



Farce majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers

POLICY PAPER

The COVID-19 pandemic has dramatically exposed the pre-existing fragilities and inequities in global garment supply chains. In early 2020, numerous global garment brands and retailers were confronted with a steep and sudden drop in consumer demand, caused by the closure of retail stores as required by governments' measures to impose "social distancing." In turn, brands and retailers responded by suspending or cancelling orders with their suppliers worldwide.¹ In order to cut costs further and improve cash flow, many brands refused to pay for completed orders (some already shipped) or those in mid-production, or demanded better payment terms or sharp discounts on the agreed contract price in order to accept them.

These actions by some of the industry's largest brands showed no apparent concern for the impact these decisions would have on their suppliers and the millions of low-wage workers whose labor, for decades, has supported the industry and fueled its profits. Though some brands subsequently agreed to pay for these orders in the face of public criticism over the devastating impact of order cancellations on workers in their supply chains, other brands still refuse to pay.²

¹ The authors recognize that some brands do not retail their own products directly to the consumer but rather produce them for sale through a third-party retailer. In some cases, these retailers have refused to accept the finished goods of brands, putting these brands in an analogous situation to the suppliers. For the purpose of this paper, we are focusing on those brands who retail their own goods to the consumer.

² A Becker, "Coronavirus disruptions deal severe blow to Bangladesh's garment industry," *Deutsche Welle*, 23 June 2020,

www.dw.com/en/coronavirus-disruptions-deal-severe-blow-to-bangladeshs-garment-industry/a-53895339;
For an up-to-date list of brands that have and have not agreed to pay for orders, see, Worker Rights Consortium, "Covid-19 Tracker: Which Brands are Acting Responsibility towards Suppliers and Workers," www.workersrights.org/issues/covid-19/tracker

The resulting costs that suppliers and workers have been forced to bear as a result is significant. Garment manufacturers in Bangladesh alone have estimated that six billion US dollars' worth of orders have been suspended or cancelled since the pandemic began.³ This has predictably led to mass unemployment among garment workers (one million in Bangladesh alone as of March and 150,000 in Cambodia as of June 2020),⁴ and has pushed many manufacturers into or near bankruptcy.⁵ In some countries, the threat of starvation has driven some unemployed garment workers to the streets in protest⁶ while others fear that desperate workers will turn to suicide.⁷ Additionally, some suppliers, which have been forced to downsize as a result of the order cancellations, have used the pandemic as an opportunity to target union members for layoffs in the hope of scaling back up or reopening union-free.⁸

If there were ever a moment for industry to step up and show leadership, this would have been it. Unsurprisingly, many brands chose not to do so, or only after intense public shaming. This comes despite brands' repeated claims of responsible business conduct, participation in

various ethical sourcing initiatives, and the promotion of international labor standards in their corporate policies. Indeed, over the last several decades the global garment industry as a whole has built a system of production that is designed to push down as much economic risk as possible to the bottom of the supply chain (onto the backs of suppliers and their workers) and to pull up nearly all of the economic benefits to the top (and with as little legal accountability as possible). This severely unequal allocation of the industry's risks and benefits is reflected in, and buttressed by, the contractual relationships brands have imposed on their suppliers as a condition of their orders.

Structural consequences of power asymmetry

Brands have been able to walk away from their suppliers because of the underlying and significant power asymmetry between them and their suppliers. This has allowed brands to structure the business relationship overwhelmingly to their advantage. As has been repeatedly documented, global brands' purchasing practices, including intense price pressures, demands for rapid turn-around times, last minute order amendments and late

³ R Paul, "Garment exporter Bangladesh faces \$6 billion hit as top retailers cancel," *Reuters*, 31 March 2020, www.reuters.com/article/health-coronavirus-bangladesh-exports/garment-exporter-bangladesh-faces-6-billion-hit-as-top-retailers-cancel-idUKKBN21I2R9

⁴ M Anner, "Abandoned? The Impact of COVID-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains," (2020) Pennsylvania State University Center for Global Workers' Rights; M Lane, "150,000 have lost jobs in Cambodia garment sector," *Apparel Insider*, 30 June 2020, www.apparelinsider.com/150000-have-lost-jobs-in-cambodia-garment-sector

⁵ Some expect that up to 50 percent of supplier factories in Bangladesh will close due to the pandemic. See "BGMEA orders factory closures in Bangladesh," *Apparel Insider*, 20 May 2020, www.apparelinsider.com/bgmea-orders-factory-closures-in-bangladesh

⁶ "Starving' Bangladesh garment workers protest for pay during COVID-19 lockdown," *Arab News*, 13 April 2020, www.arab.news/rsyv8 ("But we don't have any choice. We are starving. If we stay at home, we may save ourselves from the virus. But who will save us from starvation?")

⁷ B Matthews, "Union bosses fear suicides at H&M supplier," *Apparel Insider*, 25 June 2020, www.apparelinsider.com/union-bosses-fear-suicides-at-hm-supplier

⁸ E Paton, "Union Garment Workers Fear an Opportunity 'To Get Rid of Us,'" *New York Times*, 8 May 2020, www.nytimes.com/2020/05/08/fashion/coronavirus-garment-workers-asia-unions.html

payments have incentivized suppliers – which are already on a tight margin – to suppress workers’ rights in order to keep wages as low as possible.⁹ This has resulted in factory management suppressing wages through lawful and unlawful means, imposing unreasonable production quotas that require excessive and often illegal overtime, maintaining unsafe and unsanitary working conditions and, of course, crushing union organizing so that workers are unable to improve their conditions through collective action.¹⁰ This price squeeze also means that suppliers often simply do not pay into national social protection schemes, including for workplace injuries, unemployment and other contingencies – making them unavailable to workers now when they need them the most. As a result, workers employed in the garment industry often live paycheck to paycheck, if not in debt, with few if any resources of their own to weather an economic collapse.

In addition to pressuring suppliers for lower prices, which are delivered via lower labor costs, brands themselves pay little or no taxes to the governments of exporting countries, because very few brands own factories or employ factory workers themselves. Were it otherwise, this revenue could be used to help support employers and workers in the current

crisis. Further, many countries have relied on foreign investors to capitalize and operate garment factories. To attract this investment and enable foreign-owned factories to profitably compete for brands’ orders, countries offer tax incentives, such as export processing zones, which further deprive governments of tax revenues necessary to provide a public safety net for workers. Even now, the emergency income support measures taken by, for example, the government of Cambodia to support factory workers amount to only 40 US dollars *per month*, with employers expected to contribute an additional 30 US dollars, totaling barely one third of the country’s already low minimum wage.¹¹

Power imbalances and their contractual manifestation

The unequal relationship between brands and their suppliers manifests itself in purchase orders, which are largely contracts of adhesion, i.e. take-it-or-leave-it agreements – a point confirmed by many suppliers. Such contracts maximize the rights and interests of the party offering the contract, who will require that the other party accept the terms without negotiation, even though they are quite disadvantageous to the latter. In the case of the garment industry, brands and retailers draft

⁹ See e.g. M Anner, “Squeezing workers’ rights in global supply chains: Purchasing practices in the Bangladesh garment export sector in comparative perspective,” *27:2 Review of International Political Economy* 320, www.tandfonline.com/doi/full/10.1080/09692290.2019.1625426; Human Rights Watch, “Paying for a Bus Ticket and Expecting to Fly: How Apparel Brand Purchasing Practices Drive Labor Abuses,” 23 April 2019, www.hrw.org/report/2019/04/23/paying-bus-ticket-and-expecting-fly/how-apparel-brand-purchasing-practices-drive; S Dadush, “Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses,” (2019) *American University Law Review* 68; M Starmanns, “Purchasing practices and low wages in global supply chains empirical cases from the garment industry,” 2017 *ILO Working Papers*,

www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_561141.pdf; L Pinedo and D Vaughan-Whitehead, “Purchasing practices and working conditions in global supply chains: Global Survey results,” (2017) International Labour Organization, www.ilo.org/travail/info/fs/WCMS_556336/lang-en/index.htm

¹⁰ Ibid.

¹¹ D Sen, “Each laid-off worker to get \$70 a month,” *Khmer Times*, 23 April 2020, www.khmertimeskh.com/710752/each-laid-off-worker-to-get-70-a-month

these standard contracts, which are imposed upon the suppliers.¹² The particulars of individual orders are negotiated within the standard contract framework. Notably, brands commonly use their leverage to require suppliers to assume and finance all risks. This includes forcing factories to borrow in order to operate while awaiting payment (which does not occur until after the clothes sell to the consumer).

It is clear that many brands are cancelling contracts primarily because they *can*, not because it is justified. Brands know that their suppliers will rarely, if ever, seek to hold them legally accountable, even when the brand is clearly in the wrong.¹³ Not only do suppliers often lack the means, knowledge and/or resources to bring legal action, additional hurdles are built into the contracts. For example, the contracts reviewed for this paper all require legal action to be filed in the courts of the country where the brand is headquartered, not the supplier's country where the bulk of the effort to satisfy the terms of the contract is undertaken. Contracts also require the supplier to pay the brand's attorneys' fees if it loses.¹⁴ An equally important factor is that suppliers in the garment sector fear *permanent* retaliation, not only by the brands that they may sue but also by other brands.

This paper examines the contract language regarding the cancellation of orders that some

brands have imposed on their suppliers as a basis for refusing to pay for these orders during the COVID-19 pandemic. We explore the law of force majeure and related doctrines and how they apply to the current circumstances. The paper explains how brands' cancellation of orders violates their due diligence obligations under international instruments governing responsible business practices. In closing, we call for the effective global governance of supply chains and, more specifically, for stronger public and private accountability mechanisms by which workers themselves can secure and enforce responsible supply chain practices from the brands.

HOW SOME BRANDS ARE EXPLOITING THE CRISIS

Global brands' one-sided contracts with suppliers

The deluge of order suspensions and cancellations by major apparel brands in the wake of the COVID-19 pandemic has drawn new attention to their contracts. Indeed, the fact that suppliers even enter into them is a clear sign of their economic weakness relative to the brands. While we cite three examples here, we believe that such disadvantageous supplier contracts are more pervasive in the garment industry. Indeed, if suppliers had other options, they would not sign the kind of contracts discussed below.

¹² In some jurisdictions, the doctrine of unconscionability can be used to attempt to invalidate contracts, in whole or in part, because they are grossly unfair to one of the parties. While mere imbalance in negotiating power between the parties is typically insufficient to establish unconscionability, it may be the case that the lack of any meaningful alternatives may tip the balance in favor of the weaker party. Unfair terms in contracts of adhesion are more likely to be stricken as unconscionable.

¹³ A rare exception is the threat of litigation against Sears by 19 manufacturers in Bangladesh seeking

payment for finished goods that were shipped and stored at US ports. See B Matthews, "Suppliers threaten Sears with US\$40m legal action," *Apparel Insider*, 5 June 2020, www.apparelinsider.com/suppliers-threaten-sears-with-us40m-legal-action

¹⁴ Indeed, in some jurisdictions, the supplier would be required by law to set aside funds from the commencement of litigation in order to pay the buyer's attorneys' fees in case of loss.

US department store Kohl's Inc. cancelled all orders on 22 March 2020, without consulting or negotiating with long-term suppliers. The cancellation clause found in the standard purchase order used by Kohl's Inc. contains the following language:

We may cancel our Purchase Order in whole or in part without your authorization and at Kohl's sole and absolute discretion in the event of any of the following, each of which it is agreed will substantially impair the value of the whole Purchase Order to us: ... (g) in the event of acts of God (including, but not limited to, natural disasters, fire, flood, earthquake and disease outbreaks), lock-out, strike, war, civil commotion or disturbances, acts of public enemies, government restrictions, riots, insurrections, sabotage, blockage, embargo, or other causes beyond our reasonable control ... Cancellation by Kohl's for any of the foregoing reasons shall constitute "for cause" and shall not subject us to any liability, cost, or charge whatsoever. In the event of such cancellation, or any cancellation for cause, Kohl's may take possession of the Merchandise and any materials and equipment being used by you and may cause the Merchandise to be completed in such manner as Kohl's shall determine and you shall reimburse Kohl's for the cost of completion.¹⁵

Under this agreement, Kohl's (and only Kohl's – not the supplier) claims the right to cancel orders "in whole," completely unilaterally, at its "sole and absolute discretion," and without "any liability, cost of charge whatsoever." The supplier accepts, at the outset, that any of the

events Kohl's lists, which include "disease outbreaks" and "government restrictions" or "other causes beyond our reasonable control" will "substantially impair the value of the *whole Purchase Order*" (emphasis added). As a result, any outbreak of illness, even one far more limited than a pandemic, or any "government restrictions" or "other reasons beyond [Kohl's] reasonable control" – none of which are defined (and therefore at Kohl's "sole and absolute discretion") – trigger Kohl's right to cancel without any liability, and render the supplier's products worthless.

Moreover, the "causes" for cancellation do not even have to be unforeseen events – as long as Kohl's cannot control the event. Even if it were entirely predictable, the supplier is left footing the bill. In short, as long as it can cite a "cause ... beyond our reasonable control," Kohl's can assert that the products that it has ordered and caused the supplier to manufacture to Kohl's specifications effectively have no value at all, and Kohl's can cancel said order with zero liability to the supplier.

Remarkably, Kohl's also claims the right to even "take possession of the Merchandise and materials" that it cancels the order for, and then *make the supplier pay* for the cost of completing the order. Finally, and quite notably, there is no time limitation regarding *when* Kohl's can take such unilateral actions – presumably, Kohl's believes it would be within its rights to do so even after a product is shipped.

After cutting 150 million US dollars in orders to Korea and Bangladesh, furloughing 8,500 US staff and causing the unemployment of many more garment workers hired by suppliers, Kohl's paid shareholders 109

¹⁵ Kohl's Inc., "Merchandise Purchase Order: Terms and Conditions," March 2020 (on file with authors)

million US dollars in dividends on 1 April 2020.¹⁶ Of course, Kohl's is not alone.

Arcadia, owner of the Topshop retail chain of stores, recently sent a letter to its suppliers informing them of its cancellation of orders due to the impact of COVID-19.¹⁷ The letter reminded suppliers of cancellation provisions in the company's "conditions of trading:"

Our Right to Cancel

We wanted to take you through the part of our contract that allows us to cancel any order. Condition 18 of the Conditions of Trading section of the Supplier Handbook says that:

"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 ... If we suspend or cancel an order we will not be legally responsible for any direct or indirect damage or loss this may cause you."

You will note that we are able to cancel any order at any stage. This includes orders in production and orders in transit. 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.¹⁸

Once again, the cause giving rise to Arcadia's right to cancel – "any cause beyond our control" – is entirely undefined. Moreover, the cause need not "prevent" Arcadia from selling the product, but need only "hinder ...

[Arcadia] from using" it. Finally, Arcadia's terms are explicit in that it has the right to "cancel any at any stage ... [and] [t]his includes orders in production and orders in transit" – i.e. those already shipped. The buyer bears no responsibility for any costs to the supplier if it does this.

Arcadia does explain in its letter to suppliers that it would accept goods already in transit, but at a 30 percent discount. For many suppliers, this discount will inflict significant economic harm, which will certainly be passed down to their workers. Even if not for the one-side cancellation language in the brand's terms, Arcadia's suppliers would be in little position to dispute such a discount, given that the alternative is to receive nothing at all for goods they have already paid to produce and shipped.

The Anglo-Irish retailer Primark uses a standard "Terms and Conditions of Purchase of Goods for Resale (Europe)," which contains an equally broad cancellation clause. Articles 7.1 and 7.2 read:

The Buyer shall be able to terminate the Contract or Purchase Order and/or cancel any other contracts or purchase orders with the Seller (whether such purchase orders were issued by the Buyer or any other member of the Buyer's group) immediately without liability to the Seller by giving the Seller notice of such termination [... Article 7.2 continues] Notwithstanding the foregoing, the Buyer may terminate the Contract or any Purchase Order

¹⁶ M McNamara, "Anger at huge shareholder payout as US chain Kohl's cancels \$150m in orders," *The Guardian*, 10 June 2020,

www.theguardian.com/global-development/2020/jun/10/anger-at-huge-shareholder-layout-as-us-chain-kohls-cancels-150m-in-orders

¹⁷ A Kelly, "Arcadia Group cancels 'over £100m' of orders as garment industry faces ruin," *The Guardian*,

15 April 2020, www.theguardian.com/global-development/2020/apr/15/arcadia-group-cancels-over-100m-of-orders-as-garment-industry-faces-ruin

¹⁸ Arcadia Group Ltd., Letter to Trade Suppliers, 9 April 2020 (copy on file with authors)

without penalty or further obligation to the Seller at any time for any or no reason upon 30 days' prior written notice to the Seller.

In a letter from 18 March 2020,¹⁹ Primark informed its suppliers that it was putting all existing orders on hold and terminating all future orders. In a subsequent letter dated 20 March,²⁰ Primark canceled all orders invoking Articles 7.2 and 16 (force majeure) of its Terms and Conditions. After sharp public criticism, Primark decided to “take all product that was both in production and finished and planned for handover by 17 April.”²¹ It later extended this commitment to all outstanding finished garments.

Unilateral modification of contracts

In addition to canceling or suspending orders, some brands exercised their position to unilaterally amend the terms of their contracts to extend payment terms or to force deep discounts. While amending contractual terms could be a responsible way to address a crisis such as COVID-19, it is critical that this is a negotiation between the buyer and the seller and not simply imposed by the former on the latter.

For example, British retailer Marks and Spencer informed its suppliers by letter that for “all goods onboard vessel after the 24th March

2020 ... [the] new standard payment terms will be 120 days from the invoice receipt date.”²² Similarly, in a letter dated 27 March 2020, PVH Corp (the parent company of Calvin Klein, Tommy Hilfiger and other brands) informed suppliers that it unilaterally changed the payment terms of “goods that are currently cut and in the production lines or finished goods” from 90 days to 120 days.²³ The Danish retailer Bestseller told its suppliers that “the extraordinary situation requires us to act timely to ensure a robust business foundation [...] we will also require you to extend payment terms to TT 120 until further notice.”²⁴

Similarly, some companies “requested” a retroactive discount from suppliers for orders already placed. For example, the British retailer Debenhams reportedly requested a 90 percent discount.²⁵ Asda, another UK retailer, demanded a 40 to 70 percent discount on in-process orders and those completed but not yet shipped.²⁶ Unlike most apparel retailers, Asda has been allowed to keep its stores open throughout the crisis and thus has not faced the same financial challenges confronting many of its competitors.

There is of course a strong business case for brands to refrain from the behavior cited above. Brands have a self-interest in supporting their strategic suppliers so that they

¹⁹ Primark Coronavirus Update 18 March 2020 (on file with authors)

²⁰ Notice of cancellation of contract(s) and/or purchase order(s) under Primark's terms and conditions

²¹ Primark press release, 20 April 2020, www.primark.com/en/primark-cares/newsroom/primark-extends-its-commitment-to-support-its-suppliers-agreeing-to-take-some-370m-of-additional-products-both-finished-and-in-production/a/752c6e08-5840-4f7e-a90c-0e4da83eb4

²² Marks and Spencer, Letter to Supply Partners, 7 April 2020 (copy on file with authors)

²³ PVH, Letter to Supply Partners, 27 March 2020 (copy on file with authors)

²⁴ Bestseller, “Corona Virus, Impact on Business,” 17 March 2020 (copy on file with authors)

²⁵ S Glover “Debenhams demands 90% discount on order,” *Ecotextile News*, 11 May 2020, www.ecotextile.com/2020051126067/fashion-retail-news/debenhams-demands-90-discount-on-orders.html

²⁶ E Jahshan, “Asda, Tesco & Sainsbury's cancel orders, seek discounts with fashion suppliers,” *Retail Gazette*, 19 April 2020, www.retailgazette.co.uk/blog/2020/04/asda-tesco-sainsburys-cancel-orders-seek-discounts-with-fashion-suppliers

can survive this crisis. When consumer demand returns, buyers will be able to return to trusted suppliers who will be able to produce orders again. Further, by maintaining a strong relationship built on trust, it is likelier that the supplier will prioritize the orders of the brands that stuck with them in a crisis. It is unclear how suppliers will react once the brands who abandoned them return looking to place orders.

THE LAW OF FORCE MAJEURE

Above, we provide examples of lopsided contracts that leave the buyers with nearly all of the rights and nearly none of the responsibilities – including to pay for their orders. As we explain below, the cancellation clauses in such agreements represent a significant deviation from more commonplace force majeure clauses or common law doctrines²⁷ that address circumstances in which a party may be excused from performing a contract. As the discussion here and below make clear, it is unlikely that under more standard contractual terms (such as the ICC model discussed below) and established legal doctrines, brands could have cancelled their orders without facing significant liability.

Generally speaking, a party may be excused from the full performance of a contract under the principle of force majeure (“superior force”). This legal doctrine has its origins in the French Napoleonic Code and today is frequently found in commercial contracts worldwide. In common law legal systems, including the US and UK, the common law doctrines of “impossibility,” “impracticability” or “frustration of purpose”

have performed much the same role in the absence of statutes or specific contractual language that allocate the risk between the parties.

The appendix to this paper contains summaries of the approaches of a civil law system (Germany), a common law system (the US), and international commercial law, namely the UN Convention on Contracts for the International Sale of Goods.

Force majeure clauses make it possible for a party to a contract to avoid liability in the event of nonperformance of its contractual obligations when an extraordinary event prevents that party from fulfilling these obligations. The purpose of force majeure provisions in contracts and commercial laws is to allocate risk between the parties and, specifically, define the instances in which a party is excused from timely performance. These instances consist of unforeseen events that are outside the control of either party, most commonly wars, natural disasters or other “acts of God.” A force majeure clause’s scope and the consequences of such an event will typically depend on the specific terms negotiated in the contract – in particular, which events will qualify as a force majeure event – and its interpretation will depend on the law in the jurisdiction in which the contract is enforced. The discussion below is therefore necessarily general in nature as it attempts to summarize various approaches.

The International Chamber of Commerce (ICC) developed a Model Force Majeure clause²⁸ which generally reflects prevailing international practice.²⁹

²⁷ Here, we review the general application of force majeure, recognizing that there is considerable variation among legal systems (i.e. civil law versus common law), and among countries within the same legal system.

²⁸ International Chamber of Commerce, ICC Force Majeure and Hardship Clauses (March 2020),

www.iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf

²⁹ M Augenblick and A Rousseau, “Force Majeure in Tumultuous Times: Impracticability as the New

The ICC defines force majeure as:

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

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

A force majeure event must be explicit

Even though a global pandemic might be a force majeure event,³⁰ whether a tribunal would excuse a brand from paying for an order that was already produced and, in some cases

shipped, is far less certain. In some jurisdictions, the existence of an excuse for nonperformance will require a close examination of the contract, and especially the specific wording of the force majeure clause.³¹ Claims of force majeure in these jurisdictions would likely fail unless the contracts listed “pandemic” as a basis for nonperformance.³² The legal codes of some civil law jurisdictions, including France, Spain and the Netherlands, permit a party to assert force majeure to excuse nonperformance even if the contract lacks an explicit force majeure clause.³³ However, the standard for this defense in these jurisdictions is exceedingly high, since the party asserting force majeure must demonstrate that the consequences of the triggering event made the party’s performance of its obligations under the contract are not merely commercially impracticable but actually impossible.

In contracts between parties that are domiciled in different countries, as is typically the case with agreements between brands and suppliers in today’s garment industry, tribunals considering claims of force majeure may apply

Impossibility – It’s Not as Easy to Prove as You Might Believe,” (2012) 13:1 *Journal of World Investment & Trade* 68 (noting that the ICC Model Force Majeure Clause “amalgamate[d]” and “took into account” the force majeure provisions of CISG Article 79 and the Principles of European Contract Law).

³⁰ The ICC’s Model Force Majeure Clause lists “plague [or] epidemic” among “presumed force majeure events.” A brand would need such language in its own purchasing contracts to use it as a basis for a force majeure claim.

³¹ M Polkinghorne and C Rosenberg, “Expecting the Unexpected: The Force Majeure Clause,” (2015) 16 *Journal of International Business and Law* 49 (“Tailored force majeure clauses also are important because international arbitral tribunals are as a rule reluctant to interfere with a contract without a specific contractual basis. Tribunals presume that international commercial contracts are drafted with a professional assessment of risk already included in the bargained for contract. Thus, it is the parties themselves that must take precautions against the materialization of risk by

including carefully drafted force majeure clauses in their contracts. This is particularly true when dealing with contracts that specify that the applicable law is the law of a common law jurisdiction, as there is no general law concept of force majeure in the common law. Rather, force majeure generally is treated in common law jurisdictions as a creature of consent, and as such will apply only when a force majeure clause is included in a contract.”)

³² Augenblick and Rousseau, p. 60. In quoting arbitrators’ decisions in ICC Case No. 9978/1999, the authors note that “ICC arbitrators’ consistent practice [to] enforce a force majeure defense ‘only in extreme cases such as ... [the] incidences listed’ in the force majeure clause of the contract” (emphasis added).

³³ Polkinghorne and Rosenberg. See also more specifically French Civil Code Article 1218, Dutch Civil Code Article 6:75 and Spanish Civil Code Section 1105.

Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG). Article 79 relieves a party from failure to perform when the failure is “due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences.”³⁴ While several of the leading garment exporting countries – including Bangladesh, Cambodia, India, Indonesia and Pakistan – have not ratified the CISG, most of the countries in which the major apparel brands are domiciled have. Brands’ contracts usually provide that they be interpreted according to laws of the brand’s home country. Courts may apply the CISG when they interpret such contracts, unless the brand’s contract has specifically excluded the application of the CISG.

As already noted, even if a brand’s contract includes a force majeure clause that explicitly lists “pandemics,” this does not necessarily mean that a court or arbitrator would allow the brand to walk away without payment of goods. On the contrary, the party asserting force majeure may still have to prove to the adjudicator that it could not have taken any actions that would have helped avoid the effects of the pandemic on its ability to perform its obligations – in the case of the brands, to pay the supplier – *and*, even if this were shown, the opposing party could still overcome this defense if it could prove that the pandemic’s effects were foreseeable.³⁵

As Mark Augenblick and Allison Rousseau concluded upon their review of courts and

arbitrator’s prior treatment of force majeure claims, even where a contract explicitly lists a relevant event as a basis for asserting force majeure, the defense remains “not as easy to prove as it might appear to be.”³⁶

Brand must show the pandemic and its impact on business were unforeseeable

In addition, even if a brand with a force majeure clause listing “pandemic” could show that paying the supplier for the ordered goods is impossible (or impracticable in common law) in the current circumstances, a supplier still could overcome this defense if the supplier could convince a court or arbitrator that the outbreak of COVID-19 and its effects on the brand’s business were in fact reasonably foreseeable and avoidable.³⁷ Such an argument might well be successful, particularly in the case of orders placed by brands after mid-January 2020, once the emergence of COVID-19 rapidly led to a government lockdown and suspension of economic activity in Wuhan, China, a city of 11 million people.

Indeed, at least one major brand, Victoria’s Secret, sought to ensure that another party (a potential acquirer) would fulfill its obligation by including a clause explicitly *exempting* a COVID-19 pandemic or government action from the scope of the force majeure clause in a contract signed in mid-February 2020. This suggests that the emergence of the pandemic and its effects were already foreseeable at that point.³⁸ Such an argument might also be viable with respect to contracts signed *before* the virus’ initial outbreak in Wuhan, given the other international viral outbreaks and near-

³⁴ See appendix for a discussion of CISG Article 79.

³⁵ Augenblick and Rousseau, p. 65 (citing the Introductory Notes to ICC Model Force Majeure Clause).

³⁶ Augenblick and Rousseau, p. 60.

³⁷ See e.g. G Wagner, “Corona Law,” (2020) *Zeitschrift für Europäisches Privatrecht* 531.

³⁸ J Stewart, “The Victoria’s Secret Contract that Anticipated a Pandemic,” *New York Times*, 29 April 2020, www.nytimes.com/2020/04/29/business/victorias-secret-sycamore-coronavirus.html

outbreaks that have occurred over the past two decades, such as MERS, H1N1, Ebola and SARS, of which the latter alone caused economic losses of more than 80 billion US dollars.

For example, case law in France has established that the H1N1 flu pandemic could not be considered a force majeure as it was widely reported and expected.³⁹ Moreover, even if COVID-19 is successfully argued to constitute a force majeure event, a party seeking to invoke force majeure still must establish a causal link between the epidemic and/or the government action in question, and the impossibility of the party meeting its contractual obligations. For example, the Paris Court of Appeal ruled that while the Ebola virus might be considered force majeure, this alone is not sufficient to establish that the virus caused a decrease in or absence of cash flow affecting a firm's ability to perform the contract.⁴⁰

Brand must show it is impossible (or impracticable) to pay

In the case of COVID-19 it is easy to see how a supplier might successfully assert force majeure as an excuse for not delivering a brand's products on time, as the former might well face disruption in fabric shipments, government lockdowns of its factory, or worker illness. As we have seen, the suppliers have performed their obligations by producing garments and even shipping them. The brands, however, are in a weaker position to assert that they have no way to overcome impediments in fulfilling their side of the contract. Put bluntly, all brands need to do is pay for the goods that they have already ordered. Despite current difficulties, most brands are not insolvent – they have sufficient cash flow to honor their short-term debts – much more so than their

suppliers. Brands have access to credit and, increasingly, their home country governments' assistance in paying their bills.

The fact that brands almost always can pay for the goods they have ordered is particularly significant in the case of purchase agreements governed by the laws of civil law countries such as France, Spain and the Netherlands. In the case of these legal systems, where force majeure is established in the countries' civil codes, rather than by explicit contractual reference, asserting force majeure requires the party doing so to establish that performance is actually "impossible," rather than simply "commercially impracticable" – the prevailing standard in the US. In the former case, in other words, a supplier who challenged a brand's cancellation of orders could simply argue: if the brand *can* pay for the garments the supplier produced, then the brand *must*.

While the standard generally applied by courts in the US, and by arbitrators, internationally, in considering whether a force majeure event excuses nonperformance – whether the event renders performance "commercially impracticable" – is less absolute, it is nonetheless stringent. Brands can argue that in the face of weakened consumer demand and with their brick-and-mortar stores closed, they no longer need these garments. As explained in the appendix, adverse business conditions alone are unlikely to meet the standard of "commercial impracticability." Yet in this case, the cost of paying for the garments is one that the brand itself – which is indisputably the dominant party in the transaction – has negotiated. That the contract with a supplier is less profitable to a brand than it was before a particular event occurred, because that event led to a fall in consumer demand for the

³⁹ Besançon Court of Appeal, 8 January 2014, No. 12/02291.

⁴⁰ Paris Court of Appeal, 17 March 2016, No. 15/04263.

brand's goods, is simply a risk that business in cyclical industries take.

Suppliers could also counter that brands can still sell their goods online – as much retail is done now – and in stores once they reopen. Moreover, suppliers could point out that the freight-on-board (FOB) prices that brands contract to pay them for goods are a limited share of the retail prices at which brands ordinarily sell these garments, and that brands already have multiple methods at hand for recouping the FOB costs of garments when consumer demand for goods is depressed, such as markdowns, clearance pricing, resale to off-price retailers, etc.

Brands must show they tried to mitigate the effects of the pandemic before cancelling orders

Parties seeking to invoke force majeure to avoid performance of a contract must bear the burden of proving that they attempted, but were unable, to mitigate the effects of the unforeseen event, including documenting and communicating to the other party that they took all reasonable steps. A brand whose refusal to pay for an order is challenged in court or arbitration by a supplier might find this difficult, given that, as just noted, apparel companies have not only, in nearly all cases, the actual ability to pay, but also an extensive set of marketing and distribution options for recouping their costs.

Force majeure may justify delaying payment, not cancelling orders

Even if a brand demonstrates that the COVID-19 pandemic qualifies as a force majeure event under its contract, and that the consequences of this event were both unforeseeable to the brand and made its timely performance of the contract impossible or impracticable (depending on the governing law), *and* that the brand attempted to mitigate the event's impact, it is still likely that a court or arbitrator would stop short of ruling that this justifies the brand's termination of the contract. Adjudicators are more likely to permit a party asserting force majeure to delay or modify its performance, than to allow it to abandon its contractual obligations completely. A brand that is successful in asserting force majeure due to the effects of COVID-19 might be granted a delay in paying for orders until such time as the brand were able to reopen brick-and-mortar stores and generate cash flow, or to reduce the amount payable to the supplier to reflect the reduced prices that the products are likely to command.⁴¹

CONCLUSION

Brands violate international standards for corporate responsibility

Cancellation of completed orders is also inconsistent with brands' responsibility under both the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises, as the European Center for Constitutional and Human Rights explained in an April 2020

⁴¹ Indeed, Article 13 of the European Law Institute's "Principles for the COVID-19 Crisis" provides that, "Where, as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into

renegotiations even if this has not been provided for in a contract or in existing legislation," www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Principles_for_the_COVID-19_Crisis.pdf

policy paper.⁴² Both the UNGPs and the OECD Guidelines clearly stipulate that companies must comply with legal standards, particularly, as the OECD guidelines note, when they disengage from a supplier. Concretely, this ranges from honoring previously agreed contractual terms such as price and payment terms in good faith, and respecting legally mandated terms arising from national and European law on topics such as payment terms.

Cancelling already completed orders fails to comply with the company's due diligence requirements under both the UNGPs and the OECD guidelines. In particular, without brands' efforts to provide advance notice to and consultation with workers' representatives, such actions fail to take the social impact on suppliers' workers into account. Finally, brands do not meet their due diligence obligations when cancelling orders because they have failed to ensure that if suppliers become insolvent as a result of the

cancellations, suppliers' workers are treated as privileged creditors during any bankruptcy process.

It is already clear that some brands⁴³ are taking a distinctly more responsible approach than others in dealing with their third-party suppliers during the economic crisis resulting from the COVID-19 pandemic. Some major brands, including adidas, H&M, Nike, PVH, Inditex and the VF Corporation, have announced that they will honor their existing purchase orders on the original payment terms.

However, other brands like C&A, Kohl's and Bestseller are in the opposite camp and are walking away from their orders. C&A, a member of the UK-based Ethical Trading Initiative and the German Textilbündnis, cancelled finished orders despite the initiatives' written guidance on responsible purchasing practices during the COVID-19 pandemic.⁴⁴ The ETI⁴⁵ and Textilbündnis⁴⁶ guidelines state that they expect their member

⁴² ECCHR, "Garment supply chains in intensive care? Human rights due diligence in times of (economic) crises," 2020, www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_SUPPLYCHAINS_COVID_EN.pdf

⁴³ WRC, "Covid-19 Tracker: Which Brands Are Acting Responsibly toward Suppliers and Workers?"

⁴⁴ Deutsches Textilbündnis, "Guidelines for responsible purchasing practices in times of COVID-19," 2020, www.textilbuendnis.com/en/download/leitsaetze-einkaufspraktiken-covid19

⁴⁵ The guidelines provide that "payment for completed orders should be honoured and within reasonable time. Brands should consider early payment and not withhold payments to suppliers as workers need money for medication, food or to survive periods of isolation. Brands should also avoid using Force Majeure provisions in contracts for economic reasons or summarily terminating contracts. Brands are asked to work with their suppliers to ensure workers continue to receive salary payments to bridge the time of technical unemployment and work with suppliers to ensure that workers receive compensation packages in line with national and international standards." With regard to

ongoing orders, the guidelines state, "We expect members to have an inclusive dialogue with suppliers to fully assess the costs incurred so far with the aim of agreeing a reasonable way to share them. For work already completed, we would expect salaries to be paid in full by suppliers and we expect members to work hard to minimise the ongoing impact upon workers who will already be facing difficult circumstances. This will mean understanding the capacity of the factories to support their workforce and making extra efforts where necessary and possible. While there may be some brands that can accommodate this individually, we are working with others to seek sector-level support for immediate emergency assistance."

⁴⁶ The guidelines provide that "responsible and fair purchasing practices count more than ever in this situation. Basically, the following applies: already produced goods are paid for, as well as goods that are currently being produced or for which material has already been purchased. If there is no possibility to deliver/accept goods, the storage costs should be covered. Agreed payment terms should be adhered to."

brands to pay suppliers for completed orders within a reasonable time. In an interview with *Apparel Insider*, Peter McAllister, ETI's director, further clarified, "Any brand which is saying they are not going to pay for products just because they cannot use them would be contravening our guidance."⁴⁷

Recommendations for beyond the crisis: The need for reform

After the economic crisis sparked by the COVID-19 pandemic passes, it is clear that the global apparel industry cannot return to fast fashion's inhumane production model. Beyond the rather basic demand that brands honor their contracts, the crisis has highlighted that global brands' purchasing practices must change to ensure that the rights and welfare of workers in supplier factories are fully respected and supported rather than undermined.

Legal reform

International law needs to catch up with current global production patterns and help balance the power between contractual parties. Since 2016, International Labour Organization constituents have debated whether and how to regulate global supply chains – a discussion which is long overdue.⁴⁸ However, the intransigence of the International Organization of Employers⁴⁹ has blocked any meaningful discussion on transnational regulation. A February 2020 tripartite technical meeting meant to chart a way forward ended without

conclusions.⁵⁰ Given its centrality in global labor governance, the ILO, together with responsible parties, needs to move forward with a framework for regulation.

In the countries where production is generally situated, governments should amend their laws to prohibit the kinds of abusive contract terms described herein, and further build up social protection for workers in the case of future disruptions in supply chains. Of course, this will need to be a coordinated effort, as no one country will want to put itself into a (perceived) disadvantageous position compared to another where there are no effective regulations of contracts for the sale of goods.

Countries where brands are headquartered should adopt mandatory human rights due diligence legislation to ensure that brands are legally liable for the labor violations that they cause or to which they contribute – and for which conducting due diligence is no defense to liability.⁵¹ Additionally, other theories of liability should remain viable and indeed laws should be reformed to facilitate transnational litigation for abuses of workers' rights. Furthermore, regulators and legislative bodies should investigate further the power imbalances in the garment supply chains, both in terms of contractual provisions as well as practice, and consider regulation to prohibit the kinds of abusive contract terms described herein. This could build on experience in other

⁴⁷ B Matthews, "Primark, C&A flout ETI and Textilbündnis guidelines," *Apparel Insider*, 3 April 2020, www.apparelinsider.com/primark-ca-flout-eti-and-textilbundnis-guidelines

⁴⁸ In March 2017, the ILO revised its non-binding Tripartite Declaration on Multinational Enterprises, originally adopted in 1977; however, it has to date been of very little practical use for workers in addressing supply chain abuses.

⁴⁹ See IOE, www.ioe-emp.org

⁵⁰ See e.g. ILO Technical Meeting on Achieving Decent Work in Global Supply Chains – EU Closing

Statement, 28 February 2020, www.eas.europa.eu/delegations/cambodia/75856/ilo-technical-meeting-achieving-decent-work-global-supply-chains-eu-closing-statement_en

⁵¹ See ITUC, "Towards mandatory due diligence in global supply chains," (2020), www.ituc-csi.org/IMG/pdf/duediligence_global_supplychains_en.pdf

sectors such as the EU's Unfair Trading Practices Directive, which could be extended beyond agro-food products to include textiles and garments.⁵² A garment-specific initiative could also be developed.

Enforceable agreements

In the meantime, apparel industry brands must also end their refusal to negotiate binding and enforceable private agreements with national trade unions in producing countries and with global union federations that address the relationship between brands' purchasing practices and labor abuses in their supply chains.⁵³ The 2013 Accord on Building and Fire Safety in Bangladesh, signed by Bangladeshi unions, GUFs and more than 200 international brands, has shown the promise of such agreements. Under the agreement, brands were held responsible for conditions in their suppliers' factories. Brands and retailers were obliged to "negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements."⁵⁴ Signatory brands were obliged to align purchasing practices with suppliers to address concerns over fire, electrical and building

safety at their factories, which was crucial in addressing the hazards that had previously killed more than 1,500 factory workers in preventable industrial accidents.

Such agreements would go far in helping brands fulfill their due diligence responsibilities under the UNGPs⁵⁵ and the OECD guidelines⁵⁶ by eliminating the purchasing practices that contribute to labor violations in the supply chain and by ensuring continuous dialogue with workers and trade unions who are impacted by these practices. Brands, including those that refused to sign the accord, such as Gap and Walmart, must now embrace, rather than continue to resist, the constructive and practical approach to industrial relations embodied in such agreements.

Whether through agreement, legislation, or both, contracts that stipulate purchasing prices that are insufficient to enable factories to pay workers a living wage or require tight timelines that cannot be met without illegal amounts of overtime must be abolished. Payments to suppliers under contracts will need to be made in full and on time, and wages paid in full and on time to workers. Future contracts should not allow the buyer to cancel orders finished or in process without recourse

⁵² Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, www.eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0633&from=EN

⁵³ See e.g. International Labor Rights Forum, "The Future of Fashion: Worker-Led Strategies for Corporate Accountability in the Global Apparel Industry," www.laborrights.org/sites/default/files/publications/ILRF_Future%20of%20Fashion%20v5_compressed.pdf

⁵⁴ Article 22, Bangladesh Accord, bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf

⁵⁵ UN Guiding Principles, Articles 17-21, www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁵⁶ The OECD Due Diligence Guidance for Responsible Business Conduct (2018) states that businesses need to "address barriers arising from the enterprise's way of doing business that may impede the ability of suppliers and other business relationships to implement RBC policies, such as the enterprise's purchasing practices and commercial incentives." The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2017) further details how clothing brands and retailers can prevent contribution to harm through responsible purchasing practices.

for the supplier and its workers simply because the orders are no longer as profitable as when the order was placed. Finally, contracts between brands and suppliers should explicitly acknowledge supplier factory workers as the intended beneficiaries of the brand's agreement to pay the supplier and give workers the right to sue the brand for any wage arrears that may result from the brand's failure to do so.

Brands' reliance on their dominant position in the global garment supply chains in order to abandon both suppliers and workers during the current crisis, regardless of whether it is legal, may be an effective tactic for immediate self-preservation but it is hardly a model for long-term business sustainability. Supply chains will not be sustainable as long as workers and producers are forever in a precarious situation. Strengthening respect for fundamental rights is actually good for both producers and workers. Producers benefit from a higher skilled and more productive workforce and an agreed dispute settlement process.⁵⁷ Workers benefit from higher incomes and can invest that surplus into their families' future wellbeing. This of course benefits not only workers but the communities and society overall. It is not clear what future global garment brands actually want, but without major actions to reshape the global governance of supply chains, and in particular to legally enforce workers' rights and brands' accountability, the next crisis is already in motion.

⁵⁷ The OECD has found that "countries which strengthen their core labor standards can increase efficiency by raising skill levels in the workforce and

by creating an environment which encourages innovation and higher productivity." OECD, *International Trade and Core Labour Standards* (2000).

APPENDIX

This appendix contains brief summaries of the law concerning the non-performance of a contract in two countries where global garment brands are concentrated, as well as the UN Convention on Contracts for the International Sale of Goods.⁵⁸

GERMAN CIVIL CODE SECTION 313 – INTERFERENCE WITH THE BASIS OF THE TRANSACTION

- (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
- (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
- (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

The German Civil Code provides that if the underlying basis of a contract becomes obsolete due to unforeseeable circumstances, the party that is unjustly disadvantaged by this event can ask for the contract to be adjusted or to annul the contract if adjustment is not possible.

In considering whether this standard is met in the current context, the central question is not so much if the COVID-19 pandemic has destroyed the underlying basis of a brand-supplier contract, but whether the pandemic's effects, specifically the dramatic drop in consumer demand due to government-imposed shutdowns, qualify as interference with the basis of the transaction.

It is well established in academic literature and in jurisprudence that a buyer generally bears the risk of the inability to resell the products it has ordered.⁵⁹ This means, in principle, that under Section 313, a buyer cannot excuse their non-performance simply on the grounds that market demand has decreased, thereby making it less profitable to sell the ordered product.⁶⁰ One commonly cited example of this principle is that if a pub burns down in an accidental fire, its owner cannot rely on Section 313 to avoid paying for furniture they have ordered.⁶¹ The fact that the pub owner cannot use the furniture to sell drinks, food, etc. due to the fire falls within the sphere of risk that they typically assume. Furthermore, it seems difficult to argue that the present scenario qualifies as a type of "frustration of purpose." As the lockdowns only lasted a few weeks, the delivered goods were still fit for resell once the restrictions were lifted and continuously online.

⁵⁸ For a broader comparison of jurisdictions, see: Traidcraft Exchange and The Circle (2020) "Force Majeure and Covid-19: A Guide for Suppliers in the Garment Industry," <https://thecircle.ngo/force-majeure-covid-19-guide-suppliers-garment-industry>

⁵⁹ Palandt §313, Rn 42.

⁶⁰ G Wagner, "Corona Law," (2020) *Zeitschrift für Europäisches Privatrecht* 531.

⁶¹ BGH, decision on 25 May 1955 - VI ZR 6/54.

Although brands might argue that the degree of collapse in consumer demand was not actually foreseeable in this case, brands would still need to show that they were disadvantaged in their contracts with suppliers as a result. This might be difficult for brands to prove, however, since they are generally the dominant parties in their contractual relationships with suppliers and have been able to set exceptionally low prices. It is unclear how a brand is disadvantaged simply by having to pay the prices it set for goods it ordered and will receive.

Even if the brands can show that the triggering event was not foreseeable, and that they actually are disadvantaged by having to pay for their orders under Section 313, brands still could not simply cancel their contracts and walk away, but would have to first seek an adjustment to their terms. As in the case of brands seeking to cancel contracts by invoking force majeure, it is unlikely that brands attempting to avoid their contractual obligations to suppliers by citing Section 313 will ever face a legal challenge to their actions, since, as discussed, it is hard to imagine that a supplier would be willing to risk future orders by bringing such a case.

THE UNITED STATES

In the United States, contracts are generally governed by state law – whether applicable statutes or common law principles. With regard to contracts for the sale of goods, the Uniform Commercial Code usually applies, and indeed most, but not all, US states have enacted their own variant of the UCC. The issue of force majeure is governed principally by the express terms of the contract itself. If a contract is silent, state statutes, including state UCCs, or the common law may apply. Below is a brief summary of law relevant to force majeure.

Force majeure clauses

First, “it is a well-established rule of contract law that *force majeure* clauses must be narrowly construed.”⁶² Thus, a force majeure event often will need to be specifically listed in order for its occurrence to provide the basis for non-performance per the contract. Courts have been generally reluctant to consider claims based on economic hardships or unanticipated changes in economic conditions on the basis that this is an assumption of all contracts.⁶³ Indeed, state and federal courts have rejected several claims based on significantly changed

⁶² See, e.g., *Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minn., LLC*, 871 F. Supp. 2d 843, 854, 2012 U.S. Dist. LEXIS 67340, *25, 104 A.L.R.6th 675; *Wuhan Airlines v. Air Alaska, Inc.*, 1998 U.S. Dist. LEXIS 15529, 1998 WL 689957.

⁶³ *United Sugars Corp. v. U.S. Sugar Co.*, 2015 U.S. Dist. LEXIS 43573, *9, 86 U.C.C. Rep. Serv. 2d (Callaghan) 314, 2015 WL 1529861; *In re Millers Cove Energy Co., Inc. v. Moore*, 62 F3d 155, 158 (6th Cir 1995) (finding “Courts and commentators generally refuse to excuse lack of compliance with contractual provisions due to economic hardship, unless such a ground is specifically outlined in the contract.”) See also, *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. (rejecting defendant’s force majeure claim following the deep recession caused by the 2008

financial crisis, the court held that “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.”) Affirmed on appeal. *Route 6 Outparcels, LLC v Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 931 N.Y.S.2d 436, 2011 N.Y. App. Div. LEXIS 7416, 2011 NY Slip Op 7556 (finding, “While defendant, of course, had no control over the world economy, the decisions it made with respect to how to cope with the financial downturn— notwithstanding that its options may have been limited—remained within defendant’s power and control. Defendant made a calculated choice to allocate funds to the payment of its debts rather than to perform under the subject lease. Economic factors are an inherent part of

economic circumstances provoked by unforeseen events, including the 11 September terrorist attacks⁶⁴ and the 2008 financial collapse,⁶⁵ except for those contracts that specifically listed a change in economic circumstances in their force majeure clause. Governmental action which has affected profitability but not the ability to perform has also been found insufficient.⁶⁶ One could well argue that COVID-19 itself did not affect any brand's ability to pay for ordered goods, and indeed the government measures to close retail stores temporarily did not affect the ability of brands to sell the ordered goods online (as much retail business is now conducted.) Even now, many government restrictions on in-store shopping have been lifted, at least in part, in many parts of the US. And, as noted above, some brands have paid hundreds of millions of dollars in dividends to shareholders during this time, making any claim of a shortage of available funds untenable.

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.")

⁶⁴ See "Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting from COVID-19," Vol. 1, Rel. 1. ("The fact that costs went up significantly or that a market for goods or services dried up generally is not enough to excuse a party of its obligations. There have been many occasions when contracts were made financially burdensome or undesirable by events beyond the control of the affected party," but when that happens, "[n]ot even a national tragedy of the largest scale, such as the September 11th terrorist attacks, will qualify as a force majeure event unless it is specifically contemplated by the parties.")

⁶⁵ *Great Lakes Gas Transmission Limited Partnership v. Essar Steel Minn.*, LLC, 871 F. Supp. 2d 843, 2012 U.S. Dist. LEXIS 67340, 104 A.L.R.6th 675; *Elavon, Inc. v. Wachovia Bank, et al.*, 841 F. Supp. 2d 1298, 2011 U.S. Dist. LEXIS 152004, 2011 WL 7071066, *8 (N.D. Ga. 2011); *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*,

The Uniform Commercial Code

The UCC grants the parties to a contract for the sale of goods considerable freedom to draft the terms of their contracts, including the allocation of risk.⁶⁷ The UCC and common law doctrines concerning non-performance will not typically be available if the buyer and seller have allocated the risks between themselves by including a force majeure clause in their sales contract.⁶⁸ If the parties fail to allocate the risk themselves or if the contract is unclear, then the UCC (or common law) steps in.

Of relevance here is Section 2-615 of the UCC:

§ 2-615. Excuse by Failure of Presupposed Conditions

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

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under

27 Misc. 3d 1222A, 910 N.Y.S.2d 408, 2010 WL 1945738, *3-4 (N.Y. Sup. Ct. 2010). *In re Old Carco LLC*, 452 B.R. 100, 119 (S.D.N.Y. 2011) (force majeure claim was proper because the clause included "change to economic conditions")

⁶⁶ See, e.g., *United Sugars Corp. v. U.S. Sugar Co.*, 2015 U.S. Dist. LEXIS 43573, 86 U.C.C. Rep. Serv. 2d (Callaghan) 314, 2015 WL 1529861 (finding "numerous courts have declined to apply a force majeure clause where governmental action affects the profitability of a contract, but does not preclude a party's performance.")

⁶⁷ With regard to contracts involving international trade, the UCC provides that the parties can choose the law that will govern their interpretation and application, which is usually the law of the jurisdiction where a significant portion of the making of the contract occurred or where performance will occur. Thus, the analysis of a contract will depend on the law designated in the contract.

⁶⁸ See, e.g., *Aquila, Inc. v. C. W. Mining*, 2007 U.S. Dist. LEXIS 80276, *16 (D. Utah Oct. 30, 2007).

a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

The introductory clause of Section 2-615 provides an important limitation on its application, namely "Except so far as a seller may have assumed a greater obligation." As explained above, the parties to a contract may agree to a different allocation of risk – including in a force majeure clause. Thus,

while a supplier might have had an excuse under the UCC in the absence of specific contract terms, the seller could assume greater obligations under the contract.

Section 2-615 of the UCC expressly excuses the *seller* from the timely delivery of goods if performance has become commercially impracticable because of circumstances which were unforeseen by the parties at the time of entering into the contract. On its face, UCC Section 2-615 does not excuse the buyer's non-performance. Thus, while garment manufacturers in our case may have an excuse for non-performance under Section 2-615, assuming the UCC applies to the contract, the buyer does not. However, buyers are the ones now asserting commercial impracticability.⁶⁹ The leading treatise on US contract law, Corbin on Contracts, explains that, "One reason why UCC § 2-615 fails to mention buyers may be that the principal obligation of purchasers of goods is to pay money, and the inability to pay has not generally been viewed as a valid defense, even when the inability is due to circumstances beyond the control of the payor."⁷⁰ However, some US states have read into Section 2-615 an implied defense for buyers – namely the assertion of a commercial impracticability claim (see below).

⁶⁹ To assert Section 2-615, a seller would need to demonstrate that a contingency occurred, that the contingency made the party's performance commercially impracticable, and that the nonoccurrence of the contingency was a basic assumption of the contract. Hypothetically, a garment manufacturer seeking to invoke Section 2-615 could argue that the COVID-19 pandemic was the contingency, that its non-occurrence was a basic assumption of the contract, and that the occurrence of the pandemic made performance of the contract commercially impracticable. The manufacturer would

have to argue that illness caused by the pandemic and/or "social distancing" orders imposed by the government affected its ability to mobilize the workforce to produce the orders on time. Further, assuming it was relevant, it could argue that delays in inputs coming from third countries, notably China, could also excuse timely performance.

⁷⁰ Corbin on Contracts (2019), Section 74.10.

Common law doctrines: Commercial impracticability and frustration of purpose

Section 1-103 of the UCC states that “principles of law and equity” supplement the statute “unless displaced by particular provisions of this Act.” As such, buyers could assert a common law impracticability defense based on the argument that Section 2-615 displaces the common law commercial impracticability or frustration of purpose doctrine only as to sellers.

In the current situation, it is not impossible for buyers to pay for their goods.⁷¹ Thus, the commercial impracticability or frustration of purpose doctrines may be most likely to be invoked. The first is described as “when a party is excused of his or her responsibilities because performance has been made excessively burdensome—impracticable—by a supervening event that was not caused by the party seeking to be excused and that is inconsistent with the basic assumption of the parties at the time the contract was made. The supervening event must be, in some sense,

unforeseeable (but not inconceivable)—that is, so unlikely that a reasonable party would not have guarded against it in the contract.”⁷² Again, buyers have not generally fared well here.⁷³

Frustration of purpose is another basis upon which a party may attempt to excuse performance of a contract. Under this theory, if a party’s “principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.”⁷⁴ Frustration can occur even when the parties may still be able to perform, but the reason for performance no longer exists. The seminal cases under English law were the *Coronation Cases*, where parties who rented a room to watch the coronation parade sought to avoid those contracts because the parade had been postponed. While both parties could still

⁷¹ The impossibility doctrine is available only if a party can show that performance was made impossible by an unanticipated and unforeseeable event at the time the contract was made. However, while some calamities such as a natural disaster may excuse performance, the economic consequences of such a disaster may not support a claim of impossibility.

⁷² T Murray, “Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting from COVID-19,” 2020.

⁷³ See, e.g., *Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH*, 2017 U.S. App. LEXIS 15380, 2017 FED App. 0184P (6th Cir.) There, the buyer refused to respect the supply contract price with the seller and argued commercial impracticability when the price of polysilicon plummeted due to Chinese subsidies that drove down global market prices. The court found for the seller, finding, “The expectation that current market conditions will continue for the life of the contract is not such a basic assumption, so shifts in market prices ordinarily do not constitute impracticability. Likewise, the simple fact that a contract has become unprofitable for one of the

parties is generally insufficient to establish impracticability.”; *Power Eng’g & Mfg., Ltd. v. Krug Int’l*, 501 N.W.2d 490, 1993 Iowa Sup. LEXIS 157, 23 U.C.C. Rep. Serv. 2d (Callaghan) 382. Though the buyer of a machinery component could no longer ship the machine to Iraq due to an embargo imposed after entering into the contract, the court dismissed the commercially impracticability claim finding that the embargo “does not prohibit a domestic purchaser from buying... a machinery component part intended for shipment there.”

⁷⁴ Restatement (Second) of Contracts, Section 265. The commentary explains that this theory requires that (1) the purpose that is frustrated was a “principal purpose” in making the contract, such that without it the transaction “would make little sense”; (2) the frustration is substantial; and (3) the non-occurrence of the frustrating event was a basic assumption on which the contract was made. See cmt. A.

perform the contract, it no longer made sense for one party to do so.

However, courts apply the doctrine narrowly and find the defense available only “when a change in circumstances makes one party’s performance virtually worthless to the other, frustrating his purpose in making the contract.”⁷⁵ This requires “a virtually cataclysmic, wholly unforeseeable event that renders the contract valueless to one party.”⁷⁶ While the purpose of the contracts discussed in this paper is to buy garments for retail sale, it is debatable as to whether a pandemic was in fact unforeseeable. Furthermore, it is far from clear that the pandemic or the measures taken by governments to impose social distancing rendered the contract to supply garments virtually worthless to buyers. They can still sell those garments online and in some cases in physical retail outlets – albeit in a weaker consumer market. Indeed, “a party’s claim that it is unable to conduct business profitably is insufficient to state a claim of frustration of purpose.”⁷⁷

UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ARTICLE 79

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have

avoided or overcome it, or its consequences.

(2) If the party’s failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Article 79 of the CISG specifies situations in which a party may avoid liability for failure to perform when this failure is due to external events. Epidemics such as COVID-19 and/or the government response are, in principle,

⁷⁵ *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 924 N.Y.S.2d 391, 394 (App. Div. 2011) (citing Restatement (Second) of Contracts § 265 cmt. a).

⁷⁶ *In re: Ampal-american Israel Corp.*, No. 15-CV-7949 (JSR), 2016 U.S. Dist. LEXIS 27963, 2016 WL 859352, at *3 (S.D.N.Y. Feb. 28, 2016)(citing *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974))

⁷⁷ *Hemlock Semiconductor Corp. v. Kyocera Corp.*, 2016 U.S. Dist. LEXIS 915; See, also, *Horton Archery, LLC v. Farris Bros.*, 2014 U.S. Dist. LEXIS 160223 (S.D. Miss. 2014) (finding that the “Defendant admits that its only grievance is that it cannot sell the crossbows for a profit, and that is not the sort of ‘substantial frustration’ contemplated by the doctrine.”)

external events covered by Article 79. However, the applicability of Article 79 also depends on the specific circumstances of a contract between the brand and supplier, and the measures taken by the brand to mitigate the consequences of COVID-19.

A brand invoking Article 79 must prove that the external event, in this case, COVID-19, impacted its own ability to perform its contractual obligations under the contract to pay the supplier after receipt and approval of the ordered products. It is unclear how a well-capitalized and otherwise profitable brand would reasonably argue that the impediments imposed by COVID-19 actually prevent it from fulfilling its obligations to pay under the contract. Moreover, even a brand that is exempted from liability on this basis, is only relieved of such liability “for the period during which the impediment exists.” Once COVID-19-associated conditions are no longer present, the brand would still be liable if it continues to withhold payment.

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