



**IMPACT OF COVID-19 ON THE CONTRACTS BETWEEN US BUYERS
AND GARMENTS EXPORTERS FROM BANGLADESH: HOW TO
REBALANCE THE EQUATION.**

by Moriom Akther

LLM Final Thesis

SUPERVISOR: Dr. Tommaso Soave

Central European University Private University

Quellenstrasse 51-55, 1100 Vienna

Austria

© Central European University Private University

[June 29, 2021]

Acknowledgments

First of all, I would like to sincerely express my gratitude to my supervisor Professor Dr. Tommaso Soave, for his kind guidance, encouragement, and feedback on the draft. I also thank professor Markus Petsche and Professor Alvaro Fernandez De La Mora for providing comments on the thesis proposal and final presentation.

I would also express appreciation to Robin Bellers from the Academic writing centre for the guidance and support. Finally, I thank my parents and my family, who support me in engaging with the study.

Table of Contents

Abstract	v
Introduction	1
Research Questions	4
Research Methodology	4
Chapter one: Consequences of COVID-19 on the garments sector in Bangladesh: An economic and legal review	5
1.1 Economic implication of canceling garments order	5
1.2 Legal implications of canceled orders	11
Chapter two: Legal doctrines and principles in the context of COVID-19 and their application to the garments industry	14
2.1. Impossibility, impracticability, and frustration	14
2.1.1 Impossibility, impracticability, and frustration under Bangladesh law	15
2.1.2 Impossibility, impracticability, and frustration under US law	17
2.1.2 Frustration, impossibility, and impracticability: A comparison between Bangladesh and US law	19
2.1.3 Application of frustration, impossibility, and impracticability to the COVID-19 scenario	20
2.2. Force majeure	22
2.2.1 Force majeure under Bangladeshi law	23
2.2.2 Force majeure under US law	25
2.2.3 Comparison of force majeure between Bangladesh and the US	29
2.2.4 Application of force majeure doctrine to the COVID-19 context	30
2.3. Undue influence	35
2.3.1 Undue influence in Bangladesh and the US	35
2.3.2 Application of undue advantage in the contractual relations between the US buyers and Bangladeshi garments sellers	37
2.4 International laws and conventions	39
2.4.1 The International Chamber of Commerce (ICC).....	39
2.4.2 United Nations Convention on Contracts for the International Sale of Goods (CISG).....	40
2.4.3 UNIDROIT Principles of International Commercial Contracts	40
2.4.4 Comparison and application of ICC, UNCISG, and UNIDROIT PICC to the COVID-19 context	41
Chapter three: Findings of the analysis and guidance for buyers, sellers, and policymakers	44
3.1 Major findings of the analysis	44
3.2 Recommendation for the buyers, sellers, and policymakers	47
Conclusion.....	50
Bibliography.....	51

List of the Table

Table 1 Survey response of factories on cancellation of in production orders.....	7
---	---

List of the Figures

Figure 1 Export of Bangladeshi garments product: 2019-2020	6
Figure 2 Order canceled by reputed brands.....	10
Figure 3 Postponed or scrapped Bangladesh garments order by countries	10

Abstract

The thesis identifies the legal consequences of COVID-19 on the contractual relations between the US garments buyers and the garments suppliers from Bangladesh. The study finds that 1931 fashion brands canceled, delayed, or withheld 3.7 billion USD of orders since the beginning of the pandemic. The US is the top destination of Bangladeshi garments products, and the country is also in the top in terms of the number of buyers canceling orders from Bangladeshi sellers. Contractual relations between buyers and sellers are highly asymmetric, allowing buyers to use the force majeure clause to scrapping the order at their discretion. The findings of my analysis reveal that invoking force majeure in COVID-19 is not straightforward. Instead, buyers must show evidence that they have tried to overcome or avoid the consequences of the effect. In addition, COVID-19 does not restrict international fashion brands' ability to pay, given the huge cashflow of those brands. Hence, the cancellation of contracts or refusal to pay is not justified on legal grounds. In such context, the study has provided some recommendations to improve future contractual practices: Amendment of the laws of the buyers' and the sellers' countries, establishment of an independent institution to ensure fair contractual terms and practices. Given the inequality of power between sellers and buyers, all sales contracts stipulated in the future should include an appropriate force majeure clause. The current business model could be changed in a way that makes parties more responsible toward contractual obligations.

to BGMEA⁴. Buyers use force majeure in order to justify the cancellation of the orders. On the other hand, due to the COVID-19 disruption of the supply of raw materials from the global value chain, exporters of RMG, in some cases are failed to provide delivery on time; in such context, international buyers claimed compensation due to breach of contract⁵. In a survey, 93% of the producer in Bangladesh reported a delay in getting raw materials from China, and 53.4 % (out of 98%) reported that they were penalized due to the delay in the delivery/shipment of the products by the buyers⁶.

Against this backdrop, the thesis explores the legal consequences of COVID-19 on the contracts stipulated by US garment buyers and Bangladeshi garment exporters. In particular, it identifies the legal doctrines and remedies available to Bangladeshi garment exporters to rebalance their contractual relations and minimize the economic effects of COVID-19 on the industry as a whole.

To achieve these goals, the thesis discusses the legal doctrines of frustration, impossibility, impracticability, force majeure, and undue influence. In legal theory, force majeure comes into play when the circumstance is beyond the control of the party to a reasonable extent and inhibits the party from fulfilling the contractual obligation. In the absence of a force majeure clause in the contract, other legal doctrines like frustration, impossibility, and impracticability provide certain protections to the parties. Moreover, the analysis of the cancellation of the order shows that buyers, as multinational corporations, have the upper hand in the contract between the parties. What

⁴ Refayet Ullah Mirdha, 'Garment exports to major destinations nosedive' (*The daily star*, 03 June, 2020) < <https://www.thedailystar.net/business/news/garment-exports-major-destinations-nosedive-1908201> > accessed 10 December 2020

⁵ MS Siddique, 'The legal impacts of the coronavirus on RMG contracts' (*The daily star*, 18 February, 2020) < <https://www.thedailystar.net/opinion/news/the-legal-impacts-the-coronavirus-rmg-contracts-1869370> > accessed 11, December 2020

⁶ PennState Center for Global Workers' Rights, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, (Research Report, 2020)

protection does the law of the contracting parties or international law provide protection against such a situation? There are some newspaper articles or brief analyses to date on this issue. However, there is hardly any academic study found that explains how legal doctrines provide a solution in an unprecedented event like this COVID-19 pandemic in the context of garments industry.

Therefore, in chapter one, the thesis discusses the consequences of COVID-19 on the garments sector of Bangladesh from an economic and legal point of view. Chapter two examines the legal doctrines of Bangladesh and the US to analyze the fact from the supplier's and buyer's country's perspective and draws lessons from international laws. Chapter three identifies major findings and recommendations for buyers, sellers, and policymakers to improve future contractual arrangements. This thesis has greater potential to positively impact a large number of stakeholders, businesses from both the supplier and the buyers and improve the country's regulatory structure. Furthermore, the thesis focuses on Bangladesh; however, the findings and the solutions that this study has derived are transferable to other countries and similar situation contexts. In that respect, the study is able to create an impact on a large number audience beyond the jurisdiction of the study.

Research Questions

The thesis paper pursues the following legal research questions:

- What are the legal consequences of COVID-19 on the contractual relationship between US garments buyers and garments exporter from Bangladesh? What legal doctrines might be applicable which excuse non-performance? Does COVID-19 amount to force majeure in this type of contractual relationship?
- How does the unequal bargaining power of US garment buyers and Bangladeshi garments producers affect this contractual relationship? Does this asymmetry have a place under the relevant doctrines?
- What are the legal remedies available to the exporters from Bangladesh?

Research Methodology

This thesis follows a desk research methodology. The relevant information is collected from mainly secondary sources, i.e., existing legal doctrines, an overview of relevant contracts, articles, scholarly materials, cases relevant to the thesis objectives. The data and legal doctrines are critically evaluated to extract better insights out of the analysis.

Chapter one: Consequences of COVID-19 on the garments sector in Bangladesh: An economic and legal review

Chapter one discusses the status of the garments industry in the economy of Bangladesh. It sheds light on the buyer's composition of the Bangladeshi garments products, the consequences of COVID-19 on the garments sector in Bangladesh, and to what extent contractual obligations were not fulfilled. It also analyzes the nature and scope of contractual relations.

1.1 Economic implication of canceling garments order

The garment industry, which is one of the largest sectors contributing to employment in many emerging economies, has been impacted by the pandemic. Leading textile producers like Bangladesh, China, Vietnam, and India have witnessed a large fall in revenue from this industry sector which they are dependent on. The RMG industry is the backbone of Bangladesh export earnings, which bring, on average, 34 billion USD to the economy and makes Bangladesh the second-largest exporter of garments in the world after China⁷. The sector provides employment to over 4.1 million people of Bangladesh, most of whom are women⁸. More than 4600 factories in Bangladesh are working with major global garments brands to provide product supply. The country is exporting to more than 150 countries where most of its export goes to European Union (EU) and US markets. EU market (27 countries) alone stands for 61.75% of the total garments export in 2019

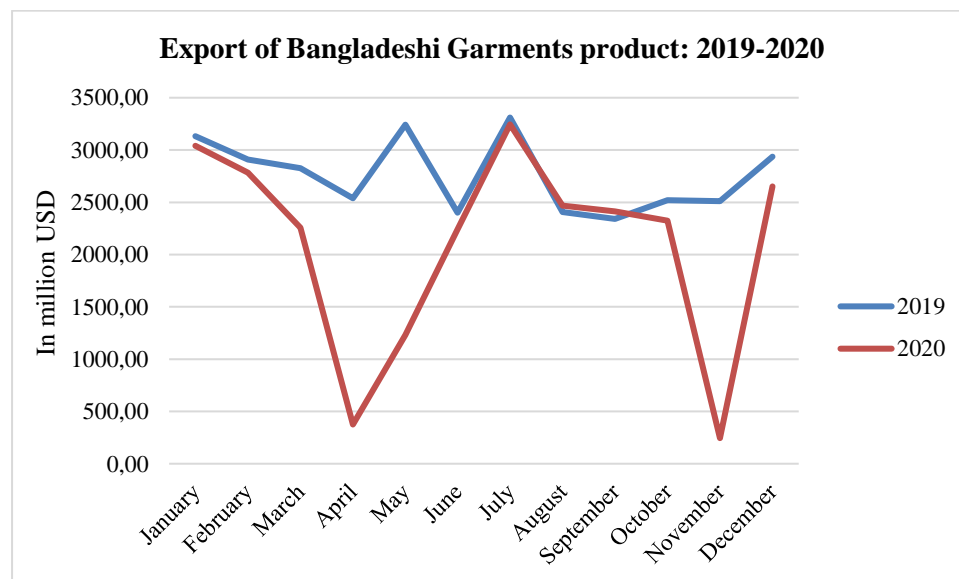
⁷ Fati, N., Safety First: Bangladesh Garment Industry Rebounds, International Finance Corporation.
<https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/insights/bangladesh-garment-industry> accessed 26 January 2021

⁸ Mostafiz Uddin, 'RMG industry as the major employment sector' (*The daily star*, 17 February 2019
<<https://www.thedailystar.net/supplements/28th-anniversary-supplements/entrepreneurship-key-youth-employment/news/rmg-industry-the-major-employment-sector-1702951#:~:text=The%20RMG%20industry%20provides%20jobs,the%20country's%20total%20export%20receipts.&t>> accessed 26 January 2020

and 18.20% of the export to the US markets. The US is the topmost destination of the Bangladesh's garments product as a single country. Bangladesh exported 5844.36 million USD in 2018 and 6020.36 million USD in 2019. The second highest export goes to Germany, which stands 5871.11 million USD in 2018 and 5535.58 million USD in 2019⁹.

However, the volume of export started to decline from the outset of the COVID-19 pandemic. According to the BGMEA, export sharply decreased by 85.25% in April and 62.06 % in May (Figure 1). BGMEA estimation shows that 3.1 billion USD worth of orders was canceled immediately after the beginning of COVID-19, which impacted 1,150 factories across the country. Compared to March-June of 2019, the country lost 4.9 billion USD due to the pandemic¹⁰.

Figure 1 Export of Bangladeshi garments product: 2019-2020



Source. Author's development based on (BGMEA, 2020)

⁹ BGMEA, 'Bangladesh's Apparel Export to World' < <https://www.bgmea.com.bd/home/pages/TradeInformation> > accessed 19 November 2020

¹⁰ Saheli Roy Choudhury, 'Vulnerable' garment workers in Bangladesh bear the brunt of the coronavirus pandemic (CNBC, 18 October 2020). < <https://www.cnbc.com/2020/10/19/coronavirus-worsened-the-reality-for-bangladesh-garment-workers.html#close> > accessed 19 November 2020

The ‘Centre for Global Workers’ Rights’ in ‘Worker Rights Consortium’ of Penn State University leads an online survey between 21 March and 25 March 2020 regarding the COVID-19 impact on the garments industries in Bangladesh, where 316 companies completed the questionnaire. The survey sample consists of small, medium, and large size garments. 67.7% of buyers of the surveyed companies are European, 15.8% are American, 4.8% are Asian, and the remainings are others¹¹¹².

23.4% of the companies expressed that 26-50 % of their in-process order was canceled, 22.3 % say that most (above 50%) of the in-process order was canceled, and 5.9% stated that all of the in-process order was canceled. Table 1 below shows the response of the factories toward the survey question, “Since the outbreak of the coronavirus, have you had In-process orders (e.g., Orders that are near completion or ready to be shipped) canceled prior to shipment?”¹³.

Table 1 Survey response of factories on cancellation of in production orders¹⁴

	Number of Factories	Percent
Some (up to 25%)	132	47.0%
A lot (26% to 50%)	64	23.3%
Most (over 50%)	61	23.7%
All	16	5.9%

Survey response also shows that 72.1% of the buyers did not even pay for the raw materials’ cost, which was already bought by the selling company for the products that had been canceled, and 91.3 % of buyers made a refusal to pay the production cost of the canceled products. 58 % of the

¹¹ PennState Center for Global Workers’ Rights, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, (Research Report, 2020)

¹³ Ibid

¹⁴ ibid

factories reported that they had to shut down most of their operation or part of their operation due to the unprecedented cancellation of orders and non-payment by buyers¹⁵.

In addition, 30 to 40 percent of buyers do not comply with agreements' and 'Cancellation of orders after shipment appeared as an enormous trouble when port and shipping lines are demanding demurrage'¹⁶. Some suppliers reported that a few brands requested to cancel the order, which was shipped three months back; some were unwilling to pick the delivery which was already shipped or asking for a 40 percent discount due to a fall in demand for new cloth. This could be regarded as taking advantage of an international fashion brand's power relations and the sellers in Bangladesh¹⁷.

In order to find the scope and nature of the problem further, some of the buyer's case needs to be analyzed. Transform Holdco LLC, a sister concern of Sears Holdings of US, withheld or cancelled orders of two dozen garments suppliers of Bangladesh. Managing director of a Combined Apparels Rakibul Alam Chowdhury said to the state news agency, "The buyer (Sears Holdings) is not paying us worth around \$50 million". The top low-price garments brand of Germany KiK canceled orders worth 96,000 USD and withheld 9.25 million USD of product in the process of shipment while the company earns 2 billion euros annual revenue¹⁸. In addition, BGMEA data shows that Primark is at the top on the list of all brands canceling, held up, or postponing 300 million USD of orders

¹⁵ ibid

¹⁶ Imam, S. H, Buyers tend to undo existing contracts with RMG producers. (The financial express, 24 May, 2020) <<https://www.thefinancialexpress.com.bd/trade/buyers-tend-to-undo-existing-contracts-with-rmg-producers-1590303853>> accessed 12 January 2021

¹⁷ ibid

¹⁸ Andreas Becker, 'Coronavirus disruptions deal severe blow to Bangladesh's garment industry'. (DW, 23 June 2020) <<https://www.dw.com/en/coronavirus-disruptions-deal-severe-blow-to-bangladeshs-garment-industry/a-53895339>> accessed 29 January 2021.

while the company recorded 8.86 billion USD of revenue on 20 April 2019. In total, 1931 fashion brands canceled, delayed, or withhold the order since the beginning of the pandemic¹⁹. According to BGMEA, world reputed brands like H&M, JCPenney, GAP, Primark, Walmart, Peacock, Arcadia Group, Topshop, Miss Selfridge, and Dorothy Perkins withheld and canceled the contract²⁰.

In a nutshell, out of the total cancellation, partial cancellation, or postponement, around 470 buyers are from the US. About 280 are from the UK, 180 from Italy and 170 from Canada, 150 from Germany, and 140 from France. The geographical distribution of the cancellation or postponement can be found in figure 3 below²¹. Moreover, around 127 buyers canceled contracts while production was in process; in some cases, buyers turned away to pick the products while they reached the port. The more surprising is that a significant number of buyers asked for large discounts when products have already been produced. For example, Debenhams, a British brand, asked for a 90 % discount on the ordered goods from 40 suppliers from Bangladesh²². Findings of the above analysis support the breach of contract in transactions between international buyers and Bangladesh's garments suppliers.

¹⁹ Sushmita S. Preetha , Zyma Islam, 'Is foul play the new normal'? (*The daily star* 26 June, 2020 <<https://www.thedailystar.net/business/news/you-suffer-we-survive-1920733>> accessed 29 January 2021

²⁰ Ibid

²¹ Ibid

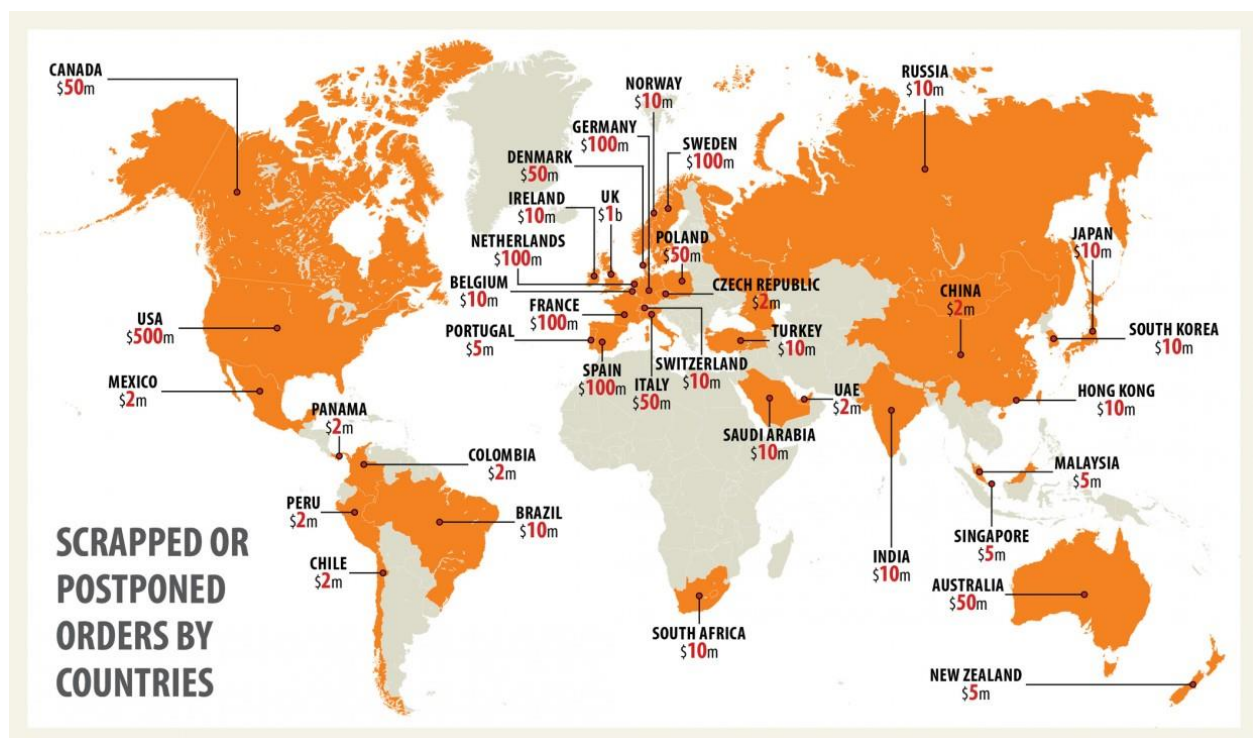
²² Ibid

Figure 2 Order canceled by reputed brands²³.



Note. Companies marked in bold have provided a commitment to take all orders back; data is updated until June 2020.

Figure 3 Postponed or scrapped Bangladesh garments order by countries²⁴



²³ Ibid

²⁴ ibid

1.2 Legal implications of canceled orders

The real implications of canceled orders are much wider than it is generally perceived, given that those cancellations have occurred through multiple channels. 4.5% of the surveyed factories reported a total closure of the company due to buyers' non-compliance with the contractual obligation that was signed²⁵. Report finds that over a million workers had been fired or suspended temporarily due to the cancellation or buyer's failure to pay for the cancellation²⁶. The survey finds that 98.1 % of the buyers are not willing to pay a partial wage to the temporarily suspended worker which is a legal obligation in the country. Workers are legally entitled in Bangladesh to receive severance pay when dismissed from work. However, 97.3% of the international buyers are not willing to participate in the severance pay. Therefore, the company could not pay 80.4% of the dismissed workers despite the fact that major fashion brands have a voluntary policy for 'responsible exit,' which permits them to avoid adverse effects on employees when they exit²⁷.

Another striking observation to emerge from the above data is that international buyers hold the upper hand in the contractual relations, allowing them to cancel the order so easily and not comply with the contractual obligations. A factory owner who got a cancellation of 1.19 million USD in production clothes from French fashion brand La Halle told a news agency that "As a factory owner, I do not have any bargaining strength during this pandemic"²⁸. The number of fashion

²⁵ PennState Center for Global Workers' Rights, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, (Research Report, 2020)

²⁶ Ibid

²⁷ Ibid

²⁸ Sushmita S. Preetha, Zyma Islam, 'Is foul play the new normal'? (The daily star 26 June, 2020 <<https://www.thedailystar.net/business/news/you-suffer-we-survive-1920733>> accessed 29 January 2021

brands is limited, but the number of suppliers is quite large, which provides brands ample opportunities to hold power in contractual relations.

In most cases, buyers use force majeure to scrap the contract²⁹. This calls for an examination of the extent to which international buyers can use COVID-19 as an excuse and under what conditions they can invoke force majeure, which is not yet clear. It is undoubtedly true that international fashion buyers face tremendous trouble due to the pandemic like other businesses. Stores of fashion brands in the United States, in Europe, or other countries are close, and the brands' revenue decline. The USA's retail sales decreased by 51% in March, 89 % in April, and 62 % in May 2020³⁰. Though online sales are an option, purchasing new clothes might not be a priority for consumers during COVID-19 or lockdown. This means that the problem that fashion brands are facing is profound. However, the process the international buyers are following in managing the pandemic is much more damaging to the poor garment suppliers of Bangladesh, millions of low-paid workers, and the country.

On the other hand, more than fifty percent of the Bangladeshi garments industry's raw materials are imported from China. Due to the disruption of the supply of raw materials from China and the global value chain, garments companies of Bangladesh, in some cases, failed to provide delivery on time. In such a context, international buyers claimed compensation due to a breach of contract³¹. A survey conducted at Penn State University shows that 93% of the surveyed company in

²⁹ The Business Standard, 'Primark, other buyers cancel \$1.5bn apparel orders' (The business standard, 22 March, 2020) <<https://tbsnews.net/coronavirus-chronicle/1089-garment-factories-face-15bn-order-cancellation-withdrawal-59737>> accessed 29 January 2021

³⁰ United Nations Industrial Development Organization, 2020. *Will COVID-19 accelerate the transition to a sustainable fashion industry?* <<https://www.unido.org/stories/will-covid-19-accelerate-transition-sustainable-fashion-industry>> accessed 30 January 2021

³¹ MS Siddique, 'The legal impacts of the coronavirus on RMG contracts' (The daily star, 18 February, 2020) <<https://www.thedailystar.net/opinion/news/the-legal-impacts-the-coronavirus-rmg-contracts-1869370>> accessed 11, December 2020

Bangladesh reported a delay in getting raw materials from China, and 53.4 % (out of 98%) reported that they were penalized by the buyers due to the delay in the delivery or shipment of the products³². Moreover, 38.3 percent of companies reported a price increase of raw materials from 25 to 50 percent and 47.7 percent of companies recorded up to 25 percent of the raw material price increase due to the crisis. At the same time, 91.9 percent of companies did not point to any adjustment in the prices of raw materials.³³

Faced with these difficulties, the question arises: How can the law help rebalance the situation? Can Bangladeshi garments companies use the force majeure clause and be excused for the delay in delivery or non-performance due to delays in the supply of raw materials? The dynamics and legal clauses need to be analyzed to derive better insight or answers. It must also be examined whether the clause is already in the contract and the extent to which the current pandemic falls under the clause. In case the clause does not exist in the sales contract, what protection does the law of the contracting parties' country offer to the respective parties.

³² PennState Center for Global Workers' Rights, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, (Research Report, 2020)

³³ Ibid

Chapter two: Legal doctrines and principles in the context of COVID-19 and their application to the garments industry

This chapter discusses the legal doctrines and principles of Bangladesh and the US to examine the facts from the supplier and importer country's legal perspective. The choice of the US as a comparator is due to the fact that the US hosts many buyers of Bangladeshi garments. In addition, it analyzes the international laws to bring a common international perspective. As per the facts discussed in the previous chapter, this chapter examines the legal doctrines: frustration and impracticability, force majeure, undue influence, and unconscionability to apply it to the COVID-19 context of the garments industry. It also critically reviews the relevant clauses of the United Nations Convention on Contracts for the International Sale of Goods (CISG), the Unidroit Principles of International Commercial Contracts (PICC), and the definitions offered by the International Chamber of Commerce (ICC). The chapter compares and contrasts legal doctrines among jurisdictions and applies them to solve potential legal issues arising from the contracts discussed in the previous chapter.

2.1. Impossibility, impracticability, and frustration

This section first discusses the impossibility, impracticability, and frustration doctrines in the light of Bangladesh and US jurisdiction. It then compares the principles between the jurisdictions in order to find similarities and differences and applies the doctrines to the problems in contract performance discussed in the previous chapter.

Impossibility and frustration are quite a known doctrines in common law jurisdictions. Treitel, G.H. (1994) defines that “supervening impossibility of performance may bring about the discharge

of a contract but will by no means always have this effect”³⁴. On the other hand, a supervening event may cause a contract to be discharged, but the event does not make the performance at all impossible but frustrates the purpose only. It is important to examine the circumstance of the case to find when a supervening event can be considered as a reason to discharge or void the contract.

In a similar fashion, the frustration of a contract means a discharge of the contract due to a supervening event. “A contract is said to be frustrated whether discharge occurs by supervening destruction of the subject-matter, or by its temporary unavailability or by the frustration of purpose or by supervening illegality”³⁵.

2.1.1 Impossibility, impracticability, and frustration under Bangladesh law

The contract act, 1872 of Bangladesh defines the terms and conditions related to the contract. Section 56 of the contract act states the frustration doctrine. It categorizes a contract to be void if it is impossible to perform.

Section 56, the contract act 1872. “An agreement to do an act impossible in itself is void”.

“A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful”³⁶.

“Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise”³⁷.

³⁴ Treitel, G.H., Frustration and force majeure. (Sweet & Maxwell) 63

³⁵ Ibid. P-58

³⁶ The Contract Act 1872, Bangladesh. <<http://bdlaws.minlaw.gov.bd/act-26.html>>

³⁷ Ibid

The contract act 1872 of Bangladesh has made it clear that if it is impossible for the parties to perform as per the contract, it can be treated as void given that the party cannot prevent the event, and it should be the case that the party does not know that the event is likely. In such a case, the contract can be considered as frustrated or void, which means that the contractor does not need to fulfill the contractual obligations. The Bangladesh supreme court also stated that the frustration doctrine could only be counted when the performance of the contract is absolutely impossible because of an unforeseen event that cannot be seen with reasonable diligence³⁸. It is the responsibility of the party who claims frustration to prove that the contract is absolutely impossible to perform³⁹. The act also provides an explanation to the 56 clauses in note (d) “A contract is in force to take in cargo for B at a foreign port. As government afterward declares war against the country in which the port is situated. The contract becomes void when war is declared⁴⁰.” It means that the event needs to be beyond the contractor’s reasonable control, which can be excused for non-performance.

However, if the event is known with reasonable diligence to the contractor, then the law does not exempt the party from non-performance; instead, it requires the party to carry the compensation of the loss incurred by the non-performance. Therefore, we can derive from the above discussion of the frustration doctrine that clause 56 of the Bangladesh contract act 1872 can be used in the advent of COVID-19. Nevertheless, it is the responsibility of the party, to prove that there is a nexus between the non-performance and the unforeseen event. Moreover, if the contract is signed after or during COVID-19, then the law requires parties to consider the event; for example, the US

³⁸ Md. Sameer Sattar , Md. Khademul Islam Choyon, COVID-19 and force majeure: A Bangladeshi perspective’ (The daily star, 25 March, 2020) <<https://www.thedailystar.net/law-our-rights/news/covid-19-and-force-majeure-bangladeshi-perspective-1885861>>,

³⁹ Ibid

⁴⁰ The Contract Act 1872, Bangladesh.

uniform commercial code requires to include a force majeure clause in the contract⁴¹. It means that parties cannot be exempted from non-performance when a contract is signed after or during COVID-19 as the supervening event is known to them.

2.1.2 Impossibility, impracticability, and frustration under US law

The restatement of contracts defines the doctrine impossibility of performance under section 454 where “impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved”⁴². In section 455, It says, “impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract”⁴³. It means that impossibility takes into consideration both strict situations and also difficult to perform the contract. However, it rules out the impossibility when it is ‘due to the nature of the performance’.

Section 457. says that if “after the formation of contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; but where such facts occur after the time when the performance of a promise is due, they do not discharge a duty to make compensation for a breach of contract”⁴⁴.

⁴¹ The Uniform Commercial Code, US

⁴² Willis, Hugh, ‘Restatement of the Law of Contracts of the American Law Institute’(1932) 7 (7) Indiana Law Journal, <https://www.repository.law.indiana.edu/ilj/vol7/iss> accessed 21 February 2021

⁴³ Ibid

⁴⁴ Ibid

Section 457 provides the contractor option to be exempted if the supervening event cannot be anticipated, nor the contractor has contributed to it. However, it requires to pay compensation for the breach of contract if the supervening event occurs ‘after the time when performance’ is due. If we apply this provision to the COVID-19 context in the garments contract, then it can be said that the specificity of the situation needs to take into consideration. For example, section 457 does not provide the option to the buyer to cancel when an order of the contract has been completed, given the fact that COVID-19 emerges after the product is ready. In many cases, buyers canceled the order when the product is ready for shipment or has already been shipped and refused to pay, which is not supported by the restatement of the contract.

Section 462 states the temporary impossibility which is applicable only for the period when performance is impossible to fulfill.⁴⁵ Section 463 allows partial impossibility, which says if a part of the performance is impossible to perform, then the party can only be exempted for that designated part only without being excused for the entire part of the contract⁴⁶. Section 462 and 463 are very relevant to the COVID-19 context because nature, time duration of the restriction (lockdown) measures that exist in the country are temporary, not permanent. Therefore, parties can apply temporary and partial impossibility for the period or portion.

Parties can also apply the frustration doctrine to be excused from non-performance. Section 265 of the restatement second of contracts outlines the frustration doctrine “Where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances

⁴⁵ Ibid

⁴⁶ Ibid

indicate the contrary”⁴⁷. Section 265 requires fulfilling three points a. principal purpose of the contract needs to be frustrated b. frustration needs to be substantial c. the event should be non-occurrence.

Impracticability doctrines can be applied in excusing the party from non-performance when performance becomes excessively burdensome to the party due to the supervening event, which was not because of the party. The supervening event should be an unforeseen event that the party cannot predict at the time of signing the contract or cannot guard themselves against the event⁴⁸. Section 261 of the restatement second of contracts says that a party can be exempted from contractual obligation if “a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made⁴⁹.” The impracticability doctrine requires that the performance of the party needs to be excessively burdensome, and the supervening event that does not happen due to the party’s fault should be unforeseen.

2.1.2 Frustration, impossibility, and impracticability: A comparison between Bangladesh and US law

The legal doctrines of frustration, impossibility, and impracticability of both the jurisdiction Bangladesh and the US are relevant to the context of COVID-19, and the issues arise in the aftermath of canceling the orders of garments suppliers. As shown above, the US doctrines are more comprehensive than the provisions stipulated in the Bangladesh contract act. The US doctrine

47 The Restatement Second of Contracts, Section 265, <
<https://matthewminer.name/law/outlines/1L/2nd+Semester/LAW+506-002+%E2%80%93+Contracts+II/Frustration+of+Purpose>>, accessed 5 April, 2021

48 Timothy Murray, Hogue & Lannis, Drafting Advice: Avoiding Disastrous Force Majeure Clauses’ (02 February 2018) < <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/drafting-advice-avoiding-disastrous-force-majeure-clauses>>

49 The Restatement (Second) of Contracts

impossibility differentiates between the subjective and objectivity of the impossibility. It also lay out the situation when there is a temporary or partial impossibility. It explicitly mentions that if the impossibility occurs for a temporary period of time, then the non-performance can only be accepted for that period. In addition, it also considers if there is a partial impossibility, then the discharge can be acceptable for that part of the obligation only. However, the act of Bangladesh does not describe such temporary and partial aspects of the contract, but there is a degree of similarities between the doctrines of both jurisdictions. Both jurisdictions recognize that the performance of the contract can be impossible to perform if an unforeseen event occurs beyond the reasonable control of the party or the party has predicted or contributed to the supervening event. Both the jurisdiction recognizes that if the party knows about the supervening event, then the contract needs to be performed. If there is a breach of the contract, then the party requires to cover the compensation. The law of both jurisdictions requires that the principal purpose of the contract needs to be substantially frustrated, and it should be non-occurrence. The impracticability doctrine requires that the performance of the party needs to be excessively burdensome or absolutely impossible to perform. Both the frustration and impracticability doctrines require a substantial impact of the supervening event on the performance of the contract. It means that non-performance of the contract can be considered only when the impact of the unforeseen event, in this case, COVID-19, is substantial and enormous on the performance of the party to fulfill its contractual obligation.

2.1.3 Application of frustration, impossibility, and impracticability to the COVID-19 scenario

If these three doctrines are applied to the COVID-19 situation and its relations to the US fashion brands, it is obvious that COVID-19 is an unforeseen event that is beyond the control of the US buyers. However, it is arguable whether COVID-19 has frustrated the principal purposes or not.

The principal purposes of the contract between fashion brands and garments supplier were to buy the product which was already ordered. Was this principal purpose of purchasing garments items substantially frustrated? In order to find a valid answer, it is needed to see if the COVID-19 related restriction measures made it impossible for the buyers to sell the products. It is undoubtedly true that international fashion buyers, like other businesses, are facing tremendous trouble due to the pandemic. Stores of fashion brands in the United States, in Europe, or other countries are close, and the brands' revenue declines. However, there is an option to sell the products online, and fashion brands or other businesses are using this option for online sales⁵⁰. Therefore, this can arguably say that the COVID-19 case does not substantially frustrate the principal purpose of the contract. Consequently, the US buyers cannot be excused for non-performance due to the COVID-19.

Moreover, is it evident that it is excessively burdensome for US buyers to pay what is already ordered to the garment's suppliers from Bangladesh? The annual financial statement and company data show that a number of firms, including US fashion brands, distributed hundreds of millions of USD dividends to the shareholders. For example, The US, one of the top clothing brands, Kohl paid \$109m dividends to its shareholders just a week after canceling millions of dollars orders to Bangladeshi and Korean garments suppliers⁵¹. In addition, BGMEA data shows that Primark is at the top on the list of all brand canceling of orders while the company recorded 8.86 billion USD of revenue on 20 April 2019⁵². Therefore, these findings help us to understand that the condition of

50 Emma Simpson, M&S to sell clothes from rival brands to boost online sales, (BBC, 11 March 2020) <<https://www.bbc.com/news/business-56346245>>, accessed on 5 April, 2021.

51 M McNamara, 'Anger at huge shareholder payout as US chain Kohl's cancels \$150m in orders' (*The Guardian*, 10 June 2020), <<https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders>> accessed on 12 April, 2021

52 Sushmita S. Preetha, Zyma Islam, 'Is foul play the new normal?' (*The daily star* 26 June, 2020) <<https://www.thedailystar.net/business/news/you-suffer-we-survive-1920733>> accessed 29 January 2021

the US buyers does not fall within the premises of impracticability doctrine. Consequently, it can be said that the US buyers cannot invoke frustration, impossibility, and impracticability to excuse their non-performance of garments contracts due to COVID-19.

On the other hand, It is important to examine if the producer of the garments from Bangladesh can use these common law doctrines as an excuse for the delay in delivering the goods. In a survey, 93% of the producer in Bangladesh reported a delay in getting raw materials from China due to the COVID-19 restriction measures. Bangladeshi garments producers do not control the unforeseen event that causes delay, nor there was an option to expedite the receipt of the raw materials. It is impossible to produce the garments product without the raw materials, which means that on-time performance of the contract is impossible due to the supervening event. Section 462 of the restatement of the law of contracts provides an option for applying temporary impossibility for only the period of time when it is impossible to perform. Therefore, the producer of the garments of Bangladesh can be exempted from compensation in case of delay in delivering the goods.

2.2. Force majeure

The legal doctrine of force majeure provides parties opportunities to share risk and determine when parties could be excused for non-performance and avoid liability⁵³. The force majeure provision exempts parties from non-performance when an unprecedented event happens, which needs to be unforeseen and beyond the control of the parties. Such events include natural disasters, wars, or other acts of God. The scope of the force majeure clause depends on the specificity outlined in the contract, and the interpretation is based on the law of the jurisdiction where the contract of the

⁵³ European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

parties is enforced⁵⁴. Based on the above definition of impossibility and force majeure, it can be said that the key difference between the two doctrines is that force majeure event considers the acts of god/nature (i.e. war, epidemic). On the other hand, impossibility is not because of an act of God instead, it's the inability of the promisor due to an event that promisor could not prevent.

2.2.1 Force majeure under Bangladeshi law

The “force majeure” term is not specifically defined in the contract act, 1872, or in any other statutory laws in Bangladesh. The Ministry of Planning of Bangladesh has defined the terms and conditions of using the force majeure clause more explicitly in the case of an international contract of procuring goods or service in the ‘General Conditions of Contract’ of ‘Standard Tender Document (STD)’, clause 38-41 which could also be used for the international contract between garments supplier and buyers. However, the question may arise if the ‘General Conditions of Contract’ of ‘Standard Tender Document (STD)’ of the Ministry of Planning of Bangladesh can be considered as the legal provision or not. The constitution’s Article 152 of Bangladesh defines the law as “law means any act, ordinance, order, rule, regulation, bye-law, notification or other legal instruments, and any custom or usage, having the force of law in Bangladesh”⁵⁵. Hence, the regulatory orders issued by the Ministry of Planning can be considered as a change in the law.

38.1 38.1 In this Clause, “Force Majeure” means an exceptional event or circumstance:

- (a) which is beyond a Party’s control;
- (b) which such party could not reasonably have provided against before entering into the contract;

⁵⁴ ibid

⁵⁵ The Constitution of the People’s Republic of Bangladesh, [ACT NO. OF 1972]

- (c) which, having arisen, such party could not reasonably have avoided or overcome; and
- (d) which is not substantially attributable to the other party⁵⁶.

Section 38.2 of STD lists several exceptional circumstances or events as force majeure, including (v) “natural catastrophes such as cyclone, hurricane, typhoon, tsunami, storm surge, floods, earthquake, landslides, fires, epidemics, quarantine restrictions, or volcanic activity”⁵⁷;

The most obvious finding to emerge from the above clause is that the event should be beyond the party’s control, and the party cannot overcome the circumstances. In addition, natural calamities like epidemics or pandemics can be considered as force majeure events. STD also says in clause 39 that parties could be excused from fulfilling the contractual obligation if a notice of the force majeure event is given to the other contracting party. This also makes it clear that the contract implementation can be suspended ‘for a certain period of time’ and such temporary suspension corresponds to the temporary impossibility doctrine of the US common law. It means that this provision does not necessarily warrant the cancellation of the contract, which is done by the international buyers of Bangladeshi garments products⁵⁸.

STD also says in clause 39.3, ‘Notwithstanding any other provision of this clause, force majeure shall not apply to obligations of either party to make payments to the other party under the contract’⁵⁹. This made it explicit that the payment obligation cannot be halted or canceled due to the force majeure event. As discussed in the previous chapter that reputed international brands refuse to pay even when the order is already shipped to the recipient country port or the order is in process. This means that the

⁵⁶ Government of Bangladesh [2019], Standard Tender Document (STD) for Procurement of Goods (International), Open Tendering Method, Central Procurement Technical Unit

<<https://cptu.gov.bd/upload/standarddocument/2019-10-15-17-21-59-PG4,-Updated-October-2019.docx>>

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *ibid*

practice of scrapping contracts and refuse to pay by international buyers goes against the existing legal provisions of Bangladesh. According to the provision, international buyers are held liable for the breach of contract for not fulfilling the contractual obligation. In case of breach of contract, the contract act 1872, section 73 requires the party to recover the losses that were caused by the breach of contract or non-performance. Nevertheless, the judge of the court is responsible for determining the amount of damage that the party needs to cover. Section 73 as read “When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party which had broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.”⁶⁰

2.2.2 Force majeure under US law

In the US, contracts are administered by state law, whether through common law principles or relevant statutes. The Uniform Commercial Code (UCC) is applied in almost all states for the case of sales of goods. The provision of force majeure is normally governed by the relevant clause of the contract itself⁶¹.

The contract law requires a contract to include a force majeure clause in the contract. Therefore, a force majeure event will need to be specified in the contract in order to be excused from non-performance. The court is normally not interested in counting claims based on the hardship or unforeseen alteration of economic conditions and assuming that this is applicable to all the

⁶⁰ The Contract Act 1872, Bangladesh.

⁶¹ European Center for Constitutional and Human Rights, Force majeure:
How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020)
<https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on
01 May 2021

contracts⁶². Instead, the court decides the facts on a case-by-case basis; the federal court rejected a number of claims of force majeure based on the changes in economic conditions. For example, the court rejected several claims of force majeure filed due to the attack on September 11 and the financial crisis during 2008 except the contract, which explicitly mentioned the economic changes in their force majeure clause⁶³. It means that changes in economic condition can be considered if it is explicitly mentioned in the contract.

One may argue that COVID-19 does not affect the garments brand's ability to pay for the ordered goods because the restriction measures do not prohibit brands from selling the products online. In-store sale is also open after an interval in the US. Moreover, many fashion brands have distributed a large number of dividends to the shareholders while canceling orders to the garment's suppliers. It proves that brands are solvent; they have enough cash to pay the obligation. The reputed international brands can also get easier access to credit from financial institutions than their suppliers. The US government also provides assistance to companies and enterprises as part of the stimulus packages⁶⁴. Therefore, US buyers cannot be exempted from performance due to COVID-19.

The UCC requires parties to share the risk of non-performance by including the force majeure clause in the contract. If the contract fails to include a force majeure clause, then the UCC clause will be applied to the case.

62 *ibid*

63 Timothy Murray, Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19, (2021) 1, Matthew Bender as cited in *ibid*

64 *ibid*

Section 2-615 of the UCC: § 2-615.

“Excuse by Failure of Presupposed Conditions

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer”⁶⁵.

The UCC clause 2-615 discussed above limits the application through the sentence “Except so far as a seller may have assumed a greater obligation⁶⁶.” As explained above, the law provides an option to parties to decide on a different term of allocating risk in the contract. In the absence of such a clause, UCC provides an option for an excuse to the supplier and requiring the seller to take more obligation in a contract⁶⁷. UCC Section 2-615 also explicitly clarifies that the seller (in this case, Bangladeshi garments producer can be excused if the timely delivery is not feasible because of an unforeseen event that was not recognized while signing the contract. At the same time, the

⁶⁵ Uniform Commercial Code (UCC), <https://www.law.cornell.edu/ucc/2/2-615>, accessed on April 4, 2021

⁶⁶ European Center for Constitutional and Human Rights, Force majeure:

How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf >, accessed on 01 May 2021

⁶⁷ *ibid*

most striking aspect of section 2-615 is that it does not excuse buyers (the US garments buyers in this case) from non-performance due to unforeseen events. This analysis reveals that the garments supplier from Bangladesh can be excused from liability if there is a delay in delivering the products due to the unforeseen event COVID-19.

Despite this provision of the UCC, it has been found in a survey that 53.4 % (out 98%) reported that the garments suppliers were penalized by the international buyers due to the delay in the delivery or shipment of the products⁶⁸. This practice may be explained that the approach or action was taken by the buyers especially those are from the US do not comply with the existing law of the country and Bangladeshi garments supplier can take this UCC section 2-615 to defend its right if there is a delay in delivering the product due to the disruption in the raw materials supply chain because of the COVID-19 restriction measures.

Another finding from the UCC section 2-615 is that it provides higher liability to the buyers; despite this legal provision, it is evident from the contractual terms as discussed in the previous sub section and also the practice discussed in the previous chapter that the buyers delegate absolute liability to the supplier of the garment's product. The contractual terms defined about the cancellation do not even provide the supplier's rights to negotiate or hold buyers responsible for paying the product already in the production or in the shipment. The combination of the findings shows that the practice international buyers are following in contractual relations with the buyers from Bangladesh or developing countries is not in compliance with the uniform commercial code of the US.

There could be an argument why UCC does not allow buyers to be excused. Corbin explained that “One reason why UCC § 2-615 fails to mention buyers may be that the principal obligation of

68 PennState Center for Global Workers' Rights, Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains, (Research Report, 2020)

purchasers of goods is to pay money, and the inability to pay has not generally been viewed as a valid defense, even when the inability is due to circumstances beyond the control of the payor⁶⁹.” This particular aspect shows that buyers cannot excuse themselves from the payment due to COVID-19.

2.2.3 Comparison of force majeure between Bangladesh and the US

The common element of the force majeure doctrine of both jurisdictions is that both recognize that the non-performance can be excused due to the supervening event. However, it requires that the event be unforeseen, unavoidable, beyond the party’s control, and an impediment for the party to perform the contract. The US UCC requires that the contract should include the force majeure clause while signing it. No such requirement can be found in Bangladeshi jurisdiction, but the contract is normally governed by the Bangladesh contract act 1872. Another key feature of the UCC is that it provides room for the seller to be excused if there is a delay in delivering the products due to the force majeure event. At the same time, it does not provide buyers the option to be excused due to unforeseen events. In contrast, the Bangladeshi jurisdiction does not make such differentiation between buyers and sellers. However, It allows a party to excuse the delay if the party notify the counterpart within 14 days of the event (39.1 of STD)⁷⁰. One of the important features of the force majeure provision stated in the Bangladesh standard tender document is that it asks the party not to apply force majeure in releasing the payment to other parties.

⁶⁹ European Center for Constitutional and Human Rights [2020], Force majeure:

How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers, p-20, <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

⁷⁰ Government of Bangladesh [2019], Standard Tender Document (STD) for Procurement of Goods (International), Open Tendering Method, Central Procurement Technical Unit
<<https://cptu.gov.bd/upload/standarddocument/2019-10-15-17-21-59-PG4,-Updated-October-2019.docx>>

2.2.4 Application of force majeure doctrine to the COVID-19 context

The companies face difficulties in full filling the contractual obligations due to the COVID-19 disruptions. However, the use of force majeure is not as straightforward as international fashion brands are using it.

In order to get further insight regarding the application of force majeure, the study sheds light on some similar cases. For example, the government of Morocco postponed the African Nations Cup due to the spread of the Ebola virus across West African countries in 2015. The government used force majeure as an excuse for not organizing the game. The Court of Arbitration for Sport (CAS) decided that the Ebola virus outbreak is not a force majeure event. The virus made it the host government difficult to organize the tournament, but not impossible. The court made the government liable and fined one million USD⁷¹. Therefore, the legal doctrines provide an option for parties to be excused if it is impossible to perform due to an unforeseen event. However, a party cannot be allowed to use the clause of free will. Instead, it is subject to proof by the party and interpretation by the court. There is a diverse application of force majeure clause in deciding on the cases, for example:

The Great Lakes Gas Transmission, Ltd., vs. Essar Steel Minnesota, LLC, was lodged in the aftermath of the 2007 financial crisis to use the crisis as force majeure. The court decided that inability to get credit is an unforeseen event; however financial crisis cannot be considered as a force majeure as market instruments were not counted in the force majeure⁷². On the other hand, in the case of ‘Hoosier Energy Rural Electric Cooperative, Inc. vs. John Hancock Life Ins. Co’, the

71 Mohammed Salah Uddin, Covid-2019: Applicability of Force Majeure clause in Bangladesh, (The Financial Express, 14 May 2020)<<https://www.thefinancialexpress.com.bd/views/covid-2019-applicability-of-force-majeure-clause-in-bangladesh-1589040154> >?>, accessed on 4 April, 2021

⁷² ibid

court decided the credit crisis as unprecedented and force majeure. A similar application is also seen in the case of the Greece debt crisis, where the European Commission and Greek parliament recognized the crisis as force majeure⁷³. Therefore, it can be said that the interpretation and application of the force majeure depend on the case and court or jurisdiction, in addition to the domestic legal doctrines or principles of the country.

The UCC mentioned that force majeure could only be applied only when it is explicitly mentioned in the sales contract. Hence, it is also equally important to scan through the international sales contract, especially to see what is included in relation to force majeure or an unforeseen event and how that could be applied to the legal doctrines.

US department store Kohl's Inc., a US-based brand, canceled all of its orders on March 22, 2020, negotiating with the suppliers. Kohl's Inc. used the following clause to cancel the contract:

“We may cancel our Purchase Order in whole or in part without your authorization and at Kohl's sole and absolute discretion in the event of any of the following, each of which it is agreed will substantially impair the value of the whole Purchase Order to us: ... (g) in the event of acts of God (including, but not limited to, natural disasters, fire, flood, earthquake and disease outbreaks), lock-out, strike, war, civil commotion or disturbances, acts of public enemies, government restrictions, riots, insurrections, sabotage, blockage, embargo, or other causes beyond our reasonable control”⁷⁴

... “Cancellation by Kohl's for any of the foregoing reasons shall constitute “for cause” and shall not subject us to any liability, cost, or charge whatsoever. In the event of such cancellation, or any cancellation for cause, Kohl's may take possession of the merchandise and any materials and equipment being used by you and may cause the

⁷³ *ibid*

⁷⁴ Kohl's Inc., “Merchandise Purchase Order: Terms and Conditions,” (March 2020) as cited in European Center for Constitutional and Human Rights [2020], Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers, p-5, <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

merchandise to be completed in such manner as Kohl's shall determine and you shall reimburse Kohl's for the cost of completion"⁷⁵.

The above agreement clause shows that Kohl has the right to cancel complete or partial orders with its discretion without any consultation or authorization of the supplier. Second, the event does not need to be unforeseen as long as it is beyond the buyer's control. Third, cancellation of the contract will not trigger any cost, liability, or charges whatsoever to Kohl. The clause does not define or interpret at what stage the buyer can cancel the contract. However, as buyer has discretionary power, which means that buyer can cancel the contract at any stage regardless of its status in production, finished, or on the way to the shipment⁷⁶. Consequently, the product that suppliers produced is regarded as worthless, thereby incurring substantial financial losses of the financially disadvantaged garments supplier from Bangladesh. To what extent is the cancellation clause being consistent with the legal doctrines of Bangladesh and the US? It is very evident that such a clause is not in compliance with section 56 of the Bangladesh contract act, which requires the event to be unforeseen, and the parties cannot perform. It also does not comply with the administrative order issued by the ministry of planning which requires the contractor to pay. In a similar fashion, the contract terms are contrary to the US UCC, which requires more responsibility by buyers. As discussed above, the UCC provides only suppliers the option to be excused for the delay in performance or delivering goods, whereas the contractual terms and practices are non-compliance with the US legal doctrines as well. Another striking point of the cancellation clause is that Kohl can take possession of the merchandise for what the canceled and the suppliers need to pay the cost of completing the product, which seems that there is an application of influence and higher power

⁷⁵ ibid

⁷⁶ European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers, (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

from the buyers in agreeing with the suppliers with the terms of contract as suppliers are in an economically disadvantaged position which is elaborated in the next sub-section. Another interesting aspect is that Kohl canceled 150 million USD of contracts to Bangladeshi and Korean suppliers using the cancellation. At the same time, the company paid 109 million USD of dividends to its shareholder on April 1, 2020⁷⁷. I would argue that if the international fashion brands were to take more responsibility toward their suppliers, this would be high time to do so as the policy and action of the buyers have a substantial impact down on the supply chain.

Another top fashion brand Primark which canceled the highest order to Bangladeshi suppliers, using “Terms and Conditions of Purchase of Goods for Resale (Europe),” which includes provisions 7.1 and 7.2 for cancellation:

“The buyer shall be able to terminate the Contract or Purchase Order and/or cancel any other contracts or purchase orders with the seller (whether such purchase orders were issued by the buyer or any other member of the buyer’s group) immediately without liability to the seller by giving the seller notice of such termination [... Article 7.2 continues] Notwithstanding the foregoing, the buyer may terminate the Contract or any Purchase Order without penalty or further obligation to the seller at any time for any or no reason upon 30 days’ prior written notice to the seller⁷⁸.”

This term of the condition provides the buyer power to cancel the order at any point in time without any reason with a notification. The buyer will not bear any liabilities whatsoever. Primark indeed canceled all of its contracts using article 7.2 and force majeure clause 16 though the in-production products were taken and paid later⁷⁹. According to Bangladesh Garments Manufacturing Exporting

⁷⁷ European Center for Constitutional and Human Rights [2020], Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers, <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

⁷⁸ Ibid, p-6

⁷⁹ ibid

Association, Primark held up or postponing 300 million USD of orders while the company recorded 8.86 billion USD of revenue on 20 April 2019⁸⁰. The suppliers accepted the highly unequal terms and conditions due to the fact that they do not have an alternative option. However, how does the law of Bangladesh provide protection to such cases where buyers have influence over the terms of the condition of the contract.

In a nutshell, it can be said that the legal doctrines and principles of Bangladesh acknowledge the force majeure event with a certain condition to be fulfilled, for example, the event needs to be unforeseen, beyond the reasonable control of the party, and it should be impossible for the party to perform the contract. The administrative order issued by the ministry of planning requires a party to pay the contract. However, an opposite scenario is seen in practice where international fashion brands refused to pay for orders even at the final production stage or in shipment.

In addition, taking the Uniform Commercial Code, common law doctrines impracticability, and frustration of purpose together, it is evident that UCC excuses suppliers, in this case, Bangladeshi garments producers, from non-performance due to an unforeseen event like COVID-19. However, UCC does not provide an option to the buyers; in this case, US buyers to be excused instead requires buyers to take greater liability. Buyers can defend their rights using other common law doctrines of impracticability and frustration of purpose. Nevertheless, the findings of the above analyses show that the conditions of the US buyers do not satisfy the requirement defined under the doctrine of impracticability and frustration. Impracticability requires that performance be excessively

⁸⁰ Sushmita S. Preetha , Zyma Islam, 'Is foul play the new normal'? (*The daily star* 26 June, 2020 <<https://www.thedailystar.net/business/news/you-suffer-we-survive-1920733>> accessed 29 January 2021

burdensome for the parties, which is not fully applicable to US buyers. At the same time, frustration requires that the principal purpose of the contract should be substantially frustrated, which is also not applicable for the US buyers as the distance or restriction measures do not fully close the operation of the business or the business is adopting an alternative option of selling online. In brief, this combination of findings provides support that the US buyer could not arguably be excused for non-performance due to COVID-19.

2.3. Undue influence

Influence of dominant party or use of dominant parties position in setting terms and conditions of a contract without the free will of the other party is known as undue influence. These legal doctrines are defined in many jurisdictions, including the US, UK, Australia, and other countries.⁸¹

2.3.1 Undue influence in Bangladesh and the US

Section 16 of the Bangladesh contract act 1872 says that a contract or agreement is void or voidable if one party of the contract uses its dominant position to take an 'unfair advantage' over others. It reads "16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other"⁸².

It also says that 16 (3) "Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other"⁸³.

⁸¹ Nievod, Abraham. "Undue influence in contract and probate law." Cultic Studies Journal [1993].

⁸² The Contract Act 1872, Bangladesh.

⁸³ Ibid

In addition, section 19A says, “When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just”⁸⁴.

In summary, the contract act of Bangladesh has made it clear that the contract is voidable if the contract is made through undue influence. It defines undue influence as the power of a party to dominate the will of others, or if a party uses its position to take an unfair advantage, then it is also regarded as undue influence. Law requires the dominant party to prove if the situation is contrary to the dominance.

The US restatement § 208 discusses a similar provision called an unconscionable contract. It says, “If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result”⁸⁵.

The California Code, Civil Code - CIV § 1575 defines four types of activities that may fall under the undue influence:

1. “In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him”;

⁸⁴ *ibid*

⁸⁵ The Restatement Second of Contracts, Section 265,

2. “In taking an unfair advantage of another’s weakness of mind”; or,
3. “In taking a grossly oppressive and unfair advantage of another’s necessities or distress”⁸⁶.

In a nutshell, US law recognizes that if a party takes advantage of the other party’s weakness or distress in designing its gain, that can be regarded as undue influence. According to the US restatement of contract, such an unconscionable contract or the contract with undue influence is voidable.

Comparing both the Bangladeshi and the US jurisdiction regarding the undue influence doctrine, it is found that both recognizes the party’s dominant power and position to take unfair advantages over others in the contract as undue influence or unconscionable contract. Law has made it clear that such a type of contract is voidable. It also makes it clear that if the undue influence takes place partially, then that part of the contract is voidable.

2.3.2 Application of undue advantage in the contractual relations between the US buyers and Bangladeshi garments sellers

It is important to examine how the legal doctrine undue influence of the US and Bangladesh is applicable to the contractual relations between the US buyers and Bangladeshi garments seller.

In the chapter one discussion, it is found that the international buyers hold enormous power in the contractual relations due to the limited number of fashion brands compared to a quite large number of suppliers. In addition, the contractual terms and practices discussed in the previous section reveal that international buyer’s set the terms of the contract at their will. Sellers have no power to negotiate the terms and conditions of the sales contract. As a result, buyers can easily exercise

⁸⁶ California Code, Civil Code - CIV § 1575

power in an unfair way to scrap the contract, withhold or even refuse to pay while even delivery is ready for shipment.

The language of the cancellation terms, for example, “We may cancel our Purchase Order in whole or in part without your authorization and at Kohl’s sole and absolute discretion..... Kohl’s may take possession of the merchandise and any materials and equipment being used by you⁸⁷” reflects that there is an undue influence in the contract and the contract is unconscionable, meaning that the contractual terms are one-sided, overwhelmingly favoring one party (international buyers) due to its superior power in bargaining.

In practice, International buyers draft the standard contract, which normally maximizes the interest of the buyers. Buyers are canceling contracts it is not because that it is justified; instead, it is because they have the power to do so. In addition, the buyers know that the financially weaker garments supplier cannot hold them accountable legally even if they are breaching the contractual terms. In addition to other factors, the contractual terms built in the contract restrict suppliers from going for legal action. In many cases, the contract requires suppliers to file a case in the court of the buyer’s country and pay the fees of the buyer’s attorney if they lose. In addition, suppliers are afraid that if they take legal action against one buyer, they may face retaliation from the buyers they sue against and the other buyers⁸⁸. Taking it together, it can be said that the practice of setting the contractual terms, the terms and conditions itself, especially in relation to cancellation, are unfair, one-sided, and providing undue advantage to the international buyers. In that respect, the

⁸⁷ European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021
⁸⁸ ibid

doctrine of undue influence and unconscionability can be applicable to invalidate the contract fully or partially.

2.4 International laws and conventions

This chapter also investigates international laws to find a comprehensive overview and insight on the application of force majeure in the context of COVID-19.

2.4.1 The International Chamber of Commerce (ICC)

According to ICC force majeure clause 2020, force majeure can be defined as:

“The occurrence of an event or circumstance (“Force Majeure Event”) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (‘the Affected Party’) proves:

- a. that such impediment is beyond its reasonable control; and
- b. that it could not reasonably have been foreseen at the time of the conclusion of the contract; and
- c. that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party”⁸⁹.

The above definition requires all three conditions to be fulfilled; it might be easier for the party to justify point a and b in relation to COVID-19. However, the party also needs to prove that the COVID-19 impact could not have been avoided.

⁸⁹ International Chamber of Commerce force majeure and hardship clauses 2020, p-2, <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf>

2.4.2 United Nations Convention on Contracts for the International Sale of Goods (CISG)

Article 79 of the CISG says 79 (1) “A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences”⁹⁰.

The above definition of force majeure by CISG has common elements with the ICC or other legal doctrines. CISG requires that the event needs to be unforeseen, beyond reasonable control, or parties could not avoid the consequences. It also requires the party to notify the other party. However, the important aspect to note is that the party needs to prove that the conditions are fulfilled and mitigation measures have been adopted to overcome the effect of being excused from non-performance. However, it is not quite convincing how international reputed and profitable fashion brands could justify that the restriction measures stemmed from COVID-19 have actually made it impossible for them to pay to the garment’s suppliers. Even if the brands are excused from the liability for the period of COVID-19, they are still obligated to pay when COVID-19 related restriction measures are at ease or over ⁹¹.

2.4.3 UNIDROIT Principles of International Commercial Contracts

The unidroit Principles of International Commercial Contracts (PICC) also has similar force majeure clauses and principles like CISG.

⁹⁰ United Nations Convention on Contracts for The International Sale of Goods, 1980 (CISG)

⁹¹ European Center for Constitutional and Human Rights [2020], Force majeure:

How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers, p-20, <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

ARTICLE 7.1.7 of PICC:

(1) “Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period....⁹²“.

2.4.4 Comparison and application of ICC, UNCISG, and UNIDROIT PICC to the COVID-19 context

The clauses of ICC, CISG, and PICC are applied to the international commercial contract. All three doctrines have recognized that non-performance can be excused due to an ‘impediment beyond its control’, and the impediment should be unforeseeable. ICC also requires that the affected party could not avoid the impact caused by the impediment, which is not a requirement under CISG and PICC.

COVID-19 needs to be an impediment. At the same time, it is also equally important that COVID-19 is beyond reasonable control. As it is a pandemic, it can be considered that it is beyond the control of the parties. However, in the case of buyers and sellers of the garments industry, it is important to examine if the COVID-19 is ‘beyond the promisor’s typical sphere of responsibility and it shall be considered as impediments’⁹³. For instance, if a flood destroys all the goods of a party, the non-performance can be excused due to the impediment of force majeure. However, can the non-performance be excused if the stocking of the products is in a warehouse located in a risky

⁹² UNIDROIT Principles of International Commercial Contracts (PICC), Article 7.1.7 (force majeure)

⁹³ Davies, Martin, and David V. Snyder, ‘International transactions in goods: global sales in comparative context’. Oxford University Press, [2014]. P-332

flood zone?⁹⁴ Therefore, while acknowledging that COVID-19 is a force majeure case, but it is not straightforward that international buyers invoke the force majeure using COVID-19 and walk away from its responsibility; instead, it should be decided on a case by case.

On the other hand, sellers may argue that the restriction measures like the ban on transport, travel, export, and import of goods or raw materials created an impediment toward timely delivery of the goods. Can this delay be excused due to the travel ban⁹⁵? In a case (Case No. 1782/1973), the ICC tribunal has refused to accept a force majeure claim due to a travel issue. The contract required the promisor to deliver and maintain trucks in an Arab country. The promisor invokes force majeure, arguing that their employees could not obtain a visa from the Arab country due to their origin in Israel. The tribunal refused the claim highlighting that 26 months of delay cannot be accepted due to travel restrictions or visa issues, and the promisor could perform the contract recruiting nationalities from other countries⁹⁶.

The economic impact of restriction measures may also be relevant here, especially in the case of decreasing sales and revenue of the buyers⁹⁷. In the sunflower seed case under CISG 79, the high cost of performing contractual obligations were not granted as an impediment to performance. In this case, the Bulgarian contractor failed to provide sunflower seeds to the Greek buyer because of the fact that a large number of seeds were destroyed by drought. In addition, the promisor could not ship the goods at river port due to the decrement of Danube river. The alternative seat port was

⁹⁴ Esra Kiraz, Esra Yıldız Üstün, 'COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards', *Uniform Law Review*, (2020) 25 (4), 437–465, <<https://doi.org/10.1093/ulr/unaa027>> accessed at 15 May 2021

⁹⁵ Ibid

⁹⁶ ICC Case Number. 1782/1973, as cited in ibid

⁹⁷ Davies, Martin, and David V. Snyder, 'International transactions in goods: global sales in comparative context'. Oxford University Press, [2014]. P-332

highly costly in delivering the goods. In such context, the court of Appeals, Lamia, Greece, rejected the appeal of the Bulgarian promisor to be exempted from liability under CISG 79⁹⁸.

The revenue of the fashion brand may be reduced compared to the previous year in some cases, but it cannot be argued that fulfilling payment obligation has causation of leading company to be insolvent. Second, the market risk, for example, price reduction, is part of the business plan that parties need to consider. Third, many fashions are found to be distributed millions USD of divided among shareholders before and after the cancellation of the contract⁹⁹. Therefore, the non-performance of the buyers cannot be justified on legal grounds under international law as well.

Another important criterion of the force majeure clause is the foreseeability of the impediment. The application of these criteria to the COVID-19 case is also challenging. If the contract is concluded before COVID-19, then it can be said the parties could not estimate the consequences of the supervening event. The contract made after the announcement of COVID-19 cases in China should foresee the consequence of the event¹⁰⁰.

In a nutshell, as per the ICC, the CISG, and the PICC force majeure clause, the COVID-19 case, in general, can be regarded as a force majeure event. However, the event should meet the criteria of beyond control, foreseeability, and unavailability. While applying the criteria to the garments industry context, it is found that the event or restriction measures are beyond the control of the fashion brands. However, financially rich international buyers can avoid the consequence of the event. Therefore, the application of force majeure cannot be justified on the legal ground by merely notifying the COVID-19. Instead, it should be decided on a case by case.

⁹⁸ *ibid*

⁹⁹ M McNamara, 'Anger at huge shareholder payout as US chain Kohl's cancels \$150m in orders' (The Guardian, 10 June 2020), < <https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders?> accessed on 12 April, 2021

¹⁰⁰ Esra Kiraz, Esra Yıldız Üstün, 'COVID-19 and *force majeure* clauses: an examination of arbitral tribunal's awards', *Uniform Law Review*, (2020) 25 (4), 437–465, <<https://doi.org/10.1093/ulr/unaa027>> accessed at 15 May 2021

Chapter three: Findings of the analysis and guidance for buyers, sellers, and policymakers

This section below identifies major findings in the light of the above analysis and draws recommendations for the buyers, sellers, and policymakers.

3.1 Major findings of the analysis

1. Substantial cancellation of garments products order by international buyers induced violation of labor rights

One thousand nine hundred thirty-one fashion brands canceled or withhold 3.7 billion USD of orders since the beginning of the pandemic. Over a million workers had been fired or suspended temporarily due to the cancellation or buyer's failure to pay as per contract. A number of factories were a force to be closed due to cancellation. In addition, the buyers are not willing to pay a partial wage to the temporarily suspended worker which is a legal obligation in the country. Such practices induced violation of labor rights by suppliers where the buyers cannot be exempted from their responsibility. Furthermore, cancellation of contract after the product completion is a violation of the 'UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises, as the European Center for Constitutional and Human Rights'¹⁰¹.

2. Under the doctrine of force majeure, COVID-19 excuses delays the delivery of garments from Bangladesh to the US, but not the cancellation of orders by US buyers

¹⁰¹ European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

More than fifty percent of the Bangladeshi garments industry's raw materials are imported from China. Due to the disruption of the supply in the global value chain, garments suppliers from Bangladesh are unable to produce the product on time which is unavoidable. Therefore, suppliers can be excused for the delays under the force majeure doctrine. On the other hand, international buyers can avoid the consequence of the event through the alternative mode of business, for example, online sales. Consequently, buyers can not be excused for canceling orders.

3. COVID-19 event does not restrict international fashion brand's ability to pay

International fashion buyers can not open the shops due to restrictions measures. However, brands are increasingly using online sales¹⁰². The in-store sale is also open after an interval in the US, and countries are also opening up gradually with the improved health condition, thereby giving the option to operate the business. Third, the annual financial statement and company data show that a number of firms, including US fashion brands, distributed hundreds of millions of USD dividends to the shareholders¹⁰³. This shows that COVID-19 does not affect the garments brand's ability to pay for the ordered goods. Moreover, the principal obligation of the buyers is to pay money, and the inability to pay has not generally been viewed as a valid defense, even when the inability is due to circumstances beyond their control. Consequently, it can be said that the US buyers cannot be excused from performance or fulfilling the obligations agreed in the contract due to the COVID-19.

4. Cancellation of contract or refusal to pay is not justified on legal grounds.

102 Emma Simpson, M&S to sell clothes from rival brands to boost online sales, (BBC, 11 March 2020) < <https://www.bbc.com/news/business-56346245>>, accessed on 5 April, 2021

103 M McNamara, 'Anger at huge shareholder payout as US chain Kohl's cancels \$150m in orders' (*The Guardian*, 10 June 2020), < <https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders?> accessed on 12 April, 2021

>

Applying common law doctrines frustration, impossibility and impracticability to this context, it is found that the facts of this case do not satisfy all the criteria of these three doctrines. For example, the COVID-19 is an unforeseen event that is beyond the control of US buyers. However, it can arguably say that COVID-19 did not substantially frustrate the principal purposes of the contract. Law requires that the supervening event should be excessively burdensome to party. Is it evident that it is excessively burdensome for US buyers to pay what is already ordered to the garment's suppliers from Bangladesh? The annual financial statement of the company shows an opposite scenario. In addition, the ICC, CISG, and PICC force majeure clause requires that there was no possibility for the party to overcome, avoid the event or consequences of it. The party may have the ability to overcome the consequence of the COVID-19 due to the strong financial health and alternative online mode of sales. Therefore, cancellation of contract or refusal to pay is not justified on legal grounds.

5. Buyers and seller's contractual relations are highly asymmetric

In the above discussion, it is found that the international buyers hold enormous power in contractual relations due to the limited number of fashion brands is limited compared to a quite large number of suppliers. In addition, the contractual terms and practices discussed in the previous chapter reveal that international buyer's set the terms of the contract at their will. Sellers have no power to negotiate the terms and conditions of the sales contract. The contract terms give buyers discretionary power. Therefore, it can be said that the practice of setting the contractual terms, the terms, and conditions themselves especially in relation to cancellation, are unfair, overwhelmingly one-sided, and providing undue advantage to the international buyers.

6. Buyers have more responsibility toward the garment's supplier.

The USA's Uniform Commercial Code (UCC) requires buyers to take more responsibility in the contract. It provides room for the seller to be excused if there is a delay in delivering the products due to the force majeure event. At the same time, it does not provide buyers the option to be excused due to unforeseen events. In addition, International fashion brands are financially far better position than the garments suppliers from developing countries. Hence, if the international fashion brands were to take more responsibility toward their suppliers, this would be high time to do so as the policy and action of the buyers have a substantial impact down on the supply chain.

7. Contract signed after COVID-19 announcement cannot be excused from performance

Legal doctrines discussed above require that the supervening event should be out of the foreseeability of the party. If the contract is signed after or during the period of COVID-19, it means that COVID-19 as the supervening event is known to the parties. Therefore, parties cannot be exempted from non-performance when a contract is signed after or during COVID-19. In addition, the contract made after the announcement of COVID-19 cases in China should foresee the consequence of it, and the subsequent contract can already include the clause and specifics about it.

3.2 Recommendation for the buyers, sellers, and policymakers

1. Amendment of the law of the buyer's and seller's country

The law of the producing country should be amended to prohibit abusive terms in the contract and build up protection measures for the seller, for employees so that the industry and associated employees could be protected from similar shocks in the future. This legal framework needs to be developed in coordination with other countries because no country would be willing to introduce a measure first, putting them in a disadvantageous position in a competitive market. In addition,

the law of the buyer's country should also be amended to ensure that the fashion brands are held liable for any violation of human rights which they are contributing or causing, and there should not be any defense of such violation¹⁰⁴. Law should be amended to facilitate transnational litigation against abusive behavior. The EU has adopted the 'Unfair Trading Practices Directive' for the agro-food sector¹⁰⁵. Similar legislation could be developed for the garments and textile sector.

2. An independent institution can be established to ensure fair contractual terms and practices

The incumbent government is recommended to discuss with the international buyers and sellers how to improve and agree on establishing an independent body to assist sellers and buyers of the garments industry and monitor compliance. The prime responsibility of the body will be to assist the party in determining the contractual terms, providing training to the parties on the important issues to build their capacities, providing legal support and advice when needed. Most importantly, the institute will investigate the unequal power relations, identify abusive contractual terms and contractual practices to take legal action against those so the abusive practice could be restricted.

3. Given the inequality of power between sellers and buyers, all sales contracts stipulated in the future should include an appropriate force majeure clause

Both buyers and sellers should have the ability and options to negotiate the contractual terms, and one party should not be given discretionary power to unilaterally decide on the contractual terms or influence the decision of the other party. The drafting of the contract should be done jointly or

104 International Trade Union Confederation, "Towards mandatory due diligence in global supply chains," (2020), www.itucsi.org/IMG/pdf/duediligence_global_supplychains_en.pdf accessed 02 June 2021

105 Directive of the European parliament and of the council on unfair trading practices in business-to-business relationships in the food supply chain, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0173&from=EN>> accessed 02 June 2021

negotiated by a national or global trade union. In 2013, after the collapse of the factory in Bangladesh, 200 international fashion brands, national union, and global union federation signed the agreement of building fire safety in a garments factory. The agreement requires buyers to “negotiate commercial terms with their suppliers, ensuring that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements¹⁰⁶.” In a similar fashion, the contractual issues that arise due to the COVID-19 crisis should be negotiated with the buyers, sellers, and unions to avoid such abusive provision and practice in the future. In addition, force majeure events or similar principles should be included in all future contracts, clearly outlining the specifics and process of invoking the clause. Parties should have the option to decide on the choice of law or jurisdiction. Sellers could be allowed to take legal protection from their own jurisdiction.

4. Current business model should be changed, and buyers should be more responsible toward the garment’s supplier

The COVID-19 crisis shows that the current business model or purchasing practice is not sustainable in the long run. Brands must ensure that their policy and action are not triggering the violation of international legal provisions and international labor standards. The welfare and rights of the suppliers and workers should not be undermined; instead, they should be supported and respected¹⁰⁷.

¹⁰⁶ European Center for Constitutional and Human Rights, ‘Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers’, (2020) p-5, <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed 01 May 2021

¹⁰⁷ Ibid

Conclusion

The COVID-19 has created an extraordinarily challenging task for all stakeholders, including buyers and producers of garments products. The supervening event leads cancellation of substantial contracts by international buyers of the garments products, thereby causing an excessive burden to the garments suppliers. Cancellation of completed products or the shipped products and refusal to pay or applying a discount to the previously fixed price is a violation of international regulations, especially the UNGPs. The power relations between the buyers and sellers are highly asymmetric, allowing buyers to influence the contractual terms. There are similarities and differences in the criteria of the legal doctrines among the jurisdictions and international laws. Legal doctrines acknowledge that the COVID-19 is a force majeure event; however, invoking it is not straightforward. Buyers must show that they have tried to overcome or avoid the consequences of the impediment and failed before canceling the contract. Legal doctrines allow partial impossibility, which provides room to delay the payment but the cancellation of order abruptly or refusing pay cannot be justified on the legal ground. Therefore, international buyers cannot be excused from non-performance due to the COVID-19.

Bibliography

Andreas Becker, 'Coronavirus disruptions deal severe blow to Bangladesh's garment industry'. (DW, 23 June 2020) <<https://www.dw.com/en/coronavirus-disruptions-deal-severe-blow-to-bangladeshs-garment-industry/a-53895339>> accessed 29 January 2021.

Bangladesh Labour Act, 2006

BGMEA, 'Bangladesh's Apparel Export to World' <<https://www.bgmea.com.bd/home/pages/TradeInformation>> accessed 19 November 2020

California Code, Civil Code - CIV § 1575

Davies, Martin, and David V. Snyder, 'International transactions in goods: global sales in comparative context'. Oxford University Press, [2014]. P-332

Directive of the European parliament and of the council on unfair trading practices in business-to-business relationships in the food supply chain, <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018PC0173&from=EN>> accessed 02 June 2021

Emma Simpson, M&S to sell clothes from rival brands to boost online sales, (BBC, 11 March 2020) <<https://www.bbc.com/news/business-56346245>>, accessed on 5 April, 2021.

Esra Kiraz, Esra Yıldız Üstün, 'COVID-19 and force majeure clauses: an examination of arbitral tribunal's awards', Uniform Law Review, (2020) 25 (4), 437–465, <<https://doi.org/10.1093/ulr/unaa027>> accessed at 15 May 2021

Fati, N., Safety First: Bangladesh Garment Industry Rebounds, International Finance Corporation. <https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/insights/bangladesh-garment-industry> accessed 26 January 2021

Government of Bangladesh [2019], Standard Tender Document (STD) for Procurement of Goods (International), Open Tendering Method, Central Procurement Technical Unit <<https://cptu.gov.bd/upload/standarddocument/2019-10-15-17-21-59-PG4,-Updated-October-2019.docx>>

European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf>, accessed on 01 May 2021

Ibrahim Hossain Ovi, 'Apparel sector's contribution to GDP going down for years' The Dhaka Tribune, <<https://www.dhakatribune.com/business/2019/04/26/apparel-sector-s-contribution-to-gdp-going-down-for-years#:~:text=The%20RMG%20sector%2C%20the%20lifeline,7.28%25%20in%20the%20previous%20year>> (Dhaka, 26 April 2019)

ICC Case Number. 1782/1973, as cited in ibid

Imam, S. H, Buyers tend to undo existing contracts with RMG producers. (The financial express, 24 May, 2020) <<https://www.thefinancialexpress.com.bd/trade/buyers-tend-to-undo-existing-contracts-with-rmg-producers-1590303853>> accessed 12 January 2021

International Chamber of Commerce force majeure and hardship clauses 2020, p-2, <https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf>

International Trade Union Confederation, "Towards mandatory due diligence in global supply chains," (2020), [www.itucsi.org/IMG/pdf/duediligence_global_supplychains_en .pdf](http://www.itucsi.org/IMG/pdf/duediligence_global_supplychains_en.pdf) accessed 02 June 2021

Joseph Constrantine s. line ltd. v. Imperial Smelting Corp. Ltd [1942] A. C. 154, 163-164

Kohl's Inc., "Merchandise Purchase Order: Terms and Conditions," (March 2020) as cited European Center for Constitutional and Human Rights, Force majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers (2020) <https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf >, accessed on 01 May 2021

M McNamara, 'Anger at huge shareholder payout as US chain Kohl's cancels \$150m in orders' (*The Guardian*, 10 June 2020), < <https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders>?> accessed on 12 April, 2021

Md. Sameer Sattar , Md. Khademul Islam Choyon, COVID-19 and force majeure: A Bangladeshi perspective' (The daily star, 25 March, 2020) <<https://www.thedailystar.net/law-our-rights/news/covid-19-and-force-majeure-bangladeshi-perspective-1885861>> ,

Mohammed Salah Uddin, Covid-2019: Applicability of Force Majeure clause in Bangladesh, (The Financial Express, 14 May 2020)<<https://www.thefinancialexpress.com.bd/views/covid-2019-applicability-of-force-majeure-clause-in-bangladesh-1589040154> >?>, accessed on 4 April, 2021

Mostafiz Uddin, 'RMG industry as the major employment sector' (*The daily star*, 17 February 2019
< <https://www.thedailystar.net/supplements/28th-anniversary-supplements/entrepreneurship-key-youth-employment/news/rmg-industry-the-major-employment-sector-1702951#:~:text=The%20RMG%20industry%20provides%20jobs,the%20country's%20total%20export%20receipts.&t> > accessed 26 January 2020

MS Siddique, 'The legal impacts of the coronavirus on RMG contracts' (The daily star, 18 February, 2020)
< <https://www.thedailystar.net/opinion/news/the-legal-impacts-the-coronavirus-rmg-contracts-1869370>>accessed 11, December 2020

Nievod, Abraham. "Undue influence in contract and probate law." *Cultic Studies Journal* [1993].

PennState Center for Global Workers' Rights, *Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains*, (Research Report, 2020)

Refayet Ullah Mirdha, Garment exports to major destinations nosedive' (*The daily star*, 03 June, 2020)

< <https://www.thedailystar.net/business/news/garment-exports-major-destinations-nosedive-1908201>> accessed 10 December 2020

Saheli Roy Choudhury, Vulnerable' garment workers in Bangladesh bear the brunt of the coronavirus pandemic (CNBC, 18 October 2020). < <https://www.cnbc.com/2020/10/19/coronavirus-worsened-the-reality-for-bangladesh-garment-workers.html#close> > accessed 19 November 2020

Siddique, M., 2020. *The legal impacts of the coronavirus on RMG contracts*. [Online] Available at: <https://www.thedailystar.net/opinion/news/the-legal-impacts-the-coronavirus-rmg-contracts-1869370>

Sushmita S. Preetha , Zyma Islam, 'Is foul play the new normal'? (*The daily star* 26 June, 2020 <<https://www.thedailystar.net/business/news/you-suffer-we-survive-1920733>> accessed 29 January 2021

The Business Standard, 'Primark, other buyers cancel \$1.5bn apparel orders' (The business standard, 22 March, 2020) <<https://tbsnews.net/coronavirus-chronicle/1089-garment-factories-face-15bn-order-cancellation-withdrawal-59737>> accessed 29 January 2021

The Constitution of the People's Republic of Bangladesh, [ACT NO. OF 1972]

The Contract Act 1872, Bangladesh. <http://bdlaws.minlaw.gov.bd/act-26.html>

The Restatement (Second) of Contracts

The Uniform Commercial Code, US

Timothy Murray, Hogue & Lannis, Drafting Advice: Avoiding Disastrous Force Majeure Clauses' (02 February 2018) < <https://www.lexisnexis.com/lexis-practical-guidance/the-journal/b/pa/posts/drafting-advice-avoiding-disastrous-force-majeure-clauses>>

Treitel, G.H., Frustration and force majeure. (Sweet & Maxwell) 63

UNIDROIT Principles of International Commercial Contracts (PICC), Article 7.1.7 (force majeure)

United Nations Convention On Contracts For The International Sale Of Goods, 1980 (CISG)

United Nations Industrial Development Organization, 2020. *Will COVID-19 accelerate the transition to a sustainable fashion industry?*< <https://www.unido.org/stories/will-covid-19-accelerate-transition-sustainable-fashion-industry>> accessed 30 January 2021

Willis, Hugh, 'Restatement of the Law of Contracts of the American Law Institute' (1932) 7 (7) Indiana Law Journal, <https://www.repository.law.indiana.edu/ilj/vol7/iss> accessed 21 February 2021