary public in Bangladesh. Other security documents do not need to be notarised.

Entities incorporated outside of Bangladesh may still need to have security documents notarised if required by the law of their place of their incorporation.

DOES IT TAKE LONG TO REGISTER OR PERFECT SECURITY?

Registration and perfection of security is quite straightforward and generally takes a few days to a few weeks once all documents are ready.

IS STAMP DUTY PAYABLE?

Yes. Generally, stamp duty is payable at the time of creation of security unless exempted by the government through a gazette notification. However, in case of high level of stamp duty, it is common a practice in Bangladesh to defer the perfection of securities to expedite the closing of a financing transaction. In this case the lenders may agree for perfection to be documented as a post-closing covenant rather than a condition

precedent under the financing documents. Pending perfections the lenders may obtain other form of securities such as corporate guarantees or letters of credit. It is to be noted that courts will require security documents to be perfected before they can be enforced. The amount of stamp duty which is payable will depend on the type of instrument - by way of example, an amount of BDT 300 is payable in relation to a facility agreement, an amount of 0.5% of the total consideration is payable in relation to a share pledge and an amount of 3% of the total consideration is payable in relation to any assignment.

ARE "PARALLEL DEBT" PROVISIONS REQUIRED IN SYNDICATED FINANCINGS?

The concept of trust is legally recognized in Bangladesh. However, there are practical difficulties in using a trust structure in a financing deal. So lenders usually appoint security agents (acting on behalf of the lenders) instead of security trustees.

CAN A FOREIGN LENDER TAKE AND ENFORCE SECURITY IN BANGLADESH?

There are no restrictions on foreign lenders taking and enforcing security in Bangladesh. However, to enforce security under the traditional route, lenders will need to file a claim in the competent district court in Bangladesh. The process of enforcing a remedy or judgment through the court is a cumbersome and lengthy process which could take several years. To avoid this pitfall, foreign lenders usually take security by appointing a "schedule bank" in Bangladesh as their security agent. The "schedule banks" are allowed to enforce security without requiring the prior intervention of a court under the Artha Rin Adalat Ain 2003 (Money Loan Court Act, 2003), thereby avoiding lengthy court enforcement procedures. Once enforcement is complete, the schedule bank will transfer the proceeds to the lenders.

Legally there is no restrictions on a foreign entity lending to a Bangladeshi entity. Bangladeshi entities can directly borrow from internationally recognized banks, capital markets, financial institutions, and export credit agencies and even from their shareholders upon obtaining regulatory approvals. Foreign lenders do not need to be registered or licensed in Bangladesh to lend money to a Bangladesh person or entity in Bangladesh and to obtain the benefit of security over assets in Bangladesh granted by a Bangladesh entity. There is therefore no exemption for any specific foreign lender.



Similar to the schedule banks, certain foreign lenders including IFC, CDC, IDB, ADB, IBRD and IDA can enforce the security without intervention of the court under the Money Loan Court Act, 2003.

CAN A FOREIGN SECURITY GRANTOR WAIVE ITS SOVEREIGN IMMUNITY?

Under Bangladesh law, sovereign immunity is limited to certain diplomatic entities and personnel under Bangladesh law. It is therefore unlikely that foreign sovereign immunity will apply to a foreign security grantor. However, a waiver would not invalidate a document and therefore can be inserted if the lenders require it as a matter of policy or preference.



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