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Legal Insights

Bangladesh: 25th Largest Economy by 2035

Bangladesh will become the 25th largest economy in the world by 2035, advancing from 41st place this year. According to the latest report by UK-based Centre for Economics and Business Research (CEBR), the size of the economy will nearly triple to $855 billion in 2035 from $301 billion in 2020 in US dollar constant prices.

In current terms, Bangladesh will become more than a trillion-dollar economy before the period, as shown in the latest edition of the World Economic League Table of the think-tank. In its annual league table on the growth prospects of 193 countries, the consultancy group said that despite the Covid-19 pandemic, Bangladesh was able to escape a contraction in 2020.

The rate of gross domestic product (GDP) growth in Bangladesh is anticipated to have dipped to 3.8 per cent in 2020. This compares to 8.2 per cent GDP growth recorded in 2019. Government debt as a share of GDP rose to 39.6 per cent in 2020, which remains a low level. The government operated a fiscal deficit of 6.8 per cent in 2020, facilitated in part by the low debt to GDP ratio. According to the report, between 2021 and 2025, the annual rate of GDP growth will accelerate to an average of 6.8 per cent. However, over the remainder of the forecast horizon, economic growth is expected to decline to an average of 6.5 per cent per year.

Bangladesh had a purchasing power parity-adjusted GDP per capita of $5,139 in 2020, making it a lower-middle-income country. CEBR said that the economy enjoyed a strong rate of GDP growth in the years leading up to the Covid-19 pandemic, despite a modest rate of population growth, which averaged just 1 per cent per year over the past five years. While the harm to public health inflicted by the pandemic has been relatively limited, the effect of the outbreak on global demand and international supply chains means that the economic damage has been considerable.

The report also said that China will overtake the US to become the world's largest economy by 2028, five years earlier than previous forecast. India is tipped to become the third-largest economy by 2030 and Pakistan will be placed at 36th in 2035. Japan would remain the world's third-biggest economy until the early 2030s, when it will be overtaken by India, pushing Germany down from fourth to fifth. The United Kingdom, currently the fifth-biggest economy by the CEBR's measure, would slip to sixth place from 2024.

Legislative Updates

Company (Second Amendment) Act, 2020

1. Short Title and Introduction.
(1) This Act may be called the Company (Second Amendment) Act, 2020.
(2) It shall come into force immediately.

2. Amendment of Section 2 of Act No. 18 of 1994. After section 2 sub-section (1) clause (b) of Companies Act, 1994 (Act No. 18 of 1994), hereinafter referred to as the said Act, clause (bb) shall be inserted, namely: "(bb) "One-person company" means a company whose shareholder is only a natural person;"

3. Insertion of new Section 11A in Act No. 18 of 1994.
After section 11 of the said Act, the following new section 11A shall be inserted, namely:
"11A. Indication of Limited Company.
Notwithstanding anything contained in other provisions of this Act, a limited liability company shall be identified as follows, namely:

(a) In the case of a limited liability public company, at the end of its name "Public liability company" or "PLC." words should be written;

(b) In the case of a limited-liability private company, at the end of its name "Limited" or "LTD." words should be written;

(c) In the case of a limited person company, at the end of its name "One Person Company or OPC" words should be written:

Provided that the limited company is a company with a different purpose other than profit under section 28 and a guarantee under section 29, nothing in section will be applicable."

4. Amendment of Section 37 of Act No. 18 of 1994. After sub-section (3) of section 38 of the said Act, the following sub-section (3A) shall be inserted, namely:

"3(A). The signature of the share transferee in the deed of transfer of shares shall be as follows, namely:

(a) After submitting the list of directors transferring the shares, the statement of annual capital, deed of transfer of shares and affidavit in favour of transfer of shares to the office of the Registrar, the concerned share transferor shall appear in person and re-sign to confirm the authenticity of the transfer of shares;

(b) If the transferor is a foreign national or resides abroad, the transfer transfer documents and affidavits in support of the transfer of shares shall be sent by the authorized officer of the concerned embassy; and

(c) If the transferor of shares cannot appear in the office of the Registrar for reasonable reasons, the Commission may be sent by the Registrar subject to collection of prescribed fees."

5. Amendment of section 85 of Act No. 18 of 1994. Sub-section (1) of section 85 of the said Act No. 18 of 1994-

(a) The word "twenty-one" shall be substituted for the word "fourteen" in clause (a);
(b) The words "meeting place, time, date and" shall be substituted for the word "meeting" in clause (b);

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(c) At the end of clause (e) "." Instead of that sign ";" this sign shall be substituted and then the following clauses (f), (g) and (h) shall be added, namely;

"(f) All activities undertaken at the Extraordinary General Meeting shall be deemed to be special activities:

Provided, however, that dividend grants, bonus shares, audit report approvals, reports of directors and auditors, periodic retirement of directors and determination of remuneration of auditors shall not be treated as special activities;

(g) If any special agenda to be discussed at the special general meeting is supported by a document, the time and place of the inspection shall be clearly stated in the notice; and

(h) Shareholders with a minimum share capital of 5% can propose agenda at the AGM / Annual General Meeting of the company.

6. Amendment of Section 255 of Act No. 18 of 1994. Sub-section (4) of section 255 of the said Act shall include the following sub-section (4A), namely: "4(A). After the commencement of winding up of a company, the creditors may raise objections at their first meeting regarding the appointment of a government liquidator."

7. Amendment of Section 262 of Act No. 18 of 1994. Substitute (g) of section 262 of the said Act shall be substituted by the following clause (g), namely: "(g) To collect and spend the necessary funds by pledging the assets of the company to give priority to the unsecured creditors in repaying the loans of the lenders who agreed to such financing;"

8. Amendment of Section 327 of Act No. 18 of 1994.
Subsection (3) of section 327 of the said Act shall be followed by the following new subsections (4) and (5), namely:

"(4) Where any money is paid for the purpose of taking action on behalf or against the company or supplying any goods or granting authority to transfer immovable or movable property, within six months before a company files an application to court to wind up the company, the court may, if it deems fit, declare such transaction void and order its reversal.

(5) Where any property is transferred or supplied within one year before a company files an application for winding up in the court or a decision is taken for voluntary liquidation, it shall be void and the liquidator can recover such assets from any person or company to whom such transfer was made, unless it is carried in the normal course of business of the company or it was transferred or supplied in good faith and at a reasonable price.

9. Insertion of new chapter X-A in Act No. 17 of 1994. After the tenth chapter of the said Act, the following new chapter X-A shall be inserted, namely:

Chapter: X-A

Formation, registration, operation, etc. of one-person company

392A. Memorandum of Association and Articles of Association of one-person company.
One person company' Memorandum of Association and Articles of Association means Memorandum of Association and Articles of Association described in Schedule 9A and Schedule 9B.

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392B. Formation of one-person company, etc.

(1) A natural person, for any legal purpose, form a company, and if he so desires, may form a limited company by signing his name as an entrepreneur and taking other measures in accordance with the provisions of this Act relating to registration.

(2) A natural person can form only an one person company.

(3) One-person company' memorandum of association shall contain the name of a nominee, with the written consent of the nominee, who will be the shareholder of the company if the sole shareholder dies or becomes incapable of running the company.

(4) At the time of registration of one person company, the written consent of the said nominee shall be recorded in its memorandum of association and articles of association and register book.

(5) Such nominee may withdraw his consent in the prescribed manner.

(6) If the said nominee dies before the shareholder or is incapacitated or deformed for any other reason, another person may be appointed in his place with his consent, in the place of such nominee.

(7) If a person deems fit to be a shareholder of a company, he may, in his place, nominate another person in place of such nominee.

(8) A person shall mention in the articles of association the change of person nominated by the shareholder of the company and shall inform the Registrar in due course and in the prescribed manner.

392C. Share capital of the One-person company, etc.
(1)The one-person company': -

(a) paid-up share capital of one-person company shall be at least twenty-five lakh taka and not more than five crore taka; and

(b) an annual turnover of one-person company shall be at least one crore rupees and not more than fifty crore taka for the immediately preceding financial year.

(2) If a person owns the paid-up share capital of a company in sub-section (1) clause (a) and exceeding the said amount and the annual turnover exceeding the amount mentioned in clause (b) of sub-section (1), then subject to the requisite conditions, one person company may be converted into a private limited company or, as the case may be, a public limited company.

392D. The procedure to be followed in case of registration of one-person company.
The rules and regulations applicable to private limited companies shall be applied while registration of one-person company.

392E. Director of one-person company.
1) One person company' sole shareholder shall be its director.

2) For management of one person company, company manager, secretary and other employees shall be appointed.

392F. One-person company meeting.
The director of a one-person company will hold a board of directors meeting every half-calendar year.

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392G. Changes to Memorandum of Association and Articles of Association of one-person company. If any change is made in the Memorandum of Association and Articles of Association of an individual company, the registrar shall be informed of such change in the prescribed manner and in this case the provisions of section 12, with necessary adaptation, shall be applicable.

392H. Transfer of shares of one-person company.

All shares of one-person company may be transferred to another person of natural nature only and in case of transfer of shares the provisions of section 38, with necessary adaptation, shall be applicable.

392I. Balance sheet of one-person company.

1) In case of an individual company, within one hundred and eighty days of the end of a financial year, its financial statements must be submitted to the Registrar along with the documents.

2) Each balance sheet and every profit-loss account or income and expenditure account shall be signed by the sole shareholder director of the company.

393J. Audit of one-person company.

The provisions of this Act relating to the appointment of auditors and audit reports in one-person company shall be applicable, with the requisite action.

392K. Borrowing and disbursement by one-person company.

The provisions of section 159 to section 175 shall be applicable in case of borrowing or disbursement of loan from any bank or financial institution by an individual company, with necessary adaptation.

392L. Voluntary liquidation of one-person company.

In the case of voluntary liquidation of an individual company, the relevant provisions of this Act shall be applicable, with the necessary adaptation.

10. The following new section 401A shall be inserted in Act No. 18 of 1994, namely:

“401A. Application of the Information and Communication Technology Act, 2006.

1) Any work to be performed under this Act, may be carried out electronically in the prescribed manner, and in this regard, as far as possible, the provisions of Information and Communication Technology Act, 2006 (Act No. 39 of 2006) and the rules and regulations made under it shall be followed.

2) The Government may impose a fee for the provision of services through electronic means.

CASE LAW UPDATE

Arif A. Choudhury vs Pubali Bank Ltd. Judgment of the Hon'ble High Court Division of the Supreme Court of Bangladesh (VC Company Matter No. 33 of 2020)

Fact:

An Application bought under section 85 (3) of the Companies Act ("the Act") dwells the issues of holding 37th Annual General Meeting (AGM) via live video-conferencing including the agenda of holding election of directors (through the lottery process) of Pubali Bank Ltd. ("Bank") decided on the 1240th Meeting of the Board of Directors. Subsequently, the Bank published a Notice dated 01.07.2020 ("Notice") in The Daily Star for AGM to be held on 30.07.2020 with no specific procedures as to how the voting will take place and just providing a website link for the AGM to be conducted via live video-conferencing. In addition to that, no physical location where ballots may be cast or proxy forms submitted was mentioned.

Issue before the Court:

Whether the 37th AGM held on 30.07.2020 was conducted in accordance with the law including the BSEC Orders dated 24.03.2020 and 08.07.2020, passed amid the Covid-19 pandemic.

Decision:

The Hon'ble High Court Division of the Supreme Court of Bangladesh found that the BSEC dated 24.03.2020 issued in context of proposals received by the BSEC to devise and sanction the conduct of meetings of public listed companies by any electronic and therefore, through virtual medium instead of physical meetings by reason of epidemiological concerns raised by the spread of the coronavirus (Covid-19) pathogen. That being reflected in one of the provisions of the Order, i.e. clause (a) of Order dated 24.03.2020. The Court has duly noted that the abovementioned Orders have granted no license to deviate from the strict application of a company's Articles of Association ("AOA").

A plain reading of the Orders clearly showed further that the prospect of gatherings at distinct and separate locations to hold such meetings are not ruled out or, eliminated. Indeed, the requirement is of several gatherings at distinct geographical locations taking place as necessary upon abiding by strict protective measurers while at the same time all such venues are contemplated to remain interconnected through a specific digital platform to hold a virtual meeting.

The Court in this regard further considered that the BSEC's Orders indeed permits the procedural innovation, regulatory relaxation and the introduction of an electronic mode of holding and conducting meeting but with the important qualification of confining the whole process within the fundamentals of procedure as envisaged in the AOA.

The Court considered that the present pandemic and the lockdown along with epidemiological protocols, which in the fact raised the spectre of procedural impracticability of holding the 37th AGM. The question of impracticability has arisen in relation to the need for strict compliance with the AOA that has necessarily led to an external intervention sought of the BSEC to devise mechanisms at feasibly calling, holding and conducting one of the most fundamental of a company's activities i.e. holding AGM in compliance with the company's AOA. The BSEC duly stepped in with the set of directions, which the Bank's management appears not to have been entirely honest in either complying with or in putting together, the procedural framework needed for holding the AGM sufficiently or transparently.

The court concluded that the AGM Notice could have overcome a fatal flow by providing specific details of the actual venue where the manual voting took place by also assuring a technological base permitting of free flow of audio-video links for the AGM to be held virtually. And thus, the court declared the Notice of the AGM, in so far related to the agenda of holding of election to the Board of Directors through video-conferencing, and also in an undeclared hybrid manner, as contributing largely to the impracticability of ensuing the election of directors to the Board and therefore, illegal and without any legal effect.

Bilateral Investment Treaties:
Protection Given to Foreign Companies Against Expropriation

Bilateral investment treaties (BITs) emerged as an innovative mechanism to protect and promote foreign direct investment in developing countries from the beginning of 1950s but proliferated in 1990s. BITs are often signed between the developed nation and developing nation to encourage foreign investment and the governance of foreign investment (Kirayoglu, 2014).

Without endeavoring into the realm of BITs past and rationale, it is manifestly important to note that international investment can also be fostered by multilateral treaties such as NAFTA and overlooked by international organizations such as UNCTAD. UNCTAD defined BITs as 'agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country' (Bandelj and Mahutga, 2012). It was further noted that the BITs cover the following areas: 'scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation n the event of expropriation or damage to the investment, guarantees of free transfers of funds and dispute settlement mechanisms, bother state-state and investor-state' (Bandelj and Mahutga, 2012). The primary investment dispute settlement organizations are: International Centre for the Settlement of Investment Disputes (ICSID), the UNCITRAL, the Court of International Arbitration of the International Chamber of Commerce in Paris etc (Blanco & Razzaque, 2011).

Bangladesh have till date signed 30 BITs with various countries among which 24 BITs are currently in force whereas the rest of them are either terminated or not in force (UNCTAD). An analysis of the BITs will be conducted later to ascertain the approach of the country in dealing with expropriation and compensation. Furthermore, available precedents along with political atmosphere will be considered in providing the conclusion.

The main feature of the agreements is the protection that is afforded to the foreign investors through the notion of non-discrimination such as national treatment, most-favoured-nation treatment and fair & equitable treatment (Practical Law). BITs are considered as 'quasi-constitutional' agreements that limits the sovereignty of the State by allowing protection to investment interests (Blanco & Razzaque, 2011). These rules of protection are most significant at times of expropriation and nationalization through direct or indirect measures. Expropriation has been a central concern for foreign investors that allow the state to interfere with the property of the foreign investor, especially where there is no compensation for expropriation and BITs place the limitation on the territorial sovereignty of the state. BITs describe the specific provisions to cover situations were expropriation are lawful and the consequences of expropriation such.

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Firstly, investment as defined in the treaties are protected, secondly, the notion of 'taking' whether the interferences are formal or information and finally, the grounds of expropriation namely: a) public purpose b) non-discrimination c) due process and effective compensation (Dolzer and Schreuer, 2012).

Perusal of the respective BITs with various countries demonstrate that Bangladesh has offered fairly wide definition of investment such as in the BIT with US our biggest partner in trade it is defined as 'every kind of investment owned or controlled directly or indirectly, including equity, debt; and service and investment contracts'; and including various forms of proprietary interests (Art. 1).

The standard of protection given to investment is based on national treatment and most-favoured-nation treatment (Art. 2) and Art 3 deals with compensation for expropriation that posits the expropriation can only be lawful if it is done on a public purpose according to the due process of law without any discrimination or arbitrary process and accompanied by prompt, adequate and effective compensation. The expropriation should not violate the stabilization clause and the compensation should be based on 'fair market value'. The compensation should be extended to members of company from the other contracting party, although the company is incorporated in the host member country (Art. 4(2) BITs with BLEU). Under the BIT with Denmark, it is incorporated that the investor can review the case of expropriation, valuation and payment of compensation 'by a judicial or other competent and independent authority' host country (Art 5(4)) and such approach is adopted in the BIT with Singapore, UAE, mostly those signed after 2000.

The jurisprudence developed through case laws with ICSID such as NIKO and Chevron provide that joint venture agreements and production sharing contract amounted to investment and deduction of tariff from payment to Chevron for purchase of gas amounted to depriving the company full investment benefits. Recently BITs signed with Austria, Denmark, India, Indonesia, etc provide for the protection of foreign investments based on fair and equitable treatment (UNCTAD, BITs) especially in those signed after 2000 and the notion FET provide wider scope for successful claim pursued in international arbitration. The FET clauses can ensure that measures are applied in accordance with 'good faith as an overarching principle which fills faps and informs the understanding of specific clauses' (Dolzer and Schreuer, 2012). Other BITs mostly those signed before the 21st century is based on the most-favoured-nation and national treatment for the protection and promotion of investment. In the case of Saipem involving trade between Bangladesh and Italy, interferences by the High Court Division of Bangladesh nullifying the decision of ICC tribunal decision was considered as a measure having the equivalent effect of expropriation as held by the ICSID which was selected by the foreign company in accordance with the BIT between the parties (Bangladesh and Italy BIT; Islam 2018).

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Similarly, the BIT with UK posits that the disputes should be settled by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States by the ICSID. Hence, there is no requirement to refer to domestic legal system or to exhaust domestic remedies before resorting to international arbitration (Islam, 2018), which certainly benefits as well as protects the foreign investor from any form of indirect expropriation.

The Denmark BIT opts for settlement of dispute amicably both in case of dispute between the states or between investor-state., if it cannot be settled amicably within six months, then by referring the dispute to the competent national court or to international arbitration center such as ICSID, ad hoc tribunal or UNCITRAL or with the ICC. However, the approach adopted in the BIT with Denmark is also apparent in the BIT with UAE for the settlement of disputes, On the other hand, the settlement of dispute between investor-state cannot be dealt by any national court in case of investment by US legal persons as illustrated in the BIT (Art. 7(2)), and also appeared in the BIT with Turkey (Art. 7 (2)).

Another form of protections given to foreign investors are: protection from strife (Art. 6 BD and Austria BITs - restitution, compensation, indemnification etc based on 'no less favourable' treatment in case of war, state of emergency etc).

Nevertheless, it is vital to note that in the last years there has not been any expropriation and nationalization of industry and the Foreign Private Investment Act 1980 guarantees protection and security based on fair and equitable treatment of foreign direct investment along with other benefit of indemnification, compensation against expropriation and nationalization and repatriation of investment. The Bangladesh Investment Development Authority promotes FDIs and ensures protection against expropriation through its investment policies, however, indirect expropriation can be a concern in some instances.