

RESEARCH ARTICLE

# The Garment Industry in Bangladesh, Corporate Social Responsibility of Multinational Corporations, and The Impact of COVID-19

Ninia Reza\* and Jean Jacques Du Plessis

Deakin Law School, Deakin University, Melbourne

\*Corresponding author. E-mail: [nfreza@deakin.edu.au](mailto:nfreza@deakin.edu.au)

## Abstract

This article investigates the Bangladeshi garment industry that supplies ready-made garments for global brands and the corporate social responsibilities (CSRs) of the brands/multinational corporations (MNCs) towards their supply chains. Although outsourcing and global trade have boosted the living standards of many people in the Bangladeshi garment industry, there are some significant concerns regarding the working conditions and treatment of workers in these supply chains. This, in turn, cannot, and should not, be detached from the legal relationship between the Bangladeshi supply chains and the MNCs contracting with them. This article examines the impact of COVID-19, which has exposed the fragility and the pre-existing flaws in the relationship between the MNCs and their suppliers more clearly than at any other time in history. There is a huge governance gap between MNCs and supply chains that needs to be addressed urgently. This article assesses the legality of the cancellation of orders by the brands that invoked the *force majeure* clause. In doing so, this paper briefly deals with the responses of three American retail companies, namely Sears, Kohl's, and the Arcadia Group, in the wake of the COVID-19 pandemic. It illustrates that the power asymmetry between the MNCs and their suppliers has put the supply chains in an unreasonably disadvantageous position, creating unfair and even unconscionable conduct by several MNCs. This article also looks at solutions for the existing problems, focusing, *inter alia*, on non-financial reporting requirements in the US and the EU to implement CSR in supply chains. However, disappointingly, the authors had to conclude that MNCs typically have the propensity to disregard CSR, whenever it is convenient for them and use CSR for mere “greenwashing” purposes for their strategic benefit only. It is a problem that requires constant attention and continuing research to find long-term solutions. The article employs doctrinal methodology and, by conducting a meta-analysis of literature and case-studies, it provides a comprehensive understanding of how the industry works.

**Keywords:** Bangladeshi garment industry; corporate governance; corporate social responsibility; global supply chains; non-financial reporting; *force majeure* clauses; impact of COVID-19

## 1. Introduction

The garment industry<sup>1</sup> makes up the world's largest and most globally scattered supply chains that employ tens of millions of workers in more than 50 countries.<sup>2</sup> Global supply chains are spread across different countries in the world and are predominantly in

---

<sup>1</sup> We use “garment industry” as an all-inclusive term, to include all industries associated with the “apparel” and “textile” industries in Bangladesh.

<sup>2</sup> [lafnet.com](https://lafnet.com) (2020).

labour-intensive production industries, such as the garment industry.<sup>3</sup> In Bangladesh, the ready-made garment (RMG) sector emerged in 1978 and started with Reaz Garments, which exported its first consignment to the US and earned USD69,000.<sup>4</sup> Since 1978, there has been a successful economic development in this industry that has broadened the employment scope for millions of skilled and semi-skilled workers, who are mostly women.<sup>5</sup> The RMG sector in Bangladesh employs about 4.1 million people and is the second-largest garment-producing economy after China.<sup>6</sup> By 2012, the garment factories in Bangladesh that supply to the global market had increased to 5,000.<sup>7</sup> Therefore, much of the country's economic activity revolves around producing garments for the global supply chains that contribute 81% to gross domestic product (GDP) and export earnings.<sup>8</sup> Nevertheless, the country's readily employable poor labour force underpins this competitive advantage. As a result, there have been serious challenges, such as human rights violations and unfair contractual relationships, that need to be addressed urgently.<sup>9</sup> Therefore, although the garment industry has contributed to the country's economic growth, it has come at the cost of the health and safety of workers. Since 2003, more than 2,000 workers have died in fire incidents in the RMG sector.<sup>10</sup> The collapse of the Rana Plaza factory (in Bangladesh on 24 April 2013, killing at least 1,100 workers and injuring another 2,000) is a well-known example of unacceptable working conditions in supply chains—where safety laws, labour laws, and human rights are frequently violated.<sup>11</sup> But despite such incidents, the industry was worth USD32.93 billion in 2018 and USD30.1 billion between January and November 2019.<sup>12</sup>

The Rana Plaza disaster demonstrated the complexity and disordered nature of the governance of multinational corporations (MNCs)<sup>13</sup> with supply chains in Bangladesh.<sup>14</sup> Being one of the worst industrial disasters of recent times, the incident called into question the corporate social responsibility (CSR) practices of MNCs in the garments sector. MNCs have enormous capacity to help developing nations where they operate. But with globalization and transnational operation of corporations, bad consequences followed, such as corporations polluting the environment; exploiting employees in developing countries; allowing sweatshop conditions for workers; and being negligent with the health and safety of workers, to name but a few.<sup>15</sup> Such issues are reflected in the garment industry of Bangladesh, where contracting factories compete to cut costs to get the contracts from MNCs, thereby disregarding safe working conditions only to minimize costs. There are many similar cases

<sup>3</sup> Mamic (2005), p. 81.

<sup>4</sup> Islam, Rakib, & Adnan (2016), p. 53.

<sup>5</sup> Yunus & Yamagata (2012), p. 1.

<sup>6</sup> Fukunishi (2012), p. 4.

<sup>7</sup> Bgmea.com.bd (2012).

<sup>8</sup> Backer (2006), p. 16.

<sup>9</sup> Yunus & Yamagata, *supra* note 5, p. 14.

<sup>10</sup> Dhaka: Centre for Policy Dialogue (2013), p. 2.

<sup>11</sup> Reinke & Zumbansen (2019), p. 1.

<sup>12</sup> Textiletoday.com.bd (2020).

<sup>13</sup> MNCs are “an economic entity, in whatever legal form, that owns, controls or manages operations, either alone or in conjunction with other entities, in two or more countries;” see Deva (2003), p. 6; MNCs have been defined by the Organization for Economic Co-operation and Development (OECD) as “an entity that is incorporated in one country and carries out operations in multiple countries by assigning corporate capital, possessions, and expertise in different location irrespective of domestic boundaries;” see OECD (2011).

<sup>14</sup> The building that collapsed in Bangladesh on 24 April 2013 killed at least 1,100 workers and injured 2,000 more; see Backer (2016).

<sup>15</sup> Du Plessis (2016), p. 70. Many things have gone wrong with companies operating abroad—e.g. the suicides at a Foxconn factory in Shenzhen, Southern China, producing electronics for, *inter alia*, Dell and Apple. With respect to pollution, Shell's massive oil spills in the Ogoni delta in Nigeria resulted in the devastation of many square kilometres of water and farmland, for which it accepted liability in 2011. See also Vidal (2011).

like that of the Rana Plaza where abuse of workers is rife, exacerbated by systemic flaws of government protection of human rights in Bangladesh, and little effort from MNCs to take their social responsibilities seriously. Rana Plaza also raised the issue of corporate liability and what role CSR and tort law have in such circumstances.

In this article, we attempt to lift the lid of the boiling pot in which these issues have been brewing for far too long. The garment industry in Bangladesh, supply chains in Bangladesh, and the totally unacceptable approach by MNCs are used as a tiny case-study, but the problem is global, international, and systemic, it is submitted.

The article deals with the failure of domestic regulation to support garment manufacturers in Bangladesh during the COVID-19 crisis, as well as with the refusal of large MNCs to support them by honouring the letter and the spirit of their contracts. Although several aspects discussed in this article have application outside the garment industry and will apply to the behaviour and conduct by MNCs outside the garment industry, our focus will be on the garment industry in Bangladesh and MNCs with garment supply chains in Bangladesh. It makes the research focus narrower to keep the article within acceptable length limits, but it will serve as an example of the deeper problems associated with all MNCs and their supply chains in all developing countries.

This article contributes to the existing literature in two ways—first, by providing a clear understanding of the current regulations in the Bangladeshi garment industry along with the social responsibilities of MNCs sourcing from them; and second, it provides a thorough analysis of the impact of COVID-19 on the specific industry in Bangladesh. This is done in the context of the significant impact of COVID-19 globally. This provides a significant contribution to the literature and additional perspectives on some of the latest developments globally, in particular a new perspective on the *force majeure* doctrine and how it is seen in a new light and interpreted in the context of the law of contract in the US and some recent cases in the EU.

This article uses doctrinal methodology and identifies the laws in the Bangladeshi garment industry, the EU, and the US that affect the Bangladeshi supply chains and demonstrates the extent to which research has taken place in this area.<sup>16</sup> It examines primary sources such as legislations and case-studies, and secondary sources such as corporate codes of conduct, CSR reports, and academic literature. By analyzing authoritative texts, it clarifies the law on the topic.<sup>17</sup> It adopts methods such as case-law analyses, as well as specific case-studies focusing on three specific corporations with supply chains in the industry. Literature reviews have become a pertinent research method for scholars and regulators alike who seek to gain knowledge on complex research topics.<sup>18</sup> Thus, this approach was embraced in this contribution. Furthermore, comparative techniques have been used to study and research aspects of two or more legal systems, namely the EU and the US, to emphasize how the COVID-19 pandemic had a global impact and how approaches on the same legal challenges differ slightly in different parts of the world.

In Section 1, we introduced the topic. In Section 2, we put the crisis in the garment industry in Bangladesh in the context of the pressing challenges all countries are facing because of the COVID-19 pandemic. In Section 3, we focus on the conduct by MNCs and how supply chains in Bangladesh have been affected by their conduct in a significant way. The attention then shifts (in Section 4) to the impact of the COVID-19 crisis on the Bangladeshi garment industry, which in particular is illustrated through the lens of the conduct by a few specific MNCs (we name some) with supply chains in the garment industry in

<sup>16</sup> Hutchinson & Duncan (2012), p. 110.

<sup>17</sup> Van Hoecke has defined legal doctrine as a hermeneutical discipline as it is concerned with interpreting texts and documents in accordance with standard methods and focuses on arguing on diverging interpretations. Hoecke (2011), p. 4.

<sup>18</sup> Webster & Watson (2002), p. 14.

Bangladesh. In Section 5, we deal with some pushback of unacceptable behaviour by MNCs by the consumers of the brand names associated with the MNCs relying on supply chains in Bangladesh. In Section 6, we discuss the important issue of *force majeure* clauses, relied on by several MNCs to legally avoid their CSRs and denying any duty to act conscientiously during times of a crisis, affecting suppliers exponentially more than the MNCs themselves. In this part, we concentrate on corporations and groups like Sears, Kohl's, and the Arcadia Group. In Section 7, we provide perspectives on some issues related to how the concept of CSR has developed and is currently perceived in Bangladesh. In Section 8, we look at initiatives by MNCs to improve working conditions for the garment industry in Bangladesh. The focus in Section 9 is on broader initiatives from the home states of MNCs to govern legal requirements applying to MNCs operating from these states or jurisdictions (e.g. the EU) but having supply chains in other countries. In Section 10, we draw some conclusions from the research and analyses contained in the body of this article.

## 2. Bangladesh crisis put in context of the current global COVID-19 pandemic

The COVID-19 pandemic (coronavirus pandemic) has been a game changer for almost every single aspect related to our existence as human beings on this planet. It brought into sharp focus deeply embedded flaws and shortcomings in dominant areas such as health, economics, trade, law, social justice, community expectations, basic human rights, such as freedom of speech and freedom of movement, and too many other areas to mention here. It resulted in an overwhelming international quest for shaping “a new normal,” even though the precise meaning of such a concept is yet evasive in nature. COVID-19 has in fact resulted in a laser-sharp focus on the dire immediate need for innovative, sustainable, and long-term solutions, for good reasons, as Schwab and Malleret point out:

The fault lines of the world—most notably social divides, lack of fairness, absence of cooperation, failure of global governance and leadership—now lie exposed as never before, and people feel the time for reinvention has come. A new world will emerge, the contours of which are for us to both imagine and to draw.<sup>19</sup>

It is in the context of this anticipated “new world” that the focus of this article is on the billions and trillions of dollars that rich nations spent to help their own (country-based) workers and to support their own corporations (seated in these rich countries).<sup>20</sup> While the COVID-19 pandemic was unfolding, the big clothing brands from around the world started cancelling orders from the suppliers due to sinking demands and, therefore, their inability to sell the products—a reaction that could probably be expected based on the cost-reduction principle of “just in time” as a modern principle of inventory management adopted by large corporations, including MNCs: “this strategy helps companies lower inventory transfer costs, increase efficiency and reduce waste,”<sup>21</sup> but it can be detrimental to supply chains, especially during a crisis.<sup>22</sup> These cancellations have put the livelihoods of millions of workers at risk, including workers involved in the garment industry in Bangladesh. The Bangladeshi factory owners’ associations started making appeals to the international buyer companies at the beginning of 2020 to take responsibility and uphold orders already produced and some even shipped. This begs the question: Do these

<sup>19</sup> Schwab & Malleret (2020), pp. 11–12.

<sup>20</sup> In the US, three separate coronavirus-relief packages have been provided amounting to more than \$2 trillion, which is being given to individuals and businesses. In Australia, by the end of March, the government had announced a stimulus package of \$213 billion to support the economy.

<sup>21</sup> Stojkanović, Petcović, & Ivanov (2021), p. 193.

<sup>22</sup> Schwab & Malleret, *supra* note 19, pp. 27, 180, 181–2.

corporations have any social responsibility or social duties to support their supply chains and, if not, can this be right? Should there not be better forms of legal protection to provide remedies for blatantly unfair and unconscionable conduct affecting the very existence of billions of people?

It is even more significant now to focus on the CSR of MNCs, who currently reap massive financial benefits from the poorly regulated CSR environment in Bangladesh, but refuse to take their own CSR, or duties, seriously when push comes to shove. As will be discussed below, also relying on specific case-studies, this totally unacceptable conduct by MNCs has been illustrated in a very cruel way because of the COVID-19 pandemic. Reaping massive financial benefits, without accepting any real responsibility, is something that is unacceptable, and it will have to be addressed as part of the really challenging times ahead for all countries and all economies because of the COVID-19 pandemic. COVID-19 provided a serious global crisis and, as Milton Friedman pointed out in the Preface of his famous book, *Capitalism and Freedom*: “(o)nly a crisis—actual or perceived—produces real change. When that crisis occurs, the actions that are taken depend on the ideas that are lying around.”<sup>23</sup> It is telling to note that this wise observation was made *after* Friedman explained the role of his book (and books with a similar focus), namely “to keep options open until circumstances make change necessary.”<sup>24</sup>

In other words, Friedman never presented his theory on capitalism and freedom as rigid or of perpetual application—he envisaged that changing circumstances may make change necessary and one can even read “inevitable.” These circumstances, making the change necessary and inevitable, are here now. They have emerged because of the COVID-19 pandemic. The “ideas that are lying around” to deal with some of the changes desperately needed to deal with the changing circumstances caused by the COVID-19 crisis are discussed in the insightful book by Schwab and Malleret, *COVID-19: The Great Reset*.<sup>25</sup> The authors vent several ideas related to a so-called “great reset” required to deal with some of the most fundamental issues (referring specifically to an economic reset, social reset, geopolitical reset, environmental reset, and technological reset) of our times that were exacerbated by the COVID-19 pandemic. The statements and predictions of Schwab and Malleret should be taken seriously. This is substantiated by the fact that the book was written during the early days of the COVID-19 pandemic (June 2020), but many (if not all) of the statements and predictions they made then were not only spot on, but became even more relevant at the time of writing this article (August 2021). Thus, it would be irresponsible to ignore some of the suggestions they make in this book. They do describe the impact of COVID-19 (already in June 2020) correctly, to a disturbing extent, even if measured against current (August 2021) realities all over the world:

[The coronavirus pandemic brought us to] our defining moment—we will be dealing with its fallout for years, and many things will change forever. It is bringing economic disruption of monumental proportions, creating a dangerous and volatile period on multiple fronts—politically, socially, geopolitically—raising deep concerns about the environment and also extending the reach (pernicious or otherwise) of technology into our lives. No industry or business will be spared from the impact of these changes. Millions of companies risk disappearing and many industries face an uncertain future; a few will thrive. On an individual basis, for many, life as they’ve always known it is unravelling at alarming speed. But deep, existential crises also favour introspection and can harbour the potential for transformation.<sup>26</sup>

<sup>23</sup> Friedman (1962), p. xiv.

<sup>24</sup> *Ibid.*

<sup>25</sup> Schwab & Malleret, *supra* note 19.

<sup>26</sup> *Ibid.*, p. 11.

The CSRs and duties of MNCs require introspection and need to be reformed in the best interests of global governance and in such a way that will lead to a positive outcome for millions of workers working in Bangladeshi supply chains. This article is written using the garment industry in Bangladesh as a case-study, but it is written in the context of the serious global crisis we are in because of the coronavirus. Many issues will have to be addressed, one of them being CSR and duties of MNCs. We deal with that issue pertinently in this article.

### 3. MNCs' social responsibility during the pandemic

CSR has persistently evolved over the years and also had its impact on supply chains and foreign brands in as far as they are all part of the international economy.<sup>27</sup> Proponents of CSR try to inspire corporations to respect human rights and the environments of the host states<sup>28</sup> and guidelines are provided by international organizations for corporate management in order to protect the stakeholders.<sup>29</sup> Although there is no universal definition, broadly, CSR is about broadening the role and impact of the corporation from the economic sphere to social and environmental matters pertaining to the society in which they operate.<sup>30</sup> According to Carroll, CSR is meant to incorporate the legal responsibility to "obey the law; to be ethical and to be a good corporate citizen when making profits."<sup>31</sup> But generally, it requires businesses to address the moral and ethical consequences in their supply chains and thereby to uphold labour and human rights.<sup>32</sup>

Research over the past decade has illustrated how a company's CSR policy plays an important role in improving supply chain governance.<sup>33</sup> But still, internationally there is no coherent approach regarding the laws and regulations applying to brands that source products from abroad. Therefore, with the lack of supply chain laws internationally, the stakeholders and the workers are reliant on the voluntary CSR initiatives of the brands. Additionally, corporate law depends heavily on voluntary initiatives taken by the big brands to protect the rights of these stakeholders. So what does it mean to be socially responsible? There could be two different answers: (1) that the corporation does good or (2) that the corporation does not harm.<sup>34</sup> Taking the first approach, the corporation would be expected to contribute towards the social welfare of the host state by improving health care, infrastructure, workplace safety, etc. The second approach of avoiding harm would entail the prevention of adverse effects by actively taking note of human rights violations and other abuses in the workplaces. It is the second approach of avoiding harm to host country employers and employees that we are dealing with in the context of the garment industry, where exploitation of poor workers and lopsided contracts have become a major problem.

In this globalized world where supply chains play a major role in manufacturing products for foreign brands, the COVID-19 pandemic already has ensured, and will progressively ensure, a renewed focus on the approaches of MNCs towards their supply chains and their legal duties and responsibilities in respect of their supply chains. In fact, it will probably have a significantly wider impact on the duty of care of MNCs and supply chains towards all stakeholders that can be affected by how they conduct and manage their businesses. The failure of large American corporations to build up reserve funds to look after,

<sup>27</sup> Gereffi & Lee (2016), p. 25.

<sup>28</sup> Host state is where the MNC operates outside its own country (i.e. home state).

<sup>29</sup> Jackson (2011), p. 325.

<sup>30</sup> Carroll (1991), p. 43; Rahim & Wisuttisak (2013), p. 59.

<sup>31</sup> Fagan (2018), p. 514; Thrasyvoulou (2016), p. 74.

<sup>32</sup> Perry & Wood (2019), pp. 478–501.

<sup>33</sup> *Ibid.*

<sup>34</sup> Parell (2019), p. 728.

*inter alia*, employees has been strikingly commented on by a former Chief Justice of the Delaware Supreme Court in a piece published by the *New York Times* in 2020:

After a 10-year economic expansion that led to record increases in earnings, plus huge corporate tax relief, American corporations should have had substantial cash reserves to sustain them during a short period without revenue. But many did not, and instead were highly leveraged, lacked adequate reserves, and lived paycheck to paycheck, so to speak. What happened to that cash? Much of it was returned to shareholders in dividends and stock buybacks.<sup>35</sup>

They point out that it was the lack of reserve funds that was one cause for having to lay off thousands of workers.<sup>36</sup> They observe that there could be finger-pointing and shaming, but then ask the fundamental corporate law and corporate governance question: “Are Americans well served by a corporate governance system that has encouraged all sectors of the economy to run their businesses on fumes?”<sup>37</sup>

#### 4. The impact of the COVID-19 crisis on the Bangladeshi garment industry

##### 4.1 Rana Plaza disaster and its aftermath

Seven years after the Rana Plaza disaster the workers’ lives in this industry again face risks with order cancellations due to the ongoing pandemic. As the crisis began to hit the bottom line of the brands, they decided to put a halt on all new orders and cancelled most orders that had already been made and shipped by the suppliers in Bangladesh. It appears that historically brands have tried to push the costs down to their supply chains. During the pandemic, this was demonstrated by how abruptly they cancelled orders and declined to pay for orders already produced.<sup>38</sup> Furthermore, 72.1% of the brands refused to pay for the raw materials that were already bought and used in making their products.<sup>39</sup>

The Centre for Global Workers’ Rights and Worker Rights Consortium carried out a study on the impact of the COVID crisis in the Bangladeshi RMG sector on 27 March 2020, in which 316 suppliers participated.<sup>40</sup> The reports from this study showed that international brands and retailers had suspended clothing orders from Bangladesh for up to USD6 billion.<sup>41</sup> In this context, the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) president Rubana Haq had stated in early 2020:

Our workers’ lives will be at stake—your credibility and reputation will be at stake if we don’t come out of this crisis together—for you, it’s a question of the survival of the businesses, for us it’s the survival of our 4.1 million workers.<sup>42</sup>

In response to that, the EU provided emergency funding to help the industry that was much appreciated by Rubana Haq but she said: “this could only go so far in limiting the damage that has been done to the garment and textile industry.”<sup>43</sup>

<sup>35</sup> Strine & Lund (2020).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Donaldson (2020).

<sup>39</sup> Business and Human Rights Resource Centre (2020a); Business and Human Rights Report Centre (2020b).

<sup>40</sup> Kabir, Maple, & Usher (2021).

<sup>41</sup> According to BGMEA figures, previously, orders worth \$3.18 billion (US) have so far been cancelled since the beginning of the COVID-19 pandemic in 2020. But this was updated to 6 billion dollars. See Nasdaq.com (2020).

<sup>42</sup> Rmgb.net (2020).

<sup>43</sup> Becker (2020).

At the beginning of 2020, the Asian Development Bank (ADB) estimated that the country will lose approximately 1.1% of its GDP if the situation is at its worst and the outbreak lasts for about six months, which would impact the economy by losing USD3.02 billion.<sup>44</sup> Media reports from Bangladesh showed that some factories started making protective equipment against the coronavirus such as masks and the government allowed them to stay open during the first wave in 2020 if they were working on previous orders and taking adequate safety measures.<sup>45</sup> The Bangladesh Knitwear Manufacturers and Exporters Association vice president Mohammad Hatem stated: “[w]e have to accept coronavirus as part of life. If we do not open factories, there will be an economic crisis.”<sup>46</sup>

#### 4.2 How the pandemic affected the vulnerable workers

The COVID-19 pandemic is a global economic and health crisis, affecting many businesses equally. But simply pushing down costs to suppliers by cancelling orders that have already been made has not been a responsible approach on the part of the MNCs.<sup>47</sup> While the International Labour Organisation (ILO) estimates some 25 million people will lose their jobs worldwide due to the crisis, these supply chain workers in the Bangladeshi garment industry are particularly vulnerable considering their monthly income and socioeconomic background. Bangladesh’s low wages make the country competitive in the global market. Being one of the poorest countries in the world, it is no surprise that these workers are some of the lowest-paid in the global production chain. The minimum monthly pay for workers was approximately USD95 in December 2019. It increased from USD68 per month in 2014, but in 2006 it was only a shocking USD14 per month.<sup>48</sup> Moreover, a lot cannot be expected from the owners of the local companies that produce for the global economy as they have also suffered huge losses due to the cancellations from the brands themselves. The local factories have reported that their workers could go hungry with the MNCs cancelling or halting orders due to the coronavirus.<sup>49</sup>

The International Apparel Federation that represents hundreds of thousands of companies around the world commented in 2020 on the effect of the COVID-19 pandemic on supply chains:

No buyer can be expected to sacrifice its own existence or the jobs of its employees to save its suppliers. But collaboratively searching for ways to reduce the damage to suppliers is not only an urgent need but feasible. Solidarity in the face of this crisis means collaborating with industry members to bridge the income gap for workers and the demand gap for business. Operating with the objective of moving as much of the pain upstream in the supply chain will create breaches of trust that will be difficult to repair when we emerge from this crisis . . . . *Choices made now will be scrutinized later.*<sup>50</sup>

<sup>44</sup> Atlanticcouncil.org (2020).

<sup>45</sup> Thedailystar.net (2020).

<sup>46</sup> Bangkokpost.com (2020).

<sup>47</sup> Nova (2020).

<sup>48</sup> December 2012 report by the International Labour Rights Forum shows that “Bangladeshi produced cotton shirts are 15% cheaper than the second cheapest country, Cambodia, and overall garments are more than 50% cheaper than those made in China. Sweaters made in Bangladesh are 17% cheaper than its nearest competitor, Vietnam.” See Claeson (2012).

<sup>49</sup> Karim (2020).

<sup>50</sup> Iafnet.com, *supra* note 2, emphasis added.

Many front-line retail workers in Canada, the UK, and the US became eligible for federally sponsored wage subsidies as a result of shop closures.<sup>51</sup> In Bangladesh, a 2020 survey by the Worker's Rights Consortium (WRC) of nearly 300 Bangladeshi garment suppliers found that when workers were dismissed as a result of the cancellation of orders, about 97.3% of suppliers refused to assist suppliers with severance pay or in covering the cost of furloughing workers.<sup>52</sup> Over two million workers had lost their jobs in 2020 or were furloughed.<sup>53</sup> In this regard, Kalpona Akter, executive director of the Bangladesh Centre for Workers Solidarity, suggested that “[i]f workers are laid off, brands should ensure immediate payments to factories so that workers receive their full legally owed severance.”<sup>54</sup>

However, as the supply chain workers lack formal employment contracts, they are typically excluded from any financial support offered by the brands.<sup>55</sup> In the past, this was manifested by the limitations to compensation schemes after the Rana Plaza disaster.<sup>56</sup> Moreover, during the pandemic, there have been reports from the workers that they were being forced to work without adequate precautions, but they were taking that risk to avoid starvation.<sup>57</sup> At a time like this, people's lives, and livelihood, are equally important and some of the workers are worried that they might die of hunger, if not from contracting the virus itself due to the working conditions. As the entire global market came to a virtual shutdown, one might wonder whether there should not be enhanced social responsibility from the corporations in the form of holding the hands of their suppliers—in other words, collaboratively searching for solutions rather than a top-down legalistic approach from the rich and powerful affecting the poor and vulnerable in inhumane and unimaginable ways, largely imposed by those only experiencing the impact of the coronavirus from relatively cosy First World countries.

### **4.3 MNCs' behaviour towards their supply chains during the pandemic**

While some brands chose to change their payment terms (such as Marks and Spencer),<sup>58</sup> others had requested discounts from their suppliers such as Debenhams, who reportedly asked for a 90% discount.<sup>59</sup> Asda (a retailer) wanted a 40–70% discount on orders that were being made by the suppliers.<sup>60</sup> Furthermore, Asda refused to accept 20% of orders that had already been shipped to them by the suppliers, even before the crisis began.<sup>61</sup> Asda's behaviour in asking for that discount is difficult to justify because they were allowed to keep their stores open but blatantly exploited their suppliers at a time of crisis and disregarded any ethical obligations towards the workers down their supply chains.

Primark was one of the brands to cancel orders already made by the suppliers and had initially stated that the brand was losing sales of USD807.82 million per month.<sup>62</sup> Further, Matalan and the Edinburgh Woollen Mill are brands that cancelled £2.4 billion in orders.<sup>63</sup> Although most brands initially decided to reject orders already made by the producers,

<sup>51</sup> Brydges & Hanlon (2020), p. 195.

<sup>52</sup> Anner (2020), p. 6.

<sup>53</sup> Business and Human Rights Report Centre (2020b), *supra* note 39.

<sup>54</sup> Just-style.com (2020).

<sup>55</sup> Nagaraj (2020).

<sup>56</sup> Theconversation.com (2018).

<sup>57</sup> Business-humanrights.org (2020).

<sup>58</sup> Marks and Spencer (2020).

<sup>59</sup> Glover (2020).

<sup>60</sup> Jahshan (2020).

<sup>61</sup> *Ibid.*

<sup>62</sup> Theguardian.com (2020).

<sup>63</sup> Uddin (2020).

about 14 of them<sup>64</sup> then reverted from that decision and agreed to pay for existing orders.<sup>65</sup> This was perhaps due to the pressure from transnational labour rights activists (Clean Clothes Campaign) to support the workers.<sup>66</sup> For instance, H&M initially stated that it would “temporarily pause new orders as well as evaluate potential changes on recently placed orders.”<sup>67</sup> However, H&M later reversed that decision and agreed to honour existing financial arrangements and pay the invoices for ordered goods in 2020.<sup>68</sup> After criticism from the media, similarly Primark paid an additional £370 million to its suppliers for orders already made that were to be delivered by 17 April.<sup>69</sup>

#### 4.4 Perspectives

A core issue is, from a legal and ethical point of view, that these uncertainties should be avoided at all costs as they cause massive anxiety among those managing supply chains as well as all workers employed by these supply chains. Abuse and misuse of positions of power boil down to bullying and it is something that should not be tolerated in society generally but also, not at the highest levels of trade relationships, since all sorts of bullying affect humans in significant ways and almost inevitably leave scars for life. MNCs should be held accountable for the way they treat their suppliers during this crisis. Taking unfair advantage because of the underlying economic disparity between the parties should no longer be tolerated. MNCs should be named and shamed for not fulfilling their duty of care to protect the workers during the pandemic and for avoiding their legal duties to uphold the contracts with their suppliers. Rectifying matters should not be left to consumer pressure alone—the focus of the next part of this article.

### 5. Consumer pressure

Nowadays, corporations’ social responsibilities are scrutinized internationally by individual consumers and consumer protest groups as they want corporations to behave responsibly and fulfil their corporate social *responsibilities* or, as some argue, their corporate social responsibility *duty*.<sup>70</sup> Besides, consumers have an expectation from corporations not to breach the law, for instance not breaching human rights laws. Not fulfilling perceived CSRs, breaching the law, or in cases where corporations are suspected of illegal conduct may lead individual consumers and consumer protest groups to stop buying products manufactured by corporations not acting responsibly. This affects MNCs as well as their supply chains. Because of these factors, MNCs generally try to be transparent about the working conditions in their supply chains.<sup>71</sup> In fact, in the past, companies like GAP and Walmart have been put under considerable international pressure related to human rights abuses and poor working conditions in Bangladesh.<sup>72</sup> Moreover, it is expected that corporations will have to disclose and report on non-financial issues such as human rights, labour rights, and decent working conditions on an annual basis so that consumers can make informed purchasing decisions.<sup>73</sup>

<sup>64</sup> *Ibid.*; according to the BGMEA, the 14 brands are Hennes & Mauritz (H&M), INDITEX, PVH Corp, Target, KIABI, KappAhl, Benetton, Decathlon, Marks and Spencer (M&S), C&A, Puma, Kontoor, Primark, and Tesco.

<sup>65</sup> Theguardian.com, *supra* note 62.

<sup>66</sup> Cleanclothes.org (2020).

<sup>67</sup> Qz.com (2020).

<sup>68</sup> Uddin, *supra* note 63.

<sup>69</sup> Davey (2020).

<sup>70</sup> Du Plessis (2017), pp. 35–9.

<sup>71</sup> See e.g. *Nike Inc. v. Kasky* (2003). In this case a California resident sued Nike, claiming that Nike had made false statements concerning the working conditions of its products in supplying factories.

<sup>72</sup> Islam & McPhail (2011), p. 790.

<sup>73</sup> Du Plessis, *supra* note 15, p. 71.

It is often argued in academia that, like governments, the companies have entered into a “social contract” with stakeholders and that this social contract goes beyond their legal right to operate, thereby allowing them to coexist and thrive in society.<sup>74</sup> According to Shocker & Sethi, because of this “social contract”<sup>75</sup> between the organization and those affected by its operations,<sup>76</sup> organizations are expected to comply with the terms of this contract whether implied or expressed.<sup>77</sup> Additionally, Deegan & Rankin note that this social contract may be revoked by the community through a reduction in demand for the products by consumers.<sup>78</sup> The way corporations enter this social contract is by committing to certain ethical principles and there are various ways of doing that, whether it is through codes of conduct, CSR programmes, or voluntary industry initiatives.<sup>79</sup> Therefore, by neglecting their supply chain employees and not considering the legitimate expectations from the community, the MNCs can, in turn, suffer losses in the long run. The legitimacy theory advocates that companies use CSR disclosures as a means of gaining legitimacy through influencing society’s perception of them, including perceptions regarding human rights abuses.<sup>80</sup> Hence, according to this theory, the choices made by the MNCs at this time of crisis may have an impact on their success in the future.

Given the magnitude of the current global crisis induced by the coronavirus, the rich nations have tried to provide support to their own businesses by injecting unprecedented high levels of fiscal stimulus into their economies to prevent an economic catastrophe.<sup>81</sup> However, these supply chain workers were not included in their stimulus/rescue packages. Instead, lawsuits had to be filed to get payments from the brands that cancelled orders by invoking *force majeure* clauses. The focus of the paper will now turn to these clauses.

## 6. The legality of terminating contracts by using *force majeure* clauses

### 6.1 Overview

*Force majeure* is a legal term that has been heard a lot amidst the COVID-19 crisis as the pandemic has given rise to numerous cases around the world where companies invoked *force majeure* clauses. *Force majeure* (meaning, superior force) is a legal doctrine that has its roots in the French Napoleonic Code but is often used in commercial contracts around the world today.<sup>82</sup> *Force majeure* clauses allow the parties to avoid contractual liability where an unforeseen event prevents them from performing their contract.<sup>83</sup> The International Chamber of Commerce (ICC) defines *force majeure* similarly and it lists an epidemic as such an event.<sup>84</sup> In the common-law jurisdictions, doctrines such as the “frustration of purpose”

<sup>74</sup> Narine (2015), p. 6.

<sup>75</sup> Others have used terms like “public licence to operate” to describe a social contract. See Brown & Deegan (1998), p. 23.

<sup>76</sup> Shocker & Sethi (1974), pp. 67–80.

<sup>77</sup> *Ibid.*

<sup>78</sup> Deegan & Rankin (1996).

<sup>79</sup> Narine, *supra* note 74, p. 90.

<sup>80</sup> *Ibid.*, p. 137. However, it is also pointed out that some commentators observed that research has not revealed consistent evidence or anything other than anecdotes of consumer complaints or threats of boycott leading to significant policy changes by some of the MNCs most often accused of human rights abuses.

<sup>81</sup> Nova, *supra* note 47.

<sup>82</sup> Vogt et al. (2020), p. 8.

<sup>83</sup> Augenblick & Rousseau (2012), p. 1.

<sup>84</sup> International Chamber of Commerce (2003). The ICC’s model of *force majeure* clauses generally reflects the widespread international practice.

and “impossibility” have performed the same role in the absence of contractual terms to dictate the risk allocation amongst the parties.<sup>85</sup> The standard for invoking a *force majeure* previously was “impossibility,” which has now become “impracticability.”<sup>86</sup> The ICC developed a model *force majeure* clause in 2003, which incorporates this impracticability standard and provides some legal requirements that (1) it is beyond the party’s control, (2) not foreseeable at the time the contract is signed, and (3) is an event that could not reasonably have been avoided or overcome.<sup>87</sup>

Typically, fashion brands with supply chains try to limit their contractual or other legal obligations with their suppliers based on any *force majeure* circumstance. During the ongoing pandemic, as brands cancelled orders, they dubiously used *force majeure clauses* for non-performance of contractual obligations.<sup>88</sup> This is questionable, as a lot of these brands did not have a clause in their contracts that would allow cancellation during a global health crisis.<sup>89</sup> In pre-COVID times, there have been cases where viral outbreaks have not been regarded as a *force majeure* event. For instance, the H1N1 flu pandemic in 2009 (also called the swine flu pandemic) was not considered a *force majeure* event by the Besançon Court of Appeal in France.<sup>90</sup> The Court of Appeal in Paris came to a similar decision regarding the Ebola outbreak.<sup>91</sup> Even a major economic downturn like the global financial crisis (GFC) in 2008 was held not to be such an event,<sup>92</sup> thus not making the performance of contracts impossible.<sup>93</sup> In *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, the court stated as follows:

Commercial parties routinely enter into contractual agreements to allocate economic risk, and the risk of changing economic conditions or a decline in a contracting party’s finances is part and parcel of virtually every contract [and that] [e]conomic factors are an inherent part of all sophisticated business transactions and, as such, while not predictable, are never completely unforeseeable; indeed, financial hardship is not grounds for avoiding performance under a contract.<sup>94</sup>

Thus, mere difficulties in continuing the operations or distractions that affect the financial profitability from the contract typically do not cause the contract to be frustrated.<sup>95</sup> This was reiterated in the recent US case of *Lantino v. Clay LLC*,<sup>96</sup> where it was decided that financial difficulty, even if caused by an unforeseen event like COVID-19, does not excuse performance of the contract under common-law theories such as “frustration of contract, or impossibility.”<sup>97</sup>

However, another recent US case, *JN Contemporary Art LLC v. Phillips Auctioneers LLC*,<sup>98</sup> confirmed that the current pandemic will be considered a *force majeure* event. In this case, the contract did not include pandemic in its list of *force majeure* events, therefore the court

<sup>85</sup> Vogt et al., *supra* note 82. Whereas in the US it is called “commercial impracticability,” the test is provided in US Uniform Commercial Code Section 2–615 involving the sale of goods.

<sup>86</sup> Augenblick & Rousseau, *supra* note 83, p. 1.

<sup>87</sup> International Chamber of Commerce, *supra* note 84.

<sup>88</sup> A \$6 billion revenue loss is expected this financial year. See Bloomberg.com (2020); Nasdaq.com, *supra* note 41.

<sup>89</sup> Young (2020).

<sup>90</sup> Besançon Court of Appeal, France (2014).

<sup>91</sup> Paris Court of Appeal (17 March 2016) No. 15/04263; Vogt et al., *supra* note 82.

<sup>92</sup> *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.* (2014) (rejected the defendant’s *force majeure* claim following the deep recession caused by the 2008 financial crisis).

<sup>93</sup> *Elavon Inc. v. Wachovia Bank National Association* (2011).

<sup>94</sup> *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.* (2014), *supra* note 92.

<sup>95</sup> Europepmc.org (2021).

<sup>96</sup> *Lantino v. Clay LLC* (2020).

<sup>97</sup> Americanbar.org (2021).

<sup>98</sup> *JN Contemporary Art LLC v. Phillips Auctioneers LLC* (2020).

had to decide whether the parties intended at the time of contracting that a pandemic like the COVID-19 pandemic could be a ground for non-performance under the contract.<sup>99</sup> Relying on the broader catch-all statement “circumstances beyond our or your reasonable control” and a “natural disaster” mentioned in the contract as a circumstance, the court held that the pandemic qualified as a natural disaster and hence was a *force majeure* event.<sup>100</sup> In *JN Contemporary Art LLC v. Phillips Auctioneers LLC* it was pointed out that in analyzing a catch-all statement, the courts typically employ the *ejusdem generis* canon of construction—meaning cases “of the same kind or class.”<sup>101</sup> Therefore, the courts normally look for enumerated events like “strikes . . . fires, floods, earthquakes, or acts of God.”<sup>102</sup> Generally *force majeure* clauses are drafted to include both “acts of God,” over which humans have no control, and events like strikes that can be within human control.<sup>103</sup> If not enumerated, the invoking party has to prove that their clause fits within the catch-all statement. The second hurdle for the invoking party is to prove that the *force majeure* event proximately caused non-compliance<sup>104</sup> with the contract and not merely made a commercial contract less profitable for one of the contracting parties.<sup>105</sup> Along with *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, several other judgements in the US held that COVID-19 fell within a *force majeure* clause as a “natural disaster.”<sup>106</sup> The district court in *JN Contemporary Art LLC v. Phillips Auctioneers LLC* stated that “[i]t cannot be seriously disputed that the COVID-19 pandemic is a natural disaster.”<sup>107</sup> Nonetheless, there have been contradictory debates as to the use of COVID-19 as a *force majeure* event.<sup>108</sup>

According to Article 7.1.1 of the Vienna Convention for International Commercial Contracts, *force majeure* clauses should apply to the party with the most relevant contractual obligation, which in this case would be the Bangladeshi factories that produced the goods and not the buyers.<sup>109</sup> It is contended that COVID-19 itself did not affect most MNCs’ ability to pay for the goods ordered, since they could have sold the goods online if not in-store.<sup>110</sup> Although this pandemic has been held to be a *force majeure* event, it is doubtful whether it would be legal to cancel the orders that had already been produced and shipped. An arbitrator or a court would not likely allow a brand to walk away without “any” form of compensation even though the pandemic is a *force majeure* event.<sup>111</sup> Instead, they would likely be required to prove the efforts taken to avoid the effects of the pandemic, which justifies not being able to pay the suppliers in full as agreed upon under the terms of the contract. Additionally, it would be assessed whether the effects of the pandemic were foreseeable, such as a drop in demand, etc.<sup>112</sup> This argument can be supported by another recent US case, *Re Hitz Restaurant*,<sup>113</sup> where the tenant restaurant turned to the *force majeure* clause of the lease contract, which included “governmental

<sup>99</sup> Americanbar.org, *supra* note 97.

<sup>100</sup> *Ibid.*; *JN Contemporary Art LLC v. Phillips Auctioneers LLC* (2020), *supra* note 98.

<sup>101</sup> See *Seitz v. Mark-O-Lite Sign Contractors, Inc.* (1986). In this case the event was held to be dissimilar to the enumerated events.

<sup>102</sup> *Ibid.*

<sup>103</sup> See *Langham-Hill Petroleum Inc.* (1987), p. 1329.

<sup>104</sup> *Coker Int’l, Inc. v. Burlington Indus.* (1990).

<sup>105</sup> *Kyocera Corp. v. Hemlock Semiconductor* (2015).

<sup>106</sup> Lessans (2021), p. 800.

<sup>107</sup> *JN Contemporary Art LLC v. Phillips Auctioneers LLC* (2020), *supra* note 98, p. 7.

<sup>108</sup> Nwedu (2021), p. 3.

<sup>109</sup> Unidroit.org (2010).

<sup>110</sup> Vogt et al., *supra* note 82, p. 19.

<sup>111</sup> *Ibid.*, p. 10.

<sup>112</sup> Augenblick & Rousseau, *supra* note 83, p. 65 (citing the introductory notes to the ICC Model Force Majeure Clause).

<sup>113</sup> *Re Hitz Restaurant* (2020).

action” as such an event.<sup>114</sup> The court noted that as the Illinois restrictions prohibited on-premises dining, the tenant’s rent obligation should be partially reduced to reflect the proportion that could be earned from in-person dining only.<sup>115</sup> Therefore, the tenants still had to pay a certain amount in rent from the income accrued from deliveries and takeouts.

It is legally justifiable for courts to interpret *force majeure* contractual provisions according to the rules applying to the rules of contractual interpretation or give effect to the common-law consequence of *force majeure* events, which have been developed over hundreds of years. However, it remains indefensible that corporations can ignore their social responsibilities toward supply chains while paying hundreds of millions of dollars in dividends to shareholders and enriching shareholders through generous share buy-back schemes.<sup>116</sup>

Although hundreds of millions of dollars rested on the construction of a seemingly standard clause in the contracts, the COVID-19 pandemic revealed that in fact *force majeure*, as a legal doctrine, was quite underdeveloped in the US.<sup>117</sup> Hence the courts in the US had to make important interpretative decisions on *force majeure* clauses that they have not done before.<sup>118</sup> Such decisions and interpretative choices by the courts will determine the construction and interpretation of *force majeure* clauses in a post-COVID world. Having said that, the outcomes of the cases will undoubtedly vary depending on the circumstances of each case, even if the pandemic is considered a *force majeure* event. Another problem that has arisen is that at common law it was understood that *force majeure* could be invoked by an unforeseeable event, but that presumption has now been discarded by several judgements in the US. Instead, it will suffice if there are specific events that can excuse the performance of the contract, thus giving rise to a conflict of the *force majeure* doctrine at *common law*, which is understood as an unforeseeable event, and the contractual tool of inserting a specific *force majeure* event in *modern contract jurisprudence*.<sup>119</sup>

## 6.2 Case studies

### 6.2.1 Sears

In 2020, a USD40 million lawsuit from Bangladesh was filed by 21 RMG makers in Bangladesh against the parent company of an American company called Sears. The parent company Transformco (which also owns Kmart) refused to pay the suppliers in 2020 and left them with piles of produced clothes, knowing that employees could face hardship or even starvation.<sup>120</sup> According to the lawyers, more than USD21 million of their clients’ products were already shipped and were being stored by Transformco’s carriers in US ports when the company conveniently cancelled their order, which according to the lawyers was a breach of contract.<sup>121</sup> The lawyers stated that this “breach of contract has contributed to an evolving humanitarian disaster in Bangladesh and elsewhere in Asia.”<sup>122</sup>

It appears that the details of the settlement are confidential. However, it is not difficult to imagine why they would settle, as a large majority of published arbitral awards suggest that *force majeure* defences are typically rejected. In the past, after the Rana Plaza incident (referred to above), the humanitarian tragedy ended up with two lawsuits as class actions that were commenced in America and Canada, respectively,

<sup>114</sup> Americanbar.org (2021), *supra* note 97.

<sup>115</sup> *Re Hitz Restaurant* (2020), *supra* note 113.

<sup>116</sup> Strine & Lund, *supra* note 35.

<sup>117</sup> Lessans, *supra* note 106, p. 799.

<sup>118</sup> *Ibid.*, p. 800.

<sup>119</sup> Lessans, *supra* note 106, p. 800.

<sup>120</sup> Chua (2020).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

against corporations that sourced from Bangladesh—on grounds of negligence, vicarious liability, and breach of fiduciary duty.<sup>123</sup> These cases were based on tort law and the arguments were based on violation of CSR and corporate codes of conduct.<sup>124</sup> Unfortunately, both the cases failed because of limitation of statute issues but, in the discussion, no duty of care could be established in either case. Breach of CSR commitments was considered not to have any legal consequences and thus no remedy would be available to the plaintiffs in any case. After the current win with Sears in 2020, Joseph E. Sarachek (lawyer representing the case against Sears) stated that hundreds of other factories are also looking for a remedy for the non-payment of produced goods. Sarachek stated that the case further revealed “lopsided contracts” between brands and factories that go against international norms.<sup>125</sup> Thus, what can be seen here is the re-emergence of the same problem in the industry that is indicative of how deeply entrenched inequalities in relationships between the parties are. In this regard, Jeffrey Vogt (who has co-authored the policy paper, “Farce Majeure”), notes “[that the contracts are one-sided by design] and none of it is accidental.”<sup>126</sup> Hence, with the broad usage of the *force majeure* clause, the pandemic has attracted an examination of the contractual terms between the parties (i.e. the MNCs and their suppliers). The next part of the paper examines, as another case-study, the contract by Kohl’s (an American retail chain) and its supplier that had terms allowing the MNC the right to cancel orders for almost any reason.<sup>127</sup>

### 6.2.2 Kohl’s

Kohl’s contract stated:

[w]e 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 . . . [c]ancellation 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.<sup>128</sup>

What is particularly important in analyzing the validity of the clause is the wording of that specific clause in the contract.<sup>129</sup> This is because, according to an ICC arbitrator’s decision in a previous case, unless the type of event is specifically listed in their *force majeure* clause, there is practically no other external event that can then be deemed unforeseeable and

<sup>123</sup> See *Das v. George Weston Limited* (2017). Since 2006, Loblaw sourced its Joe Fresh apparel line from Bangladesh. New Wave, a subcontractor who was authorized by Loblaw, operated from the Rana Plaza and produced 50% of their orders in 2013 (the year the building collapsed). But later proceedings in the Ontario Court of Appeal found no duty of care on behalf of the corporation and Loblaw not vicariously liable: see *Das v. George Weston Limited* (2018); see also *Abdur Rahaman v. JC Penney Corporation Inc.* (2016). This case against Walmart in Delaware, US, on grounds of negligence and wrongful death of victims in the Rana Plaza but it was dismissed due to statute of limitations issues.

<sup>124</sup> *Ibid.*

<sup>125</sup> See United Nations Human Rights Office of the High Commissioner (2011).

<sup>126</sup> Cline (2021).

<sup>127</sup> Tbsnews.net (2020).

<sup>128</sup> Vogt et al., *supra* note 82, p. 5.

<sup>129</sup> Augenblick & Rousseau, *supra* note 83.

constitute *force majeure* to excuse contract performance,<sup>130</sup> although that will perhaps now change after the decision in *JN Contemporary Art LLC v. Phillips Auctioneers LLC*.<sup>131</sup>

In the current case, they found it within their rights to cancel even after the products were shipped to them, thereby making it clear that no time limit applies as to when they can cancel.<sup>132</sup> In their *force majeure* clause, Kohl's specified disease outbreak as such an event but what is amazing to see is that after cancelling orders worth USD150 million in Korea and Bangladesh, furloughing 8,500 US staff, and leaving thousands of garment workers unemployed, in April 2020, Kohl's paid its shareholders USD109 million in dividends, indicating gross indifference regarding the ethical implications.<sup>133</sup> It prioritized discretionary pay to the shareholders, who have already been paid USD2.4 billion over the last three years, over its contractual obligation to pay for the goods that the suppliers already have made.<sup>134</sup> By doing so, the company has placed its supply chain workers in Bangladesh at grave risk of unemployment amidst an ongoing pandemic.<sup>135</sup> According to the BGMEA, thousands of workers lost their jobs solely because of Kohl's refusal to pay, in spite of the fact that many of these workers have been making clothes for Kohl's for years.<sup>136</sup> Although this behaviour might look outrageous, it is still legal because the company typically has a cancellation clause in all its contracts that is grossly one-sided, giving it the right to cancel for almost any reason and without any liability.<sup>137</sup>

In their 2020 Environmental, Social, and Governance (ESG) report, it stated:

Kohl's leverages strong position as retailer of purpose to enhance the lives of its associates, customers and, communities throughout 2020. Responsible corporate citizenship is an important part of our company's values, and we are committed to incorporating socially responsible principles into our daily business activities. Our governance practices form the foundation for how we manage risk, ensure accountability, and provide transparency to our stakeholders.<sup>138</sup>

### 6.2.3 Arcadia Group

Contracts with the Arcadia Group contained equally one-sided cancelling powers to that of Kohl's and that too could be applied at any stage of the order. For instance, Condition 18 in Arcadia's contract stated:

We can ask you to suspend or cancel any delivery or order if we cannot use, or are hindered or prevented from using, the Goods because of any cause beyond our control . . . Where we cancel an order, we are not responsible for the cost of the Goods, the cost of any fabric, or any other cost at all, including the cost of any trim or component.<sup>139</sup>

<sup>130</sup> *Ibid.*, p. 60. In quoting arbitrators' decisions in ICC Case No. 9978/1999, the authors noted that "ICC arbitrators' consistent practice [to] enforce a force majeure defence 'only in extreme cases such as . . . [the] incidences listed' in the force majeure clause of the contract."

<sup>131</sup> *JN Contemporary Art LLC v. Phillips Auctioneers*, *supra* note 98.

<sup>132</sup> Vogt et al., *supra* note 82, p. 5.

<sup>133</sup> McNamara (2020).

<sup>134</sup> Workersrights.org (2021).

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> Kohl's Inc. (2020); Vogt et al., *supra* note 82, p. 5.

<sup>139</sup> Arcadia Group Ltd. (2020). Condition 18 of the Conditions of Trading section of the Supplier Handbook; Vogt et al., *supra* note 82, p. 6.

Depending on this clause, the Arcadia Group cancelled and refused to pay for produced goods. One factory owner stated that he would have to close his factory, which would make 2,000 workers “destitute” unless the group honoured contracts for thousands of clothing items.<sup>140</sup> The Human Rights Watch stated that “[b]rands should take steps to minimize the devastating economic consequences for garment workers in their global supply chains and for their families who depend on this income to survive.”<sup>141</sup>

### 6.3 Consequences and perspective

Whilst *force majeure* clauses allow the parties to avoid their contractual obligations where performance becomes impossible, invoking them to cancel completed orders would in most cases be inconsistent under international standards. Such actions also fail to consider the social impact on the workers. Moreover, COVID-19 created a discordance between the common-law presumption of the *force majeure* event being an unforeseeable event and the contemporary perspectives regarding the presumption of control over events and the scope of *force majeure* clauses. Although the pandemic is being cited as a *force majeure* event by the courts, the precedents so far suggest that few parties are likely to obtain any relief when they rely on it based on a pandemic that was caused in the way the COVID-19 pandemic was caused.

The above case-studies show that the lopsided contracts allow the MNCs to take up zero responsibility at a time of crisis, pushing down the burden fully on their weaker counterparts. These contracts are at large contracts of adhesion—in other words, take-it-or-leave-it agreements.<sup>142</sup> If the parties had equal bargaining powers when negotiating the contract, a *force majeure* clause would allow both parties to select a resolution that would work best in such a situation. The payout by Sears indicates that the *force majeure* clauses, in most cases, would perhaps be similarly ineffective considering the circumstances. One-sided insertion of *force majeure* rights seems unfair; therefore this status quo needs to be challenged and MNCs should be exposed for such behaviour towards their suppliers. What is unacceptable and unfortunate is that MNCs can still manage a good corporate image by window-dressing their websites with CSR rhetoric and posting ESG reports, while exploiting the poor workers down their supply chains.

## 7. CSR in Bangladesh

### 7.1 Corporate realities in Bangladesh

Strong economies generally embraced CSR principles. However, in Bangladesh, there is a lack of pressure for corporate self-regulation and basic strategies to fulfil social responsibilities by corporations.<sup>143</sup> Furthermore, in Bangladesh, a clear understanding of CSR is absent. But it does not mean that there is not an openness towards and even a willingness in Bangladesh to promote CSR principles. As Sobhan notes, there is “a volume of philanthropic activities” and businesses that are “eager to adopt CSR practices.”<sup>144</sup>

There is not much literature on the historical development of CSR practices in Bangladesh.<sup>145</sup> However, philanthropic activities can be traced back to the Indian era (i.e. before 1947), when merchants donated to society by sharing their wealth with

<sup>140</sup> Business-humanrights.org (2020), *supra* note 57.

<sup>141</sup> As stated by Aruna Kashyap, a senior counsel in the women’s rights division of Human Rights Watch stated. See Hrw.org (2020).

<sup>142</sup> Rahim & Wisuttisak, *supra* note 30, p. 72.

<sup>143</sup> Rahim (2011), p. 132.

<sup>144</sup> Sobhan (2006).

<sup>145</sup> Khatun (2014), p. 13.

different charitable organizations such as orphanages and religious institutions.<sup>146</sup> The practices of the past still have an influence on CSR in Bangladesh today, which is characterized by charitable community development activities by local companies.<sup>147</sup> Bangladesh is prone to natural disasters and voluntary contributions have been made from businesses to tackle these social issues in the aftermath of these disasters.<sup>148</sup>

It should be noted that in Bangladesh, there is no specific legislation to regulate CSR comparable to legislation on CSR in neighbouring India, where the Indian Companies Act (2013) makes it obligatory for certain large public companies to pay 2% of average net profits towards CSR.<sup>149</sup> While the Companies Act (Bangladesh 1994) describes the rights and liabilities of company owners or boards of directors and the company's corporate governance attributes, it does not address the social responsibilities of directors or their management strategies.<sup>150</sup> On account of a lack of guiding CSR principles or legislation on CSR, the problem in Bangladesh is exacerbated because of ignorant consumers, insufficient private institutions to watch corporate performances, and corrupt public establishments. Bangladesh's corporation law also fails to incorporate core philosophies of CSR in its policies and practice.<sup>151</sup> Sarwar Uddin, an academic from Bangladesh, has pointed out that the economic negligence that Bangladesh had to endure for over two centuries during colonial rule has significantly deterred the development of a proper institutional corporate regulatory system.<sup>152</sup> This is reflected in the country's hybrid corporate governance system, which has been changed on many occasions over the last 50 years.<sup>153</sup> This begs the next question: What regulations or general principles are there in Bangladesh to develop CSR?

## 7.2 Existing regulations or general CSR principles in Bangladesh

The corporate regulatory framework does not have strict measures to create pressure on corporations to accommodate stakeholders, other than the government and stockholders.<sup>154</sup> Further, the extent of NGO engagement in the corporate sector is very low. For example, in recent years, the RMG workers demanded a rise in minimum pay but NGOs did not get involved.<sup>155</sup> Nevertheless, there have been initiatives from local organizations to promote CSR, such as the Bangladesh Enterprise Institute, which is a nonprofit research centre that launched its CSR Centre in 2000.<sup>156</sup> Furthermore, CSR Bangladesh, another nonprofit organization, established in 2008, aims to promote and increase CSR practices in local Bangladeshi companies.<sup>157</sup>

The workers in the garment industry help bring billions of dollars (over USD30.61 billion of exports in the 2017–2018 financial year) to the supplying factory owners, but no or little support was provided by them at this time of crisis.<sup>158</sup> On 2 May 2020, one of the most highly regarded national daily newspapers in Bangladesh (*The Daily Prothom Alo*) published a story that two furloughed employees of a local garment factory had to sell their newborn

<sup>146</sup> Arora (2004).

<sup>147</sup> Khatun, *supra* note 145, p. 13.

<sup>148</sup> *Ibid.*

<sup>149</sup> See The Companies Act 2013 (India).

<sup>150</sup> Khatun, *supra* note 145, p. 11.

<sup>151</sup> Rahim & Wisuttisak, *supra* note 30, p. 59.

<sup>152</sup> Uddin & Hopper (2001), p. 643.

<sup>153</sup> Al Farooque notes that “the corporate governance of Bangladesh is a hybrid of the outsider-dominated market-based system (as in the US and the UK) and the insider-dominated bank-based system in the control and relationship model mostly practised in Germany and Japan.” See Al Farooque et al. (2007), p. 1455.

<sup>154</sup> Ward (2004), p. 3.

<sup>155</sup> Rahim, *supra* note 143, p. 189.

<sup>156</sup> The Bangladesh Enterprise Institute was established in the year 2000. See Khatun, *supra* note 145, p. 6.

<sup>157</sup> See [csrbangladesh.org](http://csrbangladesh.org) (2020). This organization tries to create awareness for CSR in the country.

<sup>158</sup> [Bgmea.com.bd](http://Bgmea.com.bd) (2020).

baby at a hospital for not being able to pay the hospital fees of USD295 as a result of the factory having shut down due to COVID-19.<sup>159</sup> According to local news reports, the Bangladesh government has injected a USD590 million stimulus package into the economy for the export-oriented sectors of Bangladesh in 2020 and has specifically given USD59 million to the RMG sector, with a condition that the money is disbursed in the form of salaries for the workers of the industry.<sup>160</sup> But this too has not helped the local suppliers pay many of the workers' salaries. Moreover, as one union member mentions, unions that are fighting for workers' rights are criminalized in the country.<sup>161</sup> This is more because some legislators in Bangladesh own garment factories and focus on their own profit maximization and hence they are reluctant to increase wages or improve the working conditions in the industry. Thus, Momotaz Khatun, an academic from Bangladesh, has written that "Bangladeshi laws related to corporate regulation and responsibility do not possess the necessary features to develop a socially responsible corporate culture"<sup>162</sup>

### 7.3 Action or law reform required

As Bangladesh lacks policies and strategies for developing CSR, many academics suggest that legal regulations should bridge this gap.<sup>163</sup> In the last decade, many countries have mandated aspects of CSR, which can be seen in the public companies reporting requirements around the world.<sup>164</sup> The trend in ESG reporting requirements such as on supply chain management have lifted various CSR commitments from being voluntary to mandatory.<sup>165</sup> These trends should be followed in Bangladesh, but there seems to be a long way to go before it will become part of the Bangladeshi corporate law and corporate governance models.

## 8. Initiatives by MNCs to improve working conditions in the industry

The policy-makers in Bangladesh have only recently considered the issue of CSR, which mainly got attention after the Rana Plaza disaster.<sup>166</sup> As a result of the Rana Plaza disaster and widely covered media criticism, attempts were made by the MNCs as well to improve conditions in the garment industry by developing the Accord and Alliance. The Accord on Fire and Building Safety in Bangladesh' and the Alliance for Bangladesh Worker Safety were both private governance instruments for the Bangladeshi supply chains initiated by foreign brands with supply chains in Bangladesh. The Accord in Bangladesh was created to help inspect fire and building safety for workers and the agreement was initiated and came into force after the Rana Plaza disaster.<sup>167</sup> It was a five-year agreement between global brands and trade union federations that was legally binding and enforceable and was aimed to build a safer garment industry in Bangladesh.<sup>168</sup> The Accord, which affected two million workers, was intended to be a form of labour governance, as it included legally binding arbitration clauses and created an enforceable contract, including clauses relating

<sup>159</sup> Kabir, Maple, & Usher, *supra* note 40; Prothomalo.com (2020).

<sup>160</sup> Thedailystar.net, *supra* note 45.

<sup>161</sup> Ismi (2020), p. 2.

<sup>162</sup> Khatun, *supra* note 145; Rahim (2012), pp. 132–3.

<sup>163</sup> Rahim, *supra* note 162.

<sup>164</sup> Lu (2016), p. 123.

<sup>165</sup> *Ibid.*

<sup>166</sup> Rahim, *supra* note 162, pp. 97–100.

<sup>167</sup> Bangladesh Accord (2013). The Accord on Fire and Building Safety in Bangladesh was signed in May 2013.

<sup>168</sup> Reinecke & Donaghey (2015), pp. 720–40.

to continuity of orders along with monitoring supplier transparency.<sup>169</sup> These commitments were legally enforceable in the company's home country.<sup>170</sup> This agreement already parted from the voluntary culture of CSR and, as a result, the commitments may have been observed more seriously by the MNCs. However, the commitments were not for a broad range of issues, but merely focused on fire and building safety; yet, being a legally enforceable agreement, it had deterred many US brands from signing the Accord. Therefore, GAP, Walmart, and Kohl's announced an alternative agreement that would not be legally enforceable, known as the Alliance for Bangladesh Worker Safety.<sup>171</sup> Similarly, the Alliance had contributed to workers' safety funds (WSF) in order to take measures for fire and building safety. The agreement stated that members would take initiatives to prohibit unauthorized subcontracting. The Alliance was said to be more of a CSR-driven strategy, as it was a corporate-led initiative between the MNCs and retailers.<sup>172</sup> The Alliance was aligned to Carroll's notion of CSR, namely a voluntary commitment by corporations motivated by business interests,<sup>173</sup> and was designed for self-regulating the industry. Failing to comply with these codes could have consequences such as that the factories could be disciplined and sanctioned and that there could be a loss of a contractual relationship.<sup>174</sup>

In terms of the efficacy of the Accord or the Alliance, as of 10 November 2017, the Alliance had 658 active factories amongst which 234 factories had completed their Corrective Action Plans. Similarly, the Accord showed impressive results and by April 2018, 84% of issues identified in their initial inspections had been remedied.<sup>175</sup> It has been the most effective initiative taken so far for creating a safer work environment, but a substantial amount of structural renovation such as automating fire alarms remains outstanding in many factories.<sup>176</sup>

After the five-year period, the government initially planned to replace the Accord with Bangladesh's national regulatory mechanisms called the Remediation and Coordination Cell;<sup>177</sup> however, the Accord's remit was extended until May 2021.

## 9. Attempts from home to govern MNCs operating abroad

### 9.1 Generally

Traditionally under international law, it is understood that states have the sole responsibility to protect human rights rather than non-state actors, such as companies.<sup>178</sup> In fact, international law has been "virtually silent when it comes to corporate liability for

<sup>169</sup> Schuessler, Frenkel, & Wright (2019), p. 553. There were more than 200 international brands that were signatories to the Accord along with local unions, whereas the Alliance had 29 Canadian brands such as GAP, Walmart & JC Penney; see Alamgir & Banerjee (2019), p. 273. The signatories to the Accord were committed to the following things: disclosing its supplier companies to independent fire safety experts to have the factories inspected by experts; inspecting if suppliers were repairing and renovating what is necessary to keep the factories safe; paying them sufficiently to enable them to do so; educate workers about workplace safety; and cease business with suppliers that fail these requirements—see Hensler & Blasi (2013).

<sup>170</sup> A dispute resolution is set out in Art. 5 of "The Accord"—if the MNCs failed to carry out their obligations, the unions could file arbitration in the company's home country.

<sup>171</sup> Bangladeshworkersafety.org (2018).

<sup>172</sup> *Ibid.*, p. 276.

<sup>173</sup> Carroll (1999), p. 268.

<sup>174</sup> Backer, *supra* note 14; Regan & Hall (2016), p. 2007.

<sup>175</sup> Barau, Wiersma, & Ansary (2018).

<sup>176</sup> Laborrights.org (2019).

<sup>177</sup> The government's plan is to replace the Accord with a national regulatory mechanism called the Remediation Coordination Cell, which can take over the inspection programme of the Accord; see Barau, Wiersma, & Ansary, *supra* note 175, p. 44. The international community is unsure that Bangladesh is ready to take on that responsibility as the inspection system lacks transparency. See e.g. Rahim (2017), p. 813.

<sup>178</sup> Fitzgerald (2005), p. 33.

violations of human rights.”<sup>179</sup> But MNCs operate globally and not just within their states, and corporations have immense power to do great harm or even good in the sphere of human rights, both internationally and domestically where they operate.<sup>180</sup> Although there might be an assumption that human rights do not belong in the corporate law realm, as they are related to social issues, when a company hires an employee, it makes a social decision.<sup>181</sup>

As a general rule, companies produced CSR reports voluntarily, but that is now changing due to government regulations on mandatory non-financial reporting being imposed.<sup>182</sup> Thus, many countries are now emphasizing the importance of transparency in supply chains by creating reporting requirements for MNCs. Transparency in supply chains can benefit the brands by strengthening their trademarks and protecting goodwill.<sup>183</sup> As goodwill is an intangible asset for a company, companies should protect their reputation by maintaining transparency in their supply chains, which can lead to more positive brand recognition.<sup>184</sup> Moreover, showing transparency can illustrate CSR, as reporting can publicly show consumers how consumers commit to social justice instead of hiding violations in supply chains.<sup>185</sup> For instance, in the last decade many countries such as the UK, France, Denmark, Norway, Australia, South Africa, India, and Malaysia, for example, have announced mandatory CSR reporting requirements.<sup>186</sup>

Some of the recent legislation in the US and the EU is based on the premise that corporate disclosure allows stakeholders to be informed about corporate compliance with their codes of conduct and details of their supply chains.<sup>187</sup> But do these initiatives privilege the interests of the supply chains in the developing world such as Bangladesh? The following part of the paper briefly examines the laws and regulations in place in the US and the EU that affect supply chains as an in-depth analysis is not within the scope of this paper.

## 9.2 The US

The US government has created numerous policies to improve working conditions in the garment factories. Home state laws to regulate MNCs abroad may often be seen to “constitute an unacceptable intrusion into the host State’s sovereignty.”<sup>188</sup> To avoid some of the jurisdictional problems arising out of companies committing torts outside their state of incorporation, the US has the Alien Tort Claims Act (ATCA).<sup>189</sup> The ATCA allows foreign citizens to bring cases to the US and gives the courts jurisdiction to hear cases concerning human rights abuses committed outside the US.<sup>190</sup> Since the landmark case of *Doe v. Unocal* in the US, at least 50 cases have been brought under the ATCA<sup>191</sup> claiming human rights abuses abroad. In America, slavery was abolished in 1865, yet the country only became aware of human rights abuses in corporate supply chains during the 1990s. In 1992, it was reported that Walmart produced goods through its supplying factories in

<sup>179</sup> The Harvard Law Review Association (2001), p. 2025.

<sup>180</sup> Fitzgerald, *supra* note 178, p. 33.

<sup>181</sup> Schwartz & Blair (1999), p. 135.

<sup>182</sup> King & Bartels (2015), p. 28.

<sup>183</sup> Maryanov (2010), p. 404.

<sup>184</sup> Manza (2014), p. 408.

<sup>185</sup> Maryanov, *supra* note 183, p. 401.

<sup>186</sup> King & Bartels, *supra* note 182, pp. 30–3.

<sup>187</sup> Martin-Ortega & Hoekstra (2019), p. 4.

<sup>188</sup> Joseph (2000), p. 86.

<sup>189</sup> De Jonge (2011), pp. 66–89.

<sup>190</sup> *Ibid.*

<sup>191</sup> Alien Tort Statute is a federal law which states that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Bangladesh that employed child labour.<sup>192</sup> As billions of US dollars are spent by consumers that turn a blind eye to this inhumane system, the California Act aimed to remedy the problem, as discussed in the section to follow.<sup>193</sup>

### 9.3 California's Transparency in Supply Chains Act of 2010

California's Transparency in Supply Chains Act of 2010 (CTSCA) requires corporations to disclose the efforts taken to observe and eradicate slavery from their supply chains.<sup>194</sup> California was the first governmental entity to codify supply chain disclosures and their legislative implementations are often the foundational model that other American states seem to follow.<sup>195</sup> Since its enforcement in 2012, all large companies in California have been required to disclose the extent to which they have verified their products in supply chains to address risks of slavery and forced labour.<sup>196</sup> Companies are required to publish the following on their websites: (1) whether they conduct audits of their suppliers to evaluate the risk of slavery; (2) whether the suppliers certify that their products are free from slavery and comply with the law; (3) whether there are procedures and accountability standards internally to hold those liable for non-compliance; and (4) whether they provide training to companies and employees on the issue of slavery.<sup>197</sup>

It is estimated that around 3,200 companies fall within the scope of this law.<sup>198</sup> Moreover, the Act should have a significant impact considering California is the fifth-largest economy in the world, estimated at USD2.75 trillion.<sup>199</sup> It is worth noting that these mechanisms do not provide any mandatory standard for what constitutes due diligence and, further, there are no penalties for failing to take these steps.<sup>200</sup> In fact, the wording from the Act implies that companies should provide details of their performances but at the same time specifies that failing to do so would not breach the law.<sup>201</sup> Therefore, there have been concerns that this might result in “cosmetic compliance” reporting rather than actual substantive reporting.<sup>202</sup> Nonetheless, the California Act may promote an indirect effect of retail supply chain competitiveness that is similar to the Rugmark<sup>203</sup> or FIFA<sup>204</sup> soccer ball logo, which increases the chance that companies will develop clauses in supply chain contracts to remain competitive in the market and gain consumer favour.<sup>205</sup> For instance, in the US, companies like GAP and Nike, due to their negligence in supply chains, have faced the consequences of negative reputations in the past and hence they have now employed greater safeguards and were thus among the first companies to publish extensive disclosures on their supply chains in compliance with California's law.<sup>206</sup>

<sup>192</sup> New York Times News Service (1992).

<sup>193</sup> California Transparency in Supply Chains Act (CTSCA—2010).

<sup>194</sup> California Civil Code (2017).

<sup>195</sup> Greer & Purvis (2016), p. 55.

<sup>196</sup> Nolan & Bott (2018), p. 53.

<sup>197</sup> *Ibid.*, p. 54.

<sup>198</sup> Pickles & Zhu (2013).

<sup>199</sup> Corcoran (2018).

<sup>200</sup> CTSCA (2010), *supra* note 193.

<sup>201</sup> Gaztea & Fernández (2017), pp. 285–99.

<sup>202</sup> Bayer & Hudson (2017).

<sup>203</sup> A label put on luxury rugs constructed in India—*Rugmark*—indicates that human rights abuses did not occur in manufacturing the product.

<sup>204</sup> FIFA label on soccer balls signals that child labour was not involved in the manufacturing process.

<sup>205</sup> Goodweave (2008), p. 379.

<sup>206</sup> Greer & Purvis, *supra* note 195, p. 58.

Kohl's is one such company that is required to disclose information under this Act. An examination of Kohl's website indicates that Kohl's has ticked all the above boxes in its 2020 ESG statement. Thus one might wonder whether not paying the workers after work was done and therefore exploiting the vulnerable in their supply chains during the pandemic may have hindered the company in any way from being a good corporate citizen. It is ironic to see that Kohl's states on its website that it has audited factories in its supply chains to evaluate any risk of slavery, but that the company itself refused to pay the poor workers after work was done, which might fall within the definition of slave labour itself. Therefore, whilst MNCs may decorate their websites with CSR statements, the question remains of what legal obligations are in fact included in their contracts.

#### 9.4 The European Union (EU)

The EU has taken several steps in ensuring liability for corporate-related human rights abuses.<sup>207</sup> One of the most important developments has been the legislative measure that mandated non-financial reporting. This EU Directive 2014/95 (EU) which is known as the CSR Directive, is based on the Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and came into effect on 6 December 2014.<sup>208</sup> This Directive was implemented by all Member States by December 2017.<sup>209</sup>

Ninety-eight of the world's largest public-traded garment companies<sup>210</sup> that are leaders in human rights issues are from within the EU. Although many of these companies may work proactively to avoid and prevent human rights abuse, there have been many reports of abuses in their supply chains.<sup>211</sup> For instance, in 2012, a case against the retail company KiK was brought to Germany after an incident that killed workers in a Pakistani garment industry.

The CSR Directive requires public interest companies with over 500 employees<sup>212</sup> to publish a non-financial statement declaring issues such as the policies and procedures they have regarding environmental protection, employee protection, social responsibility, board diversity, anti-corruption, and human rights.<sup>213</sup> Thus, states within the EU have taken regulatory measures that demand transparency through reports and disclosure of information on issues such as efforts taken for due diligence on human rights in supply chains.<sup>214</sup> Where a corporation fails to pursue policies based on the matters required by the Directive, it needs to provide a clear and rational explanation for not doing so.<sup>215</sup> The EU Directive is broader than the California Act, as it focuses on all kinds of human rights impacts, not just on slavery and human trafficking.<sup>216</sup> However, the EU's CSR Directive appears to have a rather discretionary approach towards supply chain reporting.<sup>217</sup>

<sup>207</sup> For other initiatives, see e.g. the OECD.

<sup>208</sup> Directive 2014/95/EU.

<sup>209</sup> Martin-Ortega & Hoekstra, *supra* note 187.

<sup>210</sup> E.g. H&M, M&S, and Addidas are all European companies and hence from within the EU.

<sup>211</sup> Grimheden (2018), pp. 235–48.

<sup>212</sup> Around 6,000 companies are required to report due to this limitation on the number of employees.

<sup>213</sup> Art. 1 of the Directive (2014) EU; Martin-Ortega & Hoekstra, *supra* note 187, p. 1.

<sup>214</sup> Martin-Ortega & Hoekstra, *supra* note 187, p. 2.

<sup>215</sup> Gaztea & Fernández, *supra* note 201, pp. 285–99.

<sup>216</sup> Nolan & Bott, *supra* note 196, p. 56.

<sup>217</sup> See Directive 2014/95/EU, *supra* note 208.

### 9.5 Positive steps toward global governance of CSR, MNCs, and supply chains?

There remains a specific gap when it comes to transnational supply chains, as the broader mandatory requirement under any national corporate law does not encompass obliging companies to perform their social responsibilities in supply chains.<sup>218</sup> Thus, CSR plays an important role in filling in that global governance void. Although it is difficult to find a comprehensive solution to the global governance problem, the mandatory reporting requirements have created a positive trend internationally to deal with transparency of MNCs in supply chains, albeit to a limited extent. It is suggested that mandatory disclosure would be more effective if the requirements were on more specific problems (like working conditions in supply chains) rather than broad issues like eradicating slavery, as required by the CTSCA.

## 10. Conclusion

Before presenting our conclusions, it is appropriate to point out some limitations of the research undertaken for purposes of this article, which is limited in its scope and cannot be too lengthy. First, for the purposes of this research, there was not time to collect any empirical data on the discussed issues. It resulted in limited scope to involve in an in-depth analysis of the possible solutions for the Bangladeshi garment industry through corporate governance mechanisms. For future research, it is suggested that more detailed case analyses and case-studies could also be beneficial to create greater certainty in this complex but very important area of the law. Future detailed research is also suggested on mandatory disclosure requirements of MNCs within the Bangladeshi context, especially in light of the significant development internationally in the sphere of expectations that MNCs report on and disclose more comprehensively on non-financial issues and matters.

As part of our conclusion, we need to emphasize the importance of appreciating where we are now—a definitive moment at which the COVID-19 pandemic forced us, as beings that pride ourselves that we are at the top of the food chain, to do serious stocktaking of almost everything we took for granted for many decades. Schwab and Malleret put it very well:

Existential crises like the pandemic confront us with our own fears and anxieties and afford great opportunities for introspection. They force us to ask the questions that truly matter and can also make us more creative in our response. History shows that new forms of individual and collective organization often emerge after economic and social depressions. . . . In times of adversity, innovation often thrives—necessity has long been recognized as the mother of invention.<sup>219</sup>

Given that the rich economies were in a far better position to deal with economic rescue plans by adding enough capital to support their own companies, it is safe to state that MNCs have been in a much better position than most of their suppliers when the COVID-19 pandemic hit economies worldwide. But instead of providing a helping hand and behaving ethically, the pandemic has revealed unfair contractual relationships between the parties. MNCs gave little thought, if any, to their moral or social responsibilities towards supply chains simply because CSR is considered voluntary. Thus, it had no legal consequences to leaving the supply chains in the cold. Many of these MNCs had policies and purported to operate under codes of conduct promoting good corporate governance practice. However, at the end of the day, they were meaningless as far as their

<sup>218</sup> Becker, *supra* note 43.

<sup>219</sup> Schwab & Malleret, *supra* note 19, p. 232.

supply chains were concerned—good intentions clearly do not lead to responsible and ethically (or morally) acceptable behaviour by corporations. In other words, lip service is paid to their wider social responsibilities, illustrated by the fact that they will profess publicly that they fulfil these responsibilities, and even get involved in some allegedly admirable socially uplifting activities and deeds. But COVID-19 revealed that in fact they were mostly distracting the society and consumers' attention from their only real aim, namely profit maximization for shareholders.<sup>220</sup> The garment industry in Bangladesh has faced tremendous CSR challenges over the years resulting from building collapses (Rana Plaza), low wages, horrific working hours, and abuses of human rights, to name but a few. The COVID-19 pandemic has exhibited a reflection of pre-existing problems in the garment supply chains and brought to the surface some additional injustices and practices with huge impacts on the workers and the environment. As the global garment industry is built on a system with unequal risk allocation, the economic risk is pushed down onto the suppliers as much as possible by MNCs.<sup>221</sup> Although there have been efforts from home states such as the US and the EU to create transparency in supply chains and regulate CSR by non-financial reporting, etc., research suggests that superficial compliance is not enough to satisfy and fundamentally change unconscionable and unethical corporate behaviour. Also, reporting requirements on broad issues like eradicating slavery as covered by the CTSCA fail to address the common problems in this industry, resulting in little or no impact at all.

We predict that corporate law and corporate governance will not be seen in the same light in the future because of the COVID-19 pandemic. While the ongoing pandemic provides an exciting opportunity to call for new initiatives to support workers across supply chains, which could change the world and society for the better, the industry will likely fall back to a business-as-usual-approach if nothing is done.<sup>222</sup> Thus, there are huge challenges ahead to reform corporate law and corporate governance models and practices, and to ensure enforcement/compliance. This is long overdue to deal with a pandemic of a different nature that was rife in the garment industry in Bangladesh long before the COVID-19 pandemic. However, the COVID-19 pandemic illustrated how vulnerable we are as human beings and it accentuated the disturbing widening gap between the rich and the poor, with little or no attention paid to this by most MNCs. It is to be hoped that this will change in the future.

**Acknowledgements.** The research for this article is primarily based on research undertaken by Ninia Reza for her PhD thesis, but she would like to thank Professor Jean du Plessis for his considerable input in writing this article. This article is dedicated to her late father, Dr Sadrel Reza.

## References

- Al Faroque, Omar, Tony Van Zijl, Keitha Dunstan, & Waresul Karim Akm (2007) "Corporate Governance in Bangladesh: Link Between Ownership and Financial Performance." 15 *Corporate Governance: An International Review* 1453–68.
- Al-Tawil, Tareq Na'el, & Younies, Hassan (2019) "Corporate Governance and Social Responsibility: A Comparative Analysis of the UK, UAE, Australia and the US." 30 *I.C.C.L.R.* 83–102.
- Alamgir, Fahreen, & Banerjee, Sabhabrata Bobby (2019) "Contested Compliance Regimes in Global Production Networks: Insights from the Bangladesh Garment Industry." 72 *Human Relations* 272–97.
- Americanbar.org (2021) "The Importance of Force Majeure Clauses in the COVID-19 Era," <https://www.americanbar.org/groups/litigation/committees/commercial-business/boilerplate-contracts/force-majeure-clauses-contracts-covid-19/> (accessed 23 August 2021).

<sup>220</sup> Al-Tawil & Younies (2019), p. 85.

<sup>221</sup> Vogt et al., *supra* note 82, p. 2.

<sup>222</sup> Brydges & Hanlon, *supra* note 51; Hanlon (2020), p. 195.

- Anner, Mark (2020) "Abandoned? The Impact of Covid-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains." <https://www.workersrights.org/research-report/abandoned-the-impact-of-covid-19-on-workers-and-businesses-at-the-bottom-of-global-garment-supply-chains/> (accessed 10 February 2022).
- Arcadia Group Ltd. (2020) "Letter to Trade Suppliers," 9 April.
- Arora, Bimal (2004) "India and Corporate Social Responsibility: An Explorative Review." International Centre for Corporate Social Responsibility (University Business School, Nottingham), 1–69.
- Atlanticcouncil.org (2020) "South Asia's Economic Outlook in the Era of COVID-19: Bangladesh," <https://www.atlanticcouncil.org/blogs/new-atlanticist/south-asias-economic-outlook-in-the-era-of-covid-19/> (accessed 14 June 2020).
- Augenblick, Mark, & Rousseau, Allison (2012) "Force Majeure in Tumultuous Times: Impracticability as the New Impossibility—It's Not as Easy to Prove as You Might Believe." 13 *Journal of World Investment & Trade* 59–75.
- Backer, Larry Cata (2006) "The Autonomous Global Corporation: On the Role of Organizational Law Beyond Asset Partitioning and Legal Personality." 41 *Tulsa Law Review* 541–72.
- Backer, Larry Cata (2016) "Are Supply Chains Transnational Legal Orders? What Can We Learn from the Rana Plaza Factory Building Collapse." 1 *UC Irvine Journal of International, Transactional and Comparative Law* 11–66.
- Bangkokpost.com (2020) "Bangladesh Garment Factories Reopen, Defying Virus Lockdown," <https://www.bangkokpost.com/world/1908360/bangladesh-garment-factories-reopen-defying-virus-lockdown> (accessed 31 July 2021).
- Bangladesh Accord (2013) "Accord on Fire and Building Safety in Bangladesh," <https://bangladeshaccord.org> (accessed 14 June 2020).
- Bangladeshworkersafety.org (2018) "Statement of Purpose by Leaders of the Alliance for Bangladesh Worker Safety," [www.bangladeshworkersafety.org](http://www.bangladeshworkersafety.org) (accessed 16 June 2020).
- Barau, U., Wiersma, J. W. F., & Ansary, M. A. (2018) "Can Rana Plaza Happen Again in Bangladesh?" [https://www.researchgate.net/profile/Erik\\_Wiersma2/publication/326175554\\_Can\\_Rana\\_Plaza\\_Happen\\_Again\\_in\\_Bangladesh/links/5b3c73fd0f7e9b0df5ec8e9f/Can-Rana-Plaza-Happen-Again-in-Bangladesh.pdf](https://www.researchgate.net/profile/Erik_Wiersma2/publication/326175554_Can_Rana_Plaza_Happen_Again_in_Bangladesh/links/5b3c73fd0f7e9b0df5ec8e9f/Can-Rana-Plaza-Happen-Again-in-Bangladesh.pdf) (accessed 3 September 2020).
- Bayer, Chris, & Hudson, J (2017) "Corporate Compliance with the California Transparency in Supply Chains Act: Anti-Slavery Performance in 2016," <https://respect.international/corporate-compliance-with-the-california-transparency-in-supply-chains-act-anti-slavery-performance-in-2016/> (accessed 31 July 2021).
- Becker, Andreas (2020) "Coronavirus Disruptions Deal Severe Blow to Bangladesh's Garment Industry," *Thai News Service (Bangkok, Thailand)*, 26 June.
- Bgmea.com.bd (2012) "Factory Growth in Bangladesh," [http://www.bgmea.com.bd/chart\\_test/factory\\_growth\\_in\\_bangladesh](http://www.bgmea.com.bd/chart_test/factory_growth_in_bangladesh) (circa accessed November 2019).
- Bgmea.com.bd (2020) "About Garment Industry of Bangladesh," <https://www.bgmea.com.bd/page/AboutGarmentsIndustry> (accessed 31 July 2021).
- Bloomberg.com (2020) "European Retailers Scrap \$1.5 Billion of Bangladesh Orders," <https://www.bloomberg.com/news/articles/2020-03-23/europe-retailers-cancel-1-billion-of-bangladesh-garment-orders> (accessed 15 June 2020).
- Brown, Noel, & Deegan, Craig (1998) "The Public Disclosure of Environmental Performance Information: A Dual Test of Media Agenda Setting Theory and Legitimacy Theory." 29 *Accounting and Business Research* 21–41.
- Brydges, Taylor, & Hanlon, Mary (2020) "Garment Worker Rights and the Fashion Industry's Response to COVID-19." 10 *Dialogues in Human Geography* 195–8.
- Business and Human Rights Resource Centre (2020a) "Bangladesh: Seven Years on from Rana Plaza Factory Collapse, Garment Workers' Lives at Risk Again Amid COVID-19," <https://www.business-humanrights.org/en/bangladesh-seven-years-on-from-rana-plaza-factory-collapse-garment-workers-lives-at-risk-again-amid-covid-19> (accessed 14 June 2020).
- Business and Human Rights Report Centre (2020b) "Major Apparel Brands Delay & Cancel Orders in Response to Pandemic, Risking Livelihoods of Millions of Garment Workers in Their Supply Chains," <https://www.business-humanrights.org/en/major-apparel-brands-delay-cancel-orders-in-response-to-pandemic-risking-livelihoods-of-millions-of-garment-workers-in-their-supply-chains> (accessed 14 June 2020).
- Business-humanrights.org (2020) "Bangladesh: Arcadia Group's Failure to Pay for Completed Orders Pushes Factory to Brink of Closure, Endangering 2000 Jobs," <https://www.business-humanrights.org/en/latest-news/bangladesh-arcadia-groups-failure-to-pay-for-completed-orders-pushes-factory-to-brink-of-closure-endangering-2000-jobs/> (accessed 31 December 2020).
- Carroll, Archie B. (1991) "The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders." 34 *Business Horizons* 39–48.
- Carroll, Archie B. (1999) "Corporate Social Responsibility Evolution of a Definitional Construct." 38 *Business & Society* 268–95.

- Chua, Jasmin Malik (2020) "Sears Owner Faces \$40 Million Lawsuit from Bangladeshi Suppliers: Report," *Sourcing Journal*, 5 June.
- Claeson, Björn (2012) "Deadly Secrets: What Companies Know about Dangerous Workplaces and Why Exposing the Truth can Save Workers' Lives in Bangladesh and Beyond," <https://laborrights.org/sites/default/files/publications-and-resources/DeadlySecrets.pdf> (accessed 24 January 2022).
- Cleanclothes.org (2020) "Brands Must Urgently Take Steps to Minimise Impact of the Coronavirus on Garment Workers' Health and Livelihoods," <https://cleanclothes.org/news/2020/brands-must-urgently-take-steps-to-minimise-impact-of-the-coronavirus-on-garment-workers-health-and-livelihoods> (accessed 30 July 2021).
- Cline, Elizabeth L. (2021) "Bangladesh Garment Makers Settle with Sears Over \$40 Million in Cancelled Orders," *Forbes*, 30 January.
- Corcoran, Kieran (2018) "California's Economy Is Now the 5th-Biggest in the World, and Has Overtaken the United Kingdom," *Business Insider*, 5 May.
- csrbangladesh.org (2020) "CSR Bangladesh," <http://csrbangladesh.org/> (accessed 14 June 2020).
- Davey, James (2020) "Primark Commits to Paying Suppliers £370m for More Orders," <https://www.businessoffashion.com/articles/retail/primark-commits-to-pay-suppliers-370-million-for-orders> (accessed 14 June 2020).
- De Jonge, Alice (2011) "Transnational Corporations and International Law: Bringing TNCs Out of the Accountability Vacuum." 7 *Critical Perspectives on International Business* 66–89.
- Deegan, C., & Rankin, M. (1996) "Do Australian Companies Objectively Report Environmental News? An Analysis of Environmental Disclosures by Firms Successfully Prosecuted by the Environmental Protection Authority." 9 *Accounting, Auditing and Accountability Journal* 50–67.
- Deva, Surya (2003) "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" 19 *Connecticut Journal of International Law* 1–57.
- Dhaka: Centre for Policy Dialogue (2013) "First Independent Monitoring Report: 100 Days of Rana Plaza Tragedy: A Report on Commitments and Delivery," <https://cpd.org.bd/wp-content/uploads/2013/08/100-Days-of-Rana-Plaza-Tragedy-A-Report-on-Commitments-and-Delivery.pdf> (accessed 31 December 2020).
- Donaldson, Tara (2020) "Brands Cancel \$100 million in Bangladesh Orders—Putting Thousands of Jobs at Risk," *Sourcing Journal*, 20 March.
- Du Plessis, Jean Jacques (2016) "Corporate Governance, Corporate Responsibility and Law: Disclosure of Non-Financial Information: A Powerful Corporate Governance Tool." 34 *Company and Securities Law Journal* 69–74.
- Du Plessis, Jean Jacques (2017) "Corporate Social Responsibility and 'Contemporary Community Expectations'." 35 *Company and Securities Law Journal* 30–46.
- Europepmc.org (2021) "Force Majeure v Specific Performance of Contract: Order Cancel Culture Impacting RMG Industry in Bangladesh," <https://europepmc.org/article/ppr/ppr281385> (accessed 30 July 2021).
- Fagan, Caitlin (2018) "Corporate Social Responsibility and Foreign Contractors: Corporate Accountability for Worker Safety Abroad." 62 *Saint Louis University Law Journal* 509–36.
- Fitzgerald, Sarala (2005) "Corporate Accountability for Human Rights Violations in Australian Domestic Law." 11 *Australian Journal of Human Rights* 33–70.
- Friedman, Milton (1962) *Capitalism and Freedom*, Chicago: The University of Chicago Press.
- Fukunishi, Takahiro (2012) "Introduction," in Fukunishi, T., ed., *Dynamics of the Garment Industry in Low Income Countries: Experience of Asia and Africa*, [https://www.ide.go.jp/library/English/Publish/Download/Report/2011/pdf/410\\_ch1.pdf](https://www.ide.go.jp/library/English/Publish/Download/Report/2011/pdf/410_ch1.pdf) (accessed 19 August 2020).
- Gaztea, Joseba Fernández, & Fernández, Alberto Muñoz (2017) "Comply or Explain in the EU, or the New Human Rights Reporting Obligation: An Analysis of the Directive 2014/95/EU." 9 *Cuadernos de Derecho Transnacional* 285–99.
- Gereffi, Gary, & Lee, Joonkoo (2016) "Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters." 133 *Journal of Business Ethics* 25–38.
- Glover, Simon (2020) "Debenhams Demands 90% Discount on Order," *Ecotextile News*, 11 May.
- Goodweave (2008) "Rugmark Foundation North America Annual Report," <https://www.yumpu.com/en/document/view/9229804/2008-annual-report-goodweave> (accessed 21 January 2022).
- Greer, Benjamin Thomas, & Purvis, Jeffrey G. (2016) "Corporate Supply Chain Transparency: California's Seminal Attempt to Discourage Forced Labour." 20 *The International Journal of Human Rights* 55–77.
- Grimheden, Jonas (2018) "Civil Litigation in Response to Corporate Human Rights Abuse: The European Union and Its Member States." 50 *Case Western Reserve Journal of International Law* 235–48.
- Hanlon, Mary (2020) "Garment Worker Rights and the Fashion Industry's Response to COVID-19." 10 *Dialogues in Human Geography* 195–8.
- Harvard Law Review Association, The (2001) "Developments in the Law: International Criminal Law." 114 *Harvard Law Review* 1943–2073.

- Hensler, Benjamin, & Blasi, Jeremy (2013) "Making Global Corporations' Labour Rights Commitments Legally Enforceable: The Bangladesh Breakthrough," <https://wsr-network.org/wp-content/uploads/2018/02/Making-Global-Corporations2019-Labor-Rights-Commitments-Legally-Enforceable-The-Bangladesh-Breakthrough-6-18-13.pdf> (accessed 19 August 2020).
- Hoecke, Mark Van (2011) "Legal Doctrine: Which Method(s) for What Kind of Discipline?" in Mark Van Hoecke, ed., *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Alhambra: Hart Publishing, 1–18.
- Hrw.org (2020) "Brands Abandon Asian Workers in Pandemic," <https://www.hrw.org/news/2020/04/01/brands-abandon-asia-workers-pandemic> (accessed 19 August 2020).
- Hutchinson, Terry, & Duncan, Nigel (2012) "Defining and Describing What We Do: Doctrinal Legal Research." 17 *Deakin Law Review* 83–119.
- Iafnet.com (2020) "IAF Urges Solidarity in Apparel Supply Chain," <https://www.iafnet.com/2020/06/01/iaf-urges-solidarity-in-apparel-supply-chain/> (accessed 14 June 2020).
- International Chamber of Commerce (2003) "Force Majeure Clause—Hardship Clause," <https://icc.tobb.org.tr/docs/forcemajeure.pdf> (accessed 25 January 2022).
- Islam, M. S., Rakib, Abdur Rakib, & Adnan, Atm (2016) "Ready-Made Garments Sector of Bangladesh: Its Contribution and Challenges towards Development." 5 *Journal of Asian Development Studies* 50–61.
- Islam, Muhammad Azizul, & McPhail, Ken (2011) "Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards within the Global Garment Manufacturing and Retail Industry." 22 *Critical Perspectives on Accounting* 790–810.
- Ismi, Asad (2020) "Workers on the Edge in Bangladesh: The Global COVID-19 Response Is Shaking Garment Supply Chains and Changing How Canadian Unions Do Solidarity with Bangladeshi Workers," *Canadian Centre of Policy Alternatives*, 20 May.
- Jackson, Katharine V. (2011) "Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis." 7 *Hastings Business Journal* 309–92.
- Jahshan, Elias (2020) "Asda, Tesco & Sainsbury's Cancel Orders, Seek Discounts with Fashion Suppliers," *Retail Gazette*, 19 April.
- Joseph, Sarah Louise (2000) "An Overview of the Human Rights Accountability of Multinational Enterprises," in M. Kamminga & S. Zia-Zarif, eds., *Liability of Multinational Corporations Under International Law*, The Hague: Kluwer Law International, 75–93.
- Just-style.com (2020) "Brands Urged to Shield Global Garment Workers from Covid-19," [https://www.just-style.com/news/brands-urged-to-shield-global-garment-workers-from-covid-19\\_id138341.aspx](https://www.just-style.com/news/brands-urged-to-shield-global-garment-workers-from-covid-19_id138341.aspx) (accessed 20 August 2020).
- Kabir, Humayun, Maple, Myfanwy, & Usher, Kim (2021) "The Impact of COVID-19 on Bangladeshi Readymade Garment (RMG) Workers." 43 *Journal of Public Health* 47–52.
- Karim, Naimul (2020) "Job Cut Fears as Fashion Brands Slash Orders in Bangladesh with Coronavirus," <https://www.reuters.com/article/us-health-coronavirus-bangladesh-jobs-tr/job-cut-fears-as-fashion-brands-slash-orders-in-bangladesh-with-coronavirus-idUSKBN2163QJ> (accessed 20 August 2020).
- Khatun, Momotaz (2014) "Corporate Social Responsibility in Bangladesh: The Law and Practices." 31 *Journal of Law, Policy & Globalization* 10–7.
- King, Adrian, & Bartels, Wim (2015) "Currents of Change: The KPMG Survey of Corporate Responsibility Reporting," <https://assets.kpmg/content/dam/kpmg/pdf/2016/02/kpmg-international-survey-of-corporate-responsibility-reporting-2015.pdf> (accessed 25 August 2021).
- Kohl's Inc. (2020) "Environmental, Social, and Governance Report 22/4/2021," <https://corporate.kohls.com/news/archive-/2021/april/kohl-s-publishes-2020-environmental-social-and-governance-repo> (accessed 1 May 2021).
- Laborrights.org (2019) "The Bangladesh Accord Continues to Operate but Its Independence May Be at Risk," <https://laborrights.org/releases/bangladesh-accord-continues-operate-its-independence-may-be-risk> (accessed 20 June 2020).
- Lessans, S. Robyn (2021) "Force Majeure and the Coronavirus: Exposing the 'Foreseeable' Clash between Force Majeure's Common Law and Contractual Significance." 80 *Maryland Law Review* 799–830.
- Lu, Haitian (2016) "The 'Legalisation' of Corporate Social Responsibility: Hong Kong Experience on ESG Reporting." 24 *Asia Pacific Law Review* 123–48.
- Mamic, Ivanka (2005) "Managing Global Supply Chain: The Sports Footwear, Apparel and Retail Sectors." 59 *Journal of Business Ethics* 81–100.
- Manza, Kathryn (2014) "Making Chocolate Sweeter: How to Encourage Hershey Company to Clean Up its Supply Chain and Eliminate Child Labor." 37 *Boston College International and Comparative Law Review* 389–418.
- Marks and Spencer (2020) "Letter to Supply Partners," 7 April.
- Martin-Ortega, Olga, & Hoekstra, Johanna (2019) "Reporting as Means to Protect and Promote Human Rights? The EU Non-Financial Reporting Directive." 44 *European Law Review* 622–45.

- Maryanov, Debra Cohen (2010) "Comment, Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain." 14 *Lewis & Clarke Law Review* 397–450.
- McNamara, Mei-Ling (2020) "Anger at Huge Shareholder Pay-Out as US Chain Kohl's Cancels \$150m in Orders," <https://www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-payout-as-us-chain-kohls-cancels-150m-in-orders> (accessed 30 July 2021).
- Nagaraj, Anuradha (2020) "India's 'Hidden' Home Garment Workers Feared Losing Out on Coronavirus Aid," <https://www.reuters.com/article/us-health-coronavirus-india-garment-trfn-idUSKBN21P1JO> (accessed 26 July 2021).
- Narine, Marcia (2015) "Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts." 47 *Columbia Human Rights Law Review* 84–150.
- Nasdaq.com (2020) "Garment Exporter Bangladesh Faces \$6 Billion Hit as World Retailers Cancel Orders," <https://www.nasdaq.com/articles/garment-exporter-bangladesh-faces-%246-bln-hit-as-world-retailers-cancel-orders-2020-03-31> (accessed 13 June 2020).
- New York Times News Service (1992) "Wal-Mart Denies Report on Child Labor but Firm Concedes It Imported Clothing," *Baltimore Sun*, 24 December.
- Nolan, Justine, & Bott, Gregory (2018) "Global Supply Chains and Human Rights: Spotlight on Forced Labour and Modern Slavery Practices." 24 *Australian Journal of Human Rights* 44–69.
- Nova, Scott (2020) "Who Will Bail Out the Workers that Make Our Clothes?" <https://cleanclothes.org/file-repository/who-will-bail-out-the-workers-march-2020.pdf/view> (accessed 15 July 2020).
- Nwedu, Nike Cosmos (2021) "The Rise of Force Majeure Amid the Coronavirus Pandemic: Legitimacy and Implications for Energy Laws and Contracts." 61 *Natural Resources Journal* 1–19.
- OECD (2011) *Guidelines for Multinational Enterprises*, Paris: OECD Publishing.
- Parell, Kishanthi (2019) "Improving Human Rights Compliance in Supply Chains." 95 *Notre Dame Law Review* 727–94.
- Perry, Patsy, & Wood, Steve (2019) "Exploring the International Fashion Supply Chain and Corporate Social Responsibility: Cost, Responsiveness and Ethical Implications," in Fernie J. & Sparks L., eds., *Logistics and Retail Management*, London: Kogan Page (ResearchGate Version), 1–27, [https://www.researchgate.net/publication/327345380\\_Exploring\\_the\\_International\\_Fashion\\_Supply\\_Chain\\_and\\_Corporate\\_Social\\_Responsibility\\_Cost\\_Responsiveness\\_and\\_Ethical\\_Implications](https://www.researchgate.net/publication/327345380_Exploring_the_International_Fashion_Supply_Chain_and_Corporate_Social_Responsibility_Cost_Responsiveness_and_Ethical_Implications) (accessed 25 October 2020).
- Pickles, John, & Zhu, Shengjun (2013) "The California Transparency in Supply Chains Act," [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2237437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2237437) (accessed 25 January 2022).
- Prothomalo.com (2020) "Unable to Pay the Bill, the Child Was Sold and Returned to His Lap by the Police," <https://www.prothomalo.com/bangladesh/article/1654203> (accessed 11 May 2020).
- Qz.com (2020) "Coronavirus Threatens the Livelihoods of Garment Workers Around the World," <https://qz.com/1821511/coronavirus-threatens-jobs-of-garment-workers-in-southeast-asia> (accessed 15 June 2020).
- Rahim, Mia Mahmudur (2011) "Meta-Regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Self-Regulation in Least Developed Common Law Countries." 40 *Common Law World Review* 174–206.
- Rahim, Mia Mahmudur (2012) "Legal Regulation of Corporate Social Responsibility: Evidence from Bangladesh." 41 *Common Law World Review* 97–133.
- Rahim, Mia Mahmudur (2017) "Improving Social Responsibility in RMG Industries through a New Governance Approach in Laws." 143 *Journal of Business Ethics* 807–26
- Rahim, Mia Mahmudur, & Wisuttisak, Pornchai (2013) "Corporate Social Responsibility Oriented Compliances and SMEs Access to Global Market: Evidence from Bangladesh." 14 *Journal of Asia-Pacific Business* 58–83.
- Regan, Milton C., & Hall, Kath (2016) "Lawyers in the Shadow of the Regulatory State: Transnational Governance on Business and Human Rights." 84 *Fordham Law Review* 2001–38.
- Reinecke, Juliane, & Donaghey, Jimmy (2015) "After Rana Plaza: Building Coalitional Power for Labour Rights Between Unions and (Consumption-Based) Social Movement Organisations." 22 *Organization* 720–40.
- Reinke, Benedikt, & Zumbansen, Peer C. (2019) "Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on Global Supply Chain Liability," in Sophie Schiller, ed., *Le Devoir de la Vigilance*, Lexis Nexis, King's College London Law School Research Paper No. 2019–18, <https://ssrn.com/abstract=3312916> (accessed 25 January 2022).
- Rmgb.net (2020) "Appropriation of Survival of Garment Workers," <https://rmgb.net/2020/04/appropriation-of-survival-of-garment-workers/> (accessed 20 August 2020).
- Schuessler, Elke, Frenkel, Stephen J., & Wright, Chris F. (2019) "Governance of Labour Standards in Australian and German Garment Supply Chains: The Impact of Rana Plaza." 72 *ILR Review* 552–79.
- Schwab, Klaus, & Malleret, Thierry (2020) *COVID-19: The Great Reset*, 1st edn, Cologne/Geneva: Forum Publishing.

- Schwartz, Peter, & Blair, Gibb (1999) *When Good Companies Do Bad Things: Responsibility and Risk in an Age of Globalization*, New York: John Wiley.
- Shocker, A. D., & Sethi, S. P. (1974) "An Approach to Incorporating Social Preferences in Developing Corporate Action Strategies," in S. P. Sethi, ed., *The Unstable Ground: Corporate Social Policy in a Dynamic Society*, Los Angeles: Melville Pub. Co, 67–80.
- Sobhan, F. (2006) "CSR: It's Importance for Bangladesh," <http://bei-bd.org/wp-content/uploads/2015/04/CSR-and-its-importance-for-Bangladesh.pdf> (accessed 20 August 2020).
- Stojkanović, Denis, Petčević, Zdravka, & Ivanov, Lazar (2021) "Just in Time as a Modern Principle of Inventory Management." 45 *Knowledge International Journal* 193–7.
- Strine, Leo E., & Lund, Dorothy S. (2020) "How to Restore Strength and Fairness to our Economy," *The New York Times*, <https://www.nytimes.com/2020/04/10/business/dealbook/coronavirus-corporate-governance.html> (accessed 20 August 2020).
- Tbsnews.net (2020) "Bangladeshi RMG Makers Win \$40 Million Lawsuit Against Sears," <https://www.tbsnews.net/economy/rmg/bangladeshi-rmg-makers-win-40m-lawsuit-against-sears-194329> (accessed 31 January 2021).
- Textiletoday.com (2020) "2019 in Review: Bangladesh Textile and Apparel Industry," <https://www.textiletoday.com.bd/2019-garment-sector-experiences-peaceful-environment-export-slows/> (accessed 2 September 2020).
- Theconversation.com (2018) "Rana Plaza: Work Injury Compensation Still Missing in Bangladesh's Labour Standards," <https://theconversation.com/rana-plaza-work-injury-compensation-still-missing-in-bangladeshs-labour-standards-107123> (accessed 30 July 2021).
- Thedailystar.net (2020) "Factories Can Run but Must Ensure Safety of Workers," <https://www.thedailystar.net/frontpage/news/factories-can-run-must-ensure-safety-workers-1886866> (accessed 14 June 2020).
- Theguardian.com (2020) "Primark and Matalan among Retailers Allegedly Cancelling £2.4bn Orders in 'Catastrophic' Move for Bangladesh," [https://www.theguardian.com/global-development/2020/apr/02/fashion-brands-cancellations-of-24bn-orders-catastrophic-for-bangladesh?CMP=share\\_btn\\_fb&fbclid=IwAR0zvlNaEccZSPqjHufjm-d0bYMXPZjSTVPH3z0GirMCOURbFNPheby1r2Y](https://www.theguardian.com/global-development/2020/apr/02/fashion-brands-cancellations-of-24bn-orders-catastrophic-for-bangladesh?CMP=share_btn_fb&fbclid=IwAR0zvlNaEccZSPqjHufjm-d0bYMXPZjSTVPH3z0GirMCOURbFNPheby1r2Y) (accessed 20 August 2020).
- Thrasylvoulou, Andreas (2016) "Corporate Social Responsibility: Here to Stay." 4 *Legal Issue Journal* 69–84.
- Uddin, Jasim (2020) "14 Apparel Brands Stand by Bangladesh," *The Business Standard*, 3 April.
- Uddin, Shehzad, & Hopper, Trevor (2001) "A Bangladesh Soap Opera: Privatisation, Accounting, and Regimes of Control in a Less-Developed Country." 26 *Accounting, Organizations & Society* 643–72.
- Unidroit.org (2010) "UNDRIT Principles 2010, Article 7.1.7 (Force Majeure)," [www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/404-chapter-7-non-performance-section-1-non-performance-in-general/1050-article-7-1-7-force-majeure](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/404-chapter-7-non-performance-section-1-non-performance-in-general/1050-article-7-1-7-force-majeure) (accessed 15 June 2020).
- United Nations Human Rights Office of the High Commissioner (2011) *UN Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) (accessed 10 February 2022).
- Vidal, John (2011) "Shell Accepts Liability for Two Oil Spills in Nigeria," <https://www.theguardian.com/environment/2011/aug/03/shell-liability-oil-spills-nigeria> (accessed 20 August 2020).
- Vogt, Jeffrey, Saage-Maaß, Miriam, Vanpeperstraete, Ben, & Hensler, Ben (2020) "Farce Majeure: How Global Apparel Brands Are Using the COVID-19 Pandemic to Stiff Suppliers and Abandon Workers," [https://www.echr.eu/fileadmin/ECCHR\\_PP\\_FARCE\\_MAJEURE.pdf](https://www.echr.eu/fileadmin/ECCHR_PP_FARCE_MAJEURE.pdf) (accessed 10 February 2022).
- Ward, Halina (2004) *Public Sector Roles in Strengthening Corporate Social Responsibility: Taking Stock*, Washington: World Bank.
- Webster, James, & Watson, T. Richard (2002) "Analyzing the Past to Prepare for the Future: Writing a Literature Review." 26 *MIS Quarterly* 13–23.
- Workersrights.org (2021) "Covid-19 Tracker: Which Brands Are Acting Responsibly toward Suppliers and Workers?" <https://www.workersrights.org/issues/covid-19/tracker/> (accessed 31 July 2021).
- Young, Vicki M. (2020) "Thinking About Cancelling on Your Factory? Here's What You Need to Know," *Sourcing Journal*, 23 March.
- Yunus, Mohammad, & Yamagata, Tatsufumi (2012) "The Garment Industry in Bangladesh," in T. Fukunishi, ed., *Dynamics of the Garment Industry in Low Income Countries: Experience of Asia and Africa*, Institute of Developing Economies—Japan External Trade Organization, [https://www.ide.go.jp/library/English/Publish/Download/Report/2011/pdf/410\\_ch6.pdf](https://www.ide.go.jp/library/English/Publish/Download/Report/2011/pdf/410_ch6.pdf) (accessed 19 August 2020).

## Case-Law

- Abdur Rahaman v. JC Penney Corporation Inc.*, 2016 Del. Super. LEXIS 258, 2016 WL 2616375
- Besançon Court of Appeal, France (France, 8 January 2014) No. 12/02291
- Coker Int'l, Inc. v. Burlington Indus.*, 747 F. Supp. 1168, 1170 (D.S.C. 1990), aff'd, 935 F.2d 267, 1170 (4th Cir. 1991)

*Das v. George Weston Limited* [2017] ONSC 4129 (Ontario, Canada)  
*Das v. George Weston Limited* [2018] ONCA 1053  
*Elavon Inc. v. Wachovia Bank National Association*, 841 F Supp 2d 1298 (ND Ga 2011) 1306–08  
*JN Contemporary Art LLC v. Phillips Auctioneers LLC*, No. 20-cv-4370 (S.D.N.Y. Dec. 16, 2020)  
*Kyocera Corp. v. Hemlock Semiconductor LLC*, 886 N.W.2d 445 (Mich. Ct. App. 2015)  
*Langham-Hill Petroleum Inc.*, 813 F.2d (United States Court of Appeals, 4th Cir. 1987)  
*Lantino v. Clay LLC*, No. 1:18-cv-12247 (S.D.N.Y. May 8, 2020)  
*Nike Inc. v. Kasky*, 539 U.S. 654 (2003)  
*Paris Court of Appeal* (17 March 2016) Case No 15/04263  
*Re Hitz Restaurant*, 616 B.R. 374 (Bankr. N.D. Ill. 2020)  
*Route 6 Outparcels, LLC v Ruby Tuesday, Inc.*, 27 Misc. 3d 1222(A), 1222A, 910 N.Y.S.2d 408, 408, 2010 N.Y. Misc. LEXIS 1018, \*10, 2010 NY Slip Op 50846(U), 5. (US case)  
*Seitz v. Mark-O-Lite Sign Contractors, Inc.*, 510 A.2d 319, 321–22 (N.J. Super. Ct. App. Div. 1986)

## Legislation

Alien Tort Statute(28 U.S.C. § 1350)  
 California Civil Code § 1714.43(a)(1) (West 2017)  
 California Transparency in Supply Chains Act (2010)  
 Companies Act 1994 (Bangladesh)  
 Companies Act 2013 (India)  
 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups

---

**Cite this article:** Reza, Ninia and Du Plessis, Jean Jacques (2022). The Garment Industry in Bangladesh, Corporate Social Responsibility of Multinational Corporations, and The Impact of COVID-19. *Asian Journal of Law and Society* 9, 255–285. <https://doi.org/10.1017/als.2022.9>