

LAW WEBINAR

Legal and Policy implications on Commerce and Investment during Pandemic

THE COVID-19 pandemic is affecting the economy around the world. The IMF has identified three areas of the Bangladesh economy that have been hugely impacted by this pandemic. Firstly, the domestic businesses are being severely hit due to the lockdown measures; secondly, the export sector, particularly in the RMG sector has also seen a sharp decline; and thirdly, the sources of foreign remittance from migrant workers has significantly fallen down. On the other hand, as more European businesses shift their focus from China, Bangladesh, as a budding investment hub, has the opportunity to improve its favourability in receiving more foreign investment.

To discuss these issues from legal and policy perspectives, Law & Our Rights, The Daily Star organised the webinar on 'Legal Implications on Commerce and Investment during Pandemic' on 14 July 2020. Mohammad Golam Sarwar, from Law Desk and also a Lecturer in Law, University of Dhaka moderated the webinar.



Dr. Rumana Islam, Professor of Law, University of Dhaka

Bangladesh is a party to 32 BITs (numbers differ between 31 and 33 as well) but unfortunately not all the BITs are accessible. Bangladesh has signed multilateral and regional treaties as well, such as the SAFTA, the BIMSTEC, the MIGA, and notably, the ICSID which is the Convention relating to the settlement of investment disputes. Bangladesh is also a party to the WTO and the WIPO treaties and has signed some double taxation agreements as well. In March, an online service was launched to improve the ease of obtaining services digitally. In the past decade, attraction of foreign investment has been a top priority which is reflected in the UNCTAD report of 2018 showing that the foreign direct investment (FDI) flow has gone up by 68%. Dedicated EPZs have also been created as incentives. Foreign investors can invest in almost every area except four – the regime is liberal and there are also tax holidays provided as incentives. The fact that Bangladesh is a party to the ICSID Convention and the New York Convention, enforcement of awards is a big advantage in attracting foreign investment.

However, it is often argued that the entire BIT regime of Bangladesh needs to be revised; for example,

India has undertaken a nationalistic approach and has adopted a model BIT in 2016. This is an instance we can take note of, because in the post-pandemic world, Bangladesh will need sufficient regulatory space with regard to its foreign investors. The current framework may lead to disputes against Bangladesh as most of the treaties do not envision public health emergencies like the present one.



Professor Dr. Mustafizur Rahman, Distinguished Fellow, Center for Policy Dialogue (CPD)

Once Bangladesh graduates from its LDC status, it will no longer receive some of the market access and preferential treatment, including in the RMG sector. This is a vital concern at present, specially with regard to the impact of the pandemic. Although more initiatives are being undertaken to attract FDI in recent times, we have been falling short of meeting the goals. For example, we received 12 billion dollars in foreign investment against the expected 30 billion dollars envisioned in the 7th Five Year Plan. This means that despite the legal and policy incentives, we are unable to attract the expected amount of FDI inflow. It is also seen that the rate of re-investment is higher compared to new investments which means that we are not attracting enough new investors. If we look at the example of Vietnam whose GDP is close to that of ours, we will realise that they have a substantially larger FDI inflow, mostly from the export-oriented businesses facilitated through their special economic zones.

We are going through a three-dimensional risk including health risk, economic risk and humanitarian risk. Without addressing our health risks, we cannot really proceed with economic revival. A good idea might be to incorporate foreign investment in the development of our infrastructure including power and health sectors. Now is the time for us to confluence many positive opportunities; we must act soon to utilise this window of opportunity. We can prioritise sectors which are strategically important to our policy objectives, specially relating to sustainable development goals (SDGs), and work to attract foreign investment in these areas.

We must also think about how to provide decent work to a substantial percentage of the population that has gone or is about to go beneath the poverty line due to the pandemic. They

RECOMMENDATIONS

- Transparency, accountability and good governance must be improved to bring about a holistic rebranding of Bangladesh as an investment-friendly country.
- We must think about how to provide decent work to a substantial percentage of the population that has gone or is about to go beneath the poverty line due to the pandemic.
- Bangladesh should adopt strategies to attract FDI that are in-line with its policy objectives of attaining SDGs.
- The existing FDI screening procedure should be implemented properly to uphold national interest while scrutinising foreign investments.
- The entire Bilateral Investment Treaty (BIT) regime of Bangladesh needs to be revised to update and adjust their provisions considering the new developments.
- The Bangladesh Arbitration Act 2001 should be chosen as the applicable law for dispute settlement concerning commerce and investment.
- The involvement of academics and researchers should be ensured in policy and lawmaking in order to encourage informed discourse.
- A coordinated effort of all stakeholders is necessary to overcome the effects of the pandemic.

will have to be given employment opportunities in the industrial sector. Furthermore, we must look beyond the RMG sector and explore other industries for diversification.



Md. Sirazul Islam, Executive Chairman, Bangladesh Investment Development Authority (BIDA)

BIDA is progressing in a planned and calculated manner in order to ensure the improvement of ease of doing business. The International Finance Corporation of the World Bank is providing assistance to the BIDA. This year, an additional indicator has been incorporated in the World Bank's ease of doing business. We hope that a substantial improvement will be seen in the coming days. 23 reforms in 7 of the 10 indicators have been submitted. As per the guidance of the Hon'ble Prime Minister, BIDA will be consulting with the relevant ministries and government agencies to discuss the plans of action and possible reforms.

The framework on which the World Bank measures the ease of doing business is quite narrow – an improvement in the index might not necessarily improve the FDI inflow. So, the government is working in other areas as well. One stop service (OSS) platform is specially pertinent in the post-pandemic 'new normal' as it aims to digitise the relevant services. The platform is providing 19 services relating to NID, Tax certificate, registration, etc. Although government offices were closed, online services have been provided to businesses.

Last year, we signed MoUs with six organisations and this year, we signed with six more. Ten more MoUs are under consideration. A business needs 150 services from about 35 government agencies and we hope to incorporate all these services within the OSS platform. We are aiming to provide at least 50 services online by the end of the year. Moreover, BIDA is conducting an entrepreneurship and skills development project to incentivise the youth to participate in business ventures.

The next two years will be years of survival and attracting foreign investors should be our priority during these times. But at the same time, we must ensure that our national interests are safeguarded, for example, FDI should be used to improve employment opportunities for our people.



Shah Monjurul Hoque, Advocate, Supreme Court of Bangladesh

Most of the laws specifically addressing foreign investments are recent and as such, they have not been tested out before courts. However, a strong infrastructure has been built in the meantime. Foreign investors prefer to take their arbitration outside the country. Unfortunately, arbitration procedures are long-drawn and costly in our legal system. All domestic laws are relevant for foreign investors, so merely reforming investment laws will not suffice. Investors looking to acquire lands may face many difficulties due to bureaucratic hurdles. These areas

should be addressed.

On a different note, The FDI screening procedure should address various factors including health, environment and most importantly the security issues of the host country. India, for example, has recently changed its policy protecting their national interest. As per the new policy, all investments from border sharing countries of India will require the prior approval of the Indian Government.

Furthermore, we should ensure that the Bangladesh Arbitration Act 2001 is chosen as the applicable law for dispute settlement. Laws relating to foreign exchange, loan recovery, money laundering are also pertinent in this context and should be properly implemented.



Barrister Anita Ghazi Rahman, Advocate, Supreme Court of Bangladesh

Foreign direct investments comprise three types of transactions: equity finance, reinvestment of earnings and intercompany loans. Bangladesh Bank has recently issued circulars widening the scope of intercompany loans. It has also issued a circular to ease the process of repatriation of sale proceeds to foreign residents in order to attract more foreign investments. This is in contrast with other countries imposing more stringent measures. This is a window of opportunity for us and the government has taken excellent initiatives.

Although Bangladesh has been home to some of the largest social enterprises, the legal framework has not been updated to accommodate them. Bangladesh has a two-tiered system where for-profit and not-for-profit ventures have to operate separately. In contrast, countries like the USA allow for a joint entity that can have both for-profit and not-for-profit activities. Social enterprises can be brought within the scheme of 'alternative investment' as laid down by the Bangladesh Securities Exchange Commission rules, but the law does not provide a proper definition of such investment. A third entity between a company and non-profit should be recognised now. Although the ICT division is providing grants to non-profit organisations, it should also provide the same to social enterprises which may even help them gain revenue.

THE EVENT REPORT IS PREPARED BY LAW DESK, THE DAILY STAR.

LAW OPINION

COVID-19: SUPPLY CHAIN DISRUPTION AND THE NEED FOR DISPUTE RESOLUTION SPECIALISM

DR. KHALED HAMID CHOWDHURY

WE are going through the crisis of the century faced by the mankind due to the outbreak of Covid-19 pandemic. Most of the countries are implementing drastic lockdown measures as well as travel restrictions, which are creating serious supply-chain disruptions, production delays and distribution slowdowns, resulting in major impediments for many businesses that depend on international supplies.

Since the ease of the lockdown situation, Bangladesh's apparel industry has been going through a common problem of negotiation of contractual terms. The widespread disruption brought about by the COVID-19 outbreak has compelled companies to consider invoking "force majeure" clauses – a provision, that may exempt them from performing contractual obligations, if successfully pleaded. At first glance, this might seem like an attractive option. In practice, the threshold for establishing force majeure is high. The "Act of God" or "Force Majeure" clauses that cover a range of events such as floods and earthquakes are designed to help insulate firms from the shock of the unforeseen.

The structuring of force majeure clauses in particular, and the allocation of risks in contracts more generally, will no doubt be given a great deal more thought in the future as lessons are learned from the impact of COVID-19.

Immediate concerns, however, should be around how the impact of the virus on the existing supply chain can be borne with and whether the force majeure provisions available in such contracts will be capable of



being enforced. An international sale and supply contract may also have applicable law and causation issues, Covid-19 itself may not be the reason to prevent performance, there may be other options to perform, albeit, expensive.

Hence, one needs to find the specific consequences of Covid-19 on a particular contractual performance – did it hinder or prevent performance? The relevant date of entering into contract would be crucial to find the reasonable anticipation of Covid-19 as a force majeure event, the effectiveness of the clause often requires giving notice of failure to perform to the other side and there is a duty to mitigate as well. One should also look at payment impact before claiming force majeure. Had the payment already fallen due?

If this contention fails or there is no force majeure clause in a contract, a plea of frustration may be made but that has

an even higher threshold – performance of a contract must have become impossible, illegal or radically different from what the parties originally bargained for. Moreover, this may be pleaded for contracts entered into before Covid-19 for it to be considered as a frustrating event and must not be in the contemplation of the parties at the time of entering into the contract.

At any rate a comprehensive Act such as the one passed in Singapore, namely Covid-19 (Temporary Measures) Act, 2020 would have allayed doubts about Covid-19 being a force majeure event, giving the parties relief from performance of contracts, made renegotiation easier, fairer, and taken care of limitation periods prescribed under general and special laws.

Our RMG sector that contributes to over 80% of our export revenue is now forecasted to face loss of payment of over US\$3

Billion for products already made and the cumulative liability for unfinished products reaching US\$10 Billion due to importers and foreign buyers taking advantage of the loosely formulated contracts by renegotiating their previously confirmed orders at a much lesser price, compelling the manufacturers and suppliers to haplessly agree to arbitrary terms.

In the recent years, many buyers also took advantage of inequality of bargaining powers making suppliers agree only on the basis of purchase orders without resorting to traditional payment of methods by letters of credit or without even offering a sales contract leaving suppliers without much legal safeguards. There are further complications created by deferred payment mechanisms.

Our RMG industry needs to take some urgent actions. Contractual disputes with foreign parties are likely to open floodgates but the question is, do we have the power to bargain or test these claims through litigation? With almost 4 million pending cases and a dearth of judges, and only a handful of courts operating remotely, here our best option must be to have resort to alternative dispute resolution (ADR) measures. There should be efficient, structured, integrative and collaborative negotiation to review the respective obligations to save the contract and to maintain future relationship, failing which one may opt for mediation or arbitration. There are the New York Convention 1958 for arbitration and the Singapore Convention 2019 for mediation to deal effectively by recognition and enforcement of cross border settlements involving foreign parties. Bangladesh is yet to be a signatory to the Singapore Convention. This needs to be considered at the earliest to save immense cost of litigation or even

arbitration. Even if a contract does not have an ADR clause, there is no bar to resort to ADR if the parties concerned agree to it mutually even after the dispute arises (which, in any event, ought to be the most sensible decision in the current crisis).

The necessity to use online platform need not be reiterated. There is fast, efficient, secure platform that is already doing wonders during this crisis. ADR measures also avoid the formality to change the legal rules. Efforts should also be made to make statute annexed ADR provisions such as in making money loan recovery more effective, implementing the amendment made to section 89 of the Code of Civil Procedure back in 2012 and making mediation mandatory in all civil suits. There should be cost implications for failing to reach a resolution or settlement through ADR without realistic efforts. Constant monitoring, taking effective measures including giving practice directions, dialogues between stakeholders, more activism ought to help our economy to recover in the coming days.

The impact of Covid-19 has just started to unfold and will evolve fast. We need to stay ahead of the curve and get ready with appropriate emergency assistance and post-crisis collaboration in different forms as appropriate. Every sector should cooperate for survival, restructuring and recovery. It is time for the dispute resolution specialists acting as peacemakers putting off their adversarial hats unless unavoidable, to take the lead when the survival of the mankind is at stake.

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