

A Tale of Two Standards

Price alteration, contractual imbalance and legal remedy in RMG sector

JUNAYED CHOWDHURY

WHEN the tragic Rana Plaza incident occurred on April 24, 2013, the entire international readymade garments (RMG) community cried out loud—and rightly so—about the abysmal working conditions in Bangladeshi apparel industry. In an article in *Time* magazine on July 11, 2013, a broadside was launched that Bangladeshi RMG workers “perish on the job with depressing frequency”. Then in May and July 2013, we saw the formation of the Accord on Fire and Building Safety in Bangladesh (Accord) and the Alliance for Bangladesh Worker Safety (Alliance) respectively—two multi-stakeholder governance programmes that worked towards a safer RMG industry in Bangladesh. There is no gainsaying that both Accord and Alliance have done good things for the RMG sector in Bangladesh.

However, it is equally true that steps taken under the Accord and the Alliance were possible because of the influence exerted by Western buyers over Bangladeshi factories. Noted management consultancy firm McKinsey & Company wrote in its 2011 survey report that price attractiveness was the first and foremost reason for Western brands purchasing in Bangladesh. To put it bluntly, Western brands can dictate the pricing terms of a contract with Bangladeshi factories.

Enter Covid-19 in 2020—with teetering economies and trembling infrastructure. Bangladeshi RMG sector has already reported an estimated USD 3.17 billion worth of orders being cancelled. Many international brands are raising defences of force majeure and frustration of contracts under Covid-19 to get out of their obligations, the legality of which is a subject matter of deep discussion in itself.

Recently, however, it has been reported by Reuters that Western brands that agreed not to cancel orders due to Covid-19 epidemic are demanding price cuts of up to 50 percent. The news report also quoted Rubana Huq, president of the Bangladesh Garment Manufacturers and Exporters Association (BGMEA), as saying, “We are still observing

their departure from original contract terms ... which includes renegotiating prices as low as 50 percent of the original deal.”

It's important that we explore the legality of such a stance by the foreign brands. It is true that a contract can be altered by mutual agreement of the parties (see section 62 of the Contract Act 1872). But here, the issue is not about mutual alteration of a contract. The problem lies in the bargaining power of the parties and the context in which such a bargain is made by a party. And at the heart of that context are the principles of economic duress and undue influence.

First, let us start with some general principles. As a matter of law, no contractual bargain—however hard it may be—which is the result of the ordinary interplay of forces will be declared invalid. For example, if a poor man agrees to pay a high rent to a landlord, then the law will not interfere on the ground that it is an unfair bargain. In the eye of the law, the man's impecuniosity will not be a defence in a case by the landlord for non-payment of rent. The decision to declare such a bargain illegal is left to the Parliament.

But every law has an exception. There are cases where courts will interfere and set aside a contract if it can be shown that the parties have not bargained on equal terms—where the bargaining power of one of the parties is so strong and the other's is so weak that, as a matter of fairness, the court will decide that the strong should not be allowed to push the weak to the wall.

One such example is the case of “undue influence”. For example, an employer—the stronger party—employs a builder—the weaker party—to do certain work for him. When the builder finished his work and asked for his payment, the employer refused to pay unless he was given some added advantage, like a discount. It may well be that in order to pay his employees, the builder agrees to such a discount and revision of the original contract. It has been observed that the court will set aside such a contract executed under pressure by the weaker party. This principle is codified in section 16 of the Contract Act 1872.

In this type of cases, the common

undercurrent is “inequality of bargaining power”. It has been held by the courts that when there is inequality of bargaining power in a contract that is grossly underpriced, the law gives relief to the one who executes such a contract, when his bargaining power is seriously impaired by his own needs, coupled with undue influence by or for the benefit of the counter-party.

Here, it should be remembered that the

advantage of the economic pressure of circumstances, rides onto it and forces the weaker party to revise a subsisting contract, such conduct no longer remains reasonable and the court will strike down such conduct. Covid-19 has created a dire economic situation in the global trade and business. Nonetheless, just because there is economic uncertainty does not mean that a party can renege and walk away from a subsisting

such contracts after receiving the discounted payment from the buyers?

There is a legal maxim—“No person can insist on a settlement procured by compulsion”. A Covid-19-induced factory closure and business disruption can be labelled as “economic compulsion”, which can be validly raised by RMG factories that are saddled with revised contracts by Western brands with discounted price. In other words, Bangladeshi RMG factories may be able to recover the price under the original contract on the ground of “economic duress” if it could be shown that the revised contract is executed against a threat of the Western brand to break the original contract.

But it should be remembered that the RMG factories relying on “economic duress” must first rescind the revised contracts and demand the balance price under the original contracts (see section 66 of the Contract Act 1872). It is essential to do so because under section 19A of the Contract Act 1872, a contract that is executed under undue influence is “voidable” and not “void”, which means the revised contract must be rescinded by the party relying on “economic duress” once the facts surrounding the duress cease to exist.

The proposed price cut by Western brands through revision of subsisting contracts with RMG factories has been a tale of two standards. On the one hand, Western brands wailed at the Bangladeshi RMG industry's state after the Rana Plaza collapse and worked commendably through Accord and Alliance towards improving workers' safety. On the other hand, in these testing times of Covid-19, the brands are threatening to walk away from valid contracts if heavy discounts are not offered by RMG factories which, as Reuters reported, would be “heaping economic pain on a country already reeling from the crisis.”

In the wake of the Rana Plaza tragedy, Bangladeshi RMG factories had nothing to defend themselves. But this time, the law is by their side.

Junayed Chowdhury is an Advocate of the Supreme Court of Bangladesh and the Managing Partner of Vertex Chambers.



Western brands can dictate the pricing terms of a contract with Bangladeshi factories.

STAR FILE PHOTO

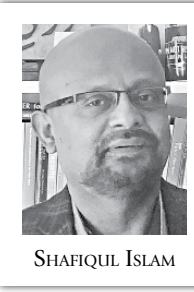
word “undue” does not mean the existence of any wrongdoing. Rather, it refers to the self-interest of a contracting party who is indifferent to the distress he is causing to the other party. On the other hand, a person who is in extreme need (for example, of money) may knowingly consent to a most one-sided bargain, only to get himself out of such financial peril.

But when the stronger party takes

contract. The demand by a Western brand, being the dominant party in a RMG contract, not to cancel orders in exchange of price discount due to Covid-19 reeks of such an attitude.

What could be done by Bangladeshi RMG factories in such a situation? What if factories agree to revised contracts with discounted price to tackle their own financial pressure of paying the workers? Can they challenge

What Bangladesh can do to fight the coronavirus



SHAFIQUUL ISLAM

WE did not know about this invisible enemy even a few months ago. Yet, in this short period of time, it has affected 210 countries and territories around the world, infected over 2.5 million people and killed over 180,000 globally. According to the official estimate, the number of Covid-19 cases in Bangladesh is 3,772 (as of April 22). Even if we take this number to be true, there are probably at least five times more untested cases. This, hypothetically, puts the number of local infection cases around 18,000-19,000.

This still may sound like a small number but this enemy is not an equal-opportunity killer. It does not prefer survival of the fittest or the wealthiest. Only the most adaptive will survive (recall, dinosaurs did not survive; humans did).

So how can Bangladesh be adaptive? Is it possible for the country to minimise the impact?

Yes, it is still possible, but time is running out.

We must keep one thing in mind: this is not the time to argue what could have been done or who did not do what or who should be blamed. Everyone needs to work together—governmental, non-governmental and private institutions as well as citizens. This is the time to learn from other nations. But make this learning adaptive with what Bangladesh has as resources: physical, economic and cultural.

Working with an interdisciplinary group with multiple expertise: It's unfortunate if leaders have to make decisions based on incomplete and uncertain information. Our leaders and policymakers must plan to work with a diverse group of scientists, engineers, business leaders, opinion makers, and citizens. They must listen carefully to

multiple perspectives and decide based on situation-specific information. There is no single solution. We must be adaptive as new information comes in.

Dividing the population into risk groups for treatment and survival support: This virus does not care about socio-economic conditions, religion or prejudices. Older people with pre-existing medical conditions are more vulnerable. Daily workers with “hand to mouth provision” are at high risk of starvation and malnutrition. It is, therefore,

This is not the time to argue what could have been done or who did not do what or who should be blamed. Everyone needs to work together—governmental, non-governmental and private institutions as well as citizens. This is the time to learn from other nations.

important to create risk groups—for treatment and survival support—and make actionable plans with advice from the experts.

Diagnostic tests must be made simpler and accessible: Assuming that everyone is a carrier is the best protection as seen in Japan. So we must act accordingly to minimise exposure and spread. Testing can be reserved for the more vulnerable people. It is unlikely

that Bangladesh will have sufficient testing kits available anytime soon. Thus, using simpler screening through temperature and oxygen saturation level measurement will be more practical. People with high temperature and low oxygen level can be isolated and then treated.

Supporting healthcare professionals: We must prepare for a possible surge in the number of severely ill patients. So we must collect as many Personal Protective Equipment (PPEs) as possible for healthcare professionals and first responders. Deploy resources to manufacture ventilators and create more intensive care units (ICUs). Repurpose some of the schools, university halls, hostels and other spaces as quarantine and make-shift hospitals for the less severe patients.

Engaging the NGOs: Use their network, infrastructure and experience to execute situation-specific responses. NGOs can come up with Covid-19 survival manuals and protocols of what to do or not to do. They can do rapid surveys to find out what interventions are working (or not working) and adapt quickly.

Deploy Army, BDR and police judiciously: From India to Rwanda to South Africa, countries have deployed security forces to enforce quarantine and lockdown. Bangladesh has also deployed the Army to carry out these operations and take part in relief efforts. Military-enforced lockdown is not without problems, as observed in South Africa, Kenya or Uganda. Yet, at times like these, deployment of troops, when done carefully and compassionately, can build confidence. The security forces can be repurposed by integrating with a public healthcare approach that puts community engagement at the centre. The Army with their excellent organisational and logistical skills can work with the youth volunteers to execute many essential services for citizens with different risks.

Inspire the public, engage the youth and create a volunteer force: This is the

time for the public—particularly youth—to actively engage with their energy and creativity. Students and young professionals can organise online hackathon and crowdsourcing to learn tips and tricks from other countries that are actionable (for example, making ventilators and masks with local resources) in Bangladesh.

Organisational and logistical experiences of the armed forces can help mobilise the youth to execute many labour-intensive activities—driving recovered patients home, checking with elderly neighbours, delivering food to vulnerable groups, etc.—as appropriate. This will help build trust between the enforcers and the citizens. This will also lessen the burden from healthcare workers.

Be a model Covid-19 fighter: Follow the safety guidelines. Create “community self-policing” units to encourage and enforce preventive measures. Encourage local leaders, village elders, imams and priests to be the early adopters of wearing masks, washing hands and isolating oneself when needed. Like the virus, modelling virus fighting behaviour can also be contagious. It has started happening in Boston, Nairobi, Tehran, etc. In Tehran, it is considered cool and responsible to wear a mask while, in Boston, people consider wearing a mask heroic!

We need to minimise the impacts of secondary effects like hunger, isolation and mental depression. We must mobilise resources from governmental, non-governmental, private sector and donor agencies to create safety nets for the most vulnerable groups facing shortage of survival essentials including nutrition, daily medicine needs and other supplies.

Aggressive and personalised social messaging: Assume what you hear (rumours and misinformation without verification) may be more viral and deadly in killing trust and confidence. Do not spread unverified information. This is not the time to criticise. Be critical of action, not of individuals or institutions. And continuously look for what

works (and why) and how to be adaptive to changing situations.

We must emphasise the importance of personalised and context-specific messages. For example, convince the imams to tell people that they don't need to come to the mosque; they can stay home and pray. Use Saudi Arabia's action to close the mosques as an example, if necessary. Avoid mass funeral rituals, and encourage alternative and safe forms of grieving and burial.

Avoid fake Covid-19 news and misinformation. Seek reliable sources of information. Create trusted information networks to make actionable information, empathy and resilience go viral.

Reasons for optimism and decisive action: Covid-19 is affecting the population over 65 years disproportionately (over 80 percent of fatalities involve over 65-year-olds with pre-existing health conditions); the youth (less than 30 percent) shows mild symptoms with very low fatality. But the youth still need to be careful because they may infect other people. Over 94 percent of Bangladeshis are less than 65 years old and this may make the country seem less vulnerable. But this is not the time to celebrate this optimistic (yet highly uncertain) projection. If we do not act quickly and decisively, it may turn into a nightmare.

Despite its many dysfunctional institutions, poverty and widespread corruption, Bangladesh has achieved remarkable progress in many development indicators. Now is the time to promote and accelerate this Bangladeshi Brand of Ingenuity. If Bangladesh takes a concerted and determined approach of adaptive learning, it can minimise the impacts of the coronavirus disaster. Bangladesh can forge an actionable and adaptive plan to defeat this virus and show the world that it is a model of adaptive survival, resilience and ingenuity.

Professor Shafiqul Islam is Director, Water Diplomacy Program, Civil and Environmental Engineering, Fletcher School of Law and Diplomacy at Tufts University, USA.





LUDWIG VON MISES
(1881-1973)
Austrian-American libertarian economist

The criterion of truth is that it works even if nobody is prepared to acknowledge it.

CROSSWORD BY THOMAS JOSEPH

ACROSS

1 Folded food

5 Bulletin board items

10 Love affair

12 Singly

13 Ship of 1492

14 Scout's job

15 Chick holder

16 Holsteins, to tots

18 1950s singing style

20 Count start

21 Inner: Prefix

23 "Street Dreams" rapper

24 Shore eroder

26 Kitty

28 Was victorious

29 Dainty drinks

31 Gallery fill

32 "What a shame!"

36 Goofs

39 Regret

40 Writer Chekhov

41 Steer clear of

43 Flea market

44 Cut into cubes

45 Seasonal greenery

46 Stock holders

DOWN

1 Not live

2 Pal, to Pedro

3 Crichton novel

4 Unconscious

5 Poi source

6 Guinness of film

7 Silk sources

8 Commonly

called

9 Detects

11 Punk

17 Make a choice

19 Tie the knot

22 Saying "nay"

24 Raptors' home

25 All things considered

27 GI-enter-taining grp.

28 Terre Haute's river

30 Skater Midori

33 Actor Willis

34 "The Age of Anxiety" poet

35 Monopoly cards

37 Cotton pod

38 Just

42 Gloss target

WRITE FOR US. SEND US YOUR OPINION PIECES TO dsopinion@gmail.com.

BETTER BAILEY

BY MORT WALKER