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Part- F

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# Dhaka University Law Journal

(The Dhaka University Studies Part-F)
Volume 24 Issue No 2 December 2013

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## Submission

*Dhaka University Law Journal* is interested in original contributions on contemporary or jurisprudentially important legal issues from scholars and professionals. This is a peer-reviewed journal, and papers and critical essays are published only after the author(s) has/have resubmitted the paper in compliance with reviewers' suggestions and recommendations, if there be any.

Two copies of manuscripts should be sent to the correspondence address, and a copy must also be submitted by email attachment to: <lawfacdu@gmail.com>. A covering-letter giving a short biographical note on the author(s) along with a declaration as to the originality of the work and the non-submission thereof to anywhere else must accompany the manuscripts.

Standard articles written on one side of good quality A4-sized papers, double spaced with wide margins, should be of 8,000-10,000 words including footnotes. The contributions must be in journal style outlined below.

## References, Footnotes and Layout

The text must contain appropriate headings, subheadings and authoritative footnotes. The footnotes should be numbered consecutively and typed single spaced at the bottom of each relevant page. Citations conform generally to a Uniform System of Citation. Thus the style should be as follows:

### Journal Articles: Single Author

Antonio Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 651. [Here, the pinpoint reference is to page 651 which is preceded by the starting page 649 and a comma and space.]

### Journal Articles: Multiple Authors

Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 47. [Note: honorific titles (and initials) are omitted. However, M, Md, Mohd and any other abbreviated form of Mohammad which are part of author's name should not be removed. 21 is the volume and 2 is the issue no of the journal. 2010 is the publishing year. Year should be placed in square brackets [for journals that do not have volume number.]

### Books: Single Author

Shahnaz Huda, *A Child of One's Own: Study on Withdrawal of Reservation to Article 21 of the Child Rights Convention and Reviewing the Issues of Adoption/fosterage/ kafalah in the Context of Bangladesh* (Bangladesh Shishu Adhikar Forum, 2008) 187. [Note: here 187 is the pinpoint reference. This reference is from the first edition of the book. In the case of editions later than the first, the edition number should be included after the publisher's name. It should appear as: 3rd ed]

John Finnis, *Natural Law and Natural Rights,* (Oxford University Press, 2nd ed, 2011) ch 4. [Here, a broad reference is made to chapter 4 of the book.]

### Books: Multiple Authors

Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, 2006) 49. Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003). [Note: when there are more than three authors, only first author's name should appear and 'et al' should be used instead of remaining authors' names.]

**Books: Edited**

Tom Ginsburg (ed), *Comparative Constitutional Design* (Cambridge University Press, 2012). [Note: where there are more than one editor, '(eds)' should be used instead of '(ed)'.]

**Chapters in Edited Books**

Jon Elster,'Clearing and Strengthening the Channels of Constitution Making' in Tom Ginsburg (ed),*Comparative Constitutional Design* (Cambridge University Press,2012)15, 18.

**Books: Corporate Author**

McGill Law Journal, *Canadian Guide to Uniform Legal Citation* (Carswell, 7th ed, 2010).

American Psychological Association, *Publication Manual of the American Psychological Association* (6th ed, 2010) 176. [Note: a publisher's name should *not* be included where the publisher's and the author's names are the same.]

World Bank, *Gender and development in the Middle East and North Africa: women in the public sphere* (2004).

**Theses**

Naim Ahmed, *Litigating in the Name of the People: Stresses and Strains of the Development of Public Interest Litigation in Bangladesh* (PhD thesis, SOAS, 1998).

**Working Paper, Conference Paper, and Similar Documents**

Jens Tapking and Jing Yang, 'Horizontal and Vertical Integration in Securities Trading and Settlement' (Working Paper No 245, Bank of England, 2004) 11--12.

James E Fleming, 'Successful Failures of the American Constitution' (Paper presented at Conference on The Limits of Constitutional Democracy, Princeton University, 14-16 February 2007) 13.

**Newspaper**

Stephen Howard and Billy Briggs, 'Law Lords Back School's Ban on Islamic Dress', *The Herald* (Glasgow), 23 March 2006, 7. Imtiaz Omar and Zakir Hossain, 'Coup d' etat, constitution and legal continuity', *The Daily Star* (online), 24 September 2005 <http://archive.thedailystar.net/ law/2005/09/04/alter.htm> accessed 9 March 2014.

**Internet Materials**

International Whaling Commission, *Extending the Global Whale Entanglement Response Network* (28 January 2014) <http://iwc.int/extending-the-global-whale-entanglement-response-n> accessed 9 March 2014. [Note: here the date within parentheses is the last date of update of the web page, and the date after the URL is the date of last access.]

**Cases**

*A (FC) v Secretary of State for the Home Department* [2004] UKHL 56.

*Additional District Magistrate, Jabalpur v Shivakant Shukla* AIR 1976 SC 11207.

*A T Mridha v State* (1973) 25 DLR (HCD) 335, 339. [Here, the case is reported on page 335, and the pinpoint is to page 339. Full stops should not be used in abbreviations.]

*Bangladesh Environmental Lawyers Association (BELA) v Bangladesh* [1999] Writ Petition No 4098 of 1999 (pending). [Note: '& others,' '& another' should be omitted.]

*Shahida Mohiuddin v Bangladesh* [2001] Writ Petition No 530 of 2001 (unreported).

Parallel citations should not be used in citations of Bangladeshi cases. But in citations of United Kingdom Nominate Reports and early US Supreme Court decisions, parallel citations are used.

**Statutes (Acts of Parliament)**

*Evidence Act 1872,* s 2. [Note: 'The' should not precede the name of the statute, and comma (,) should not be used before the year]

*Evidence Act 2006,* s 15 (New Zealand). [Note: when necessary, give jurisdiction in parentheses to avoid confusion.]

**Delegated Legislation**

Family Courts Rules 1985, r 5.
Financial Institutions Regulations 1994, reg 3.
Abbreviations should be written out in full when they appear first in the text or form the first word in a sentence. Leave out full stops in abbreviations made up of capitals as, for example, SEC, HCD, and JATI.

The abbreviation 'Ibid' should be used to repeat a citation in the immediately preceding footnote. Standing alone, 'Ibid' means strictly 'in the very same place' while 'Ibid, 231' means 'in the same work, but this time at page 231.' Avoid the use of 'Latin gadgets' such as *supra, infra, ante, Id, op cit, loc cit,* and *contra,* which are not widely understood. For cross reference and other purposes, following introductory signals can be used: See; See, eg,; See also; See especially; See generally; Cf; But see; See above/below n.

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# Dhaka University Law Journal

(The Dhaka University Studies Part-F)

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## Contents

# Appointment And Removal Of Company Directors In Bangladesh And The United Kingdom: Convergence And Diversity

**Md. Khurshid Alam***

## 1. Introduction

It is a trite principle of law that a company being "a person in abstraction" (artificial legal person) cannot manage or direct its own affairs—to run its functions a company thus must depend upon the agency of humans.[1] Of such agency of humans, the directors hold the most important position relating to the administration and management of the company. Roughly put, they are the officers of the company who are responsible for managing the company under the authority and capacity that law and their constitutional document give to them. In fact, the directors are the persons with the authority of making the decisions as to the operation of the company on a day to day basis, for the benefit of the shareholders. As a matter of fact, the provision relating to the appointment and removal of the directors thus comes to be a common part of the company law.

In Bangladesh, the appointment and removal of the directors are governed generally by the provisions of sections 90-115 of the Companies Act of 1994. On the other hand, the law of the United Kingdom (UK) concerning the appointment and removal of the directors are mainly contained in the provisions of section 154-169 of the Companies Act of 2006. Because of bearing the common law background, the law of Bangladesh in this particular field is also proved generally to be prone to the principles of English Law. Thus, there are many rules relating to the appointment and removal of the directors (such as, the qualification and disqualification of directors, the requirement of keeping of the registers for the directors, etc.) that are common to the Companies Act of both the countries. However, a comparative study of the company law of these two countries will reveal that the law of UK differs in some points from that of Bangladesh.

Of such differences, the most notable are that while UK law includes both artificial person and natural person to be appointed as director, Bangladesh law permits only natural person as director. In case of removal of directors, the difference lies on the requirements of resolution—the UK law allows the removal of directors by way of ordinary resolution, while the law of Bangladesh requires extraordinary resolution. Another difference is that UK Law provides two types of register named as public

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[1] Andres Chan and David C Donald, Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, The UK and The USA (Cambridge University Press, 2010) 312.

and private register, but in Bangladesh law there is no such classification of public and private register. In what follows, this article contains a detailed discussion on the point of divergence and convergence between the respective law of the UK and Bangladesh. In so doing, the article will proceed with an overview of the general principles of appointment and removal of directors, and the scrutiny of the provisions of the relevant statues. And finally, some major recommendation will be offered to reduce the gravity of divergence between the laws of these two countries.

## 2. General Principles of Appointment and Removal of Directors

In general, director may be defined as an individual who directs, controls, or manages the affairs of the company. The directors of the company collectively are referred to as the "board of directors" or "board". Appointment of a Director is not only a crucial administrative requirement, but is also a procedural requirement that has to be fulfilled by every company. Company directors are appointed by the shareholders of a limited company and must be registered and listed as a company director at Companies House. It is common for shareholders and directors to be the same people in smaller companies. To run the affairs of the company, certain important decisions, e.g. to change the company's name have to be made by the shareholders at a General Meeting. However, the directors are entrusted with the power of making most of the decisions of the company. Seen as such, the shareholders and directors have two completely different roles in a company. The same person can however be both a director and a shareholder, and this is usually the case in private companies. On the other hand, a director need not be a shareholder or vice versa. The shareholders (also called members) own the company and the directors manage it. Unless the articles of association say so (and most do not) a director does not need to be a shareholder and a shareholder has no right to be a director.[2]

Unless laid down in the Articles, there are no specific qualifications required in order to be appointed as a director. Generally, minor cannot be a director but age limit can vary in different laws. No educational or other qualifications are required in order to become director of the company, whether public or private. The only condition is that a body corporate, firms or associates cannot alone become a director. Only individual can be a director of a company because the office of a director is office of responsibility, accountability and position of trust.

In case of number of directors, generally every private company has to appoint at

[2] The separation in law between directors and shareholders can cause confusion in private companies. If two or three people set up a company together they often see themselves as 'partners' in the business. That relationship is often represented in a company by them all being both directors and shareholders. The problem with this is that company law requires some decisions to be made by the directors in board meetings and others to be made by the shareholders in general meetings. To complicate matters further, some decisions have to be made by the directors, but only with the shareholders' consent. Whether a particular decision has to be made by the board meeting or the general meeting, or both, depends on the provisions of the Companies Act and/or the company's articles of association.

least one director. Public companies must have at least two. Generally any law does not prescribe any maximum number of directors for public company. Maximum number of directors in case of private company shall be as specified by the articles. No approval is required in case of any increase in number. The first directors of the company are appointed by the company's documents of incorporation. Thereafter, they are appointed in accordance with the provisions of the company's Articles of Association. The Articles may permit new directors to be appointed either by the shareholders in general meeting or by the other directors, or both. The Articles will also govern the length of directors' appointments and the basis on which they must retire and seek re-appointment. Where shareholders are appointed either as directors or managers, their roles need to be so clearly distinguished that it becomes where, they are represent all shareholders as a director, and where they represent the interest of the others as a shareholder or manager of the company.

Generally Companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company. Usually, a director now has to notify Companies House of two addresses: service address and usual residential address. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies.

The most common method of removing a Director of a company is either through voluntary resignation or by rotation. Where a company decides to remove one or some of its Directors, whether or not they are employees of the company, the company must serve a special notice of the removal on all the Directors of the company including the Director that is proposed to be removed. "Special notice" must be given of the resolution to remove a director. The resolution is not effective unless notice of the intention to move it has been given to the company with a minimum time before the meeting at which it is moved. The company must then give notice of the resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, advertise in an appropriate newspaper. The ability to remove a director by ordinary resolution cannot be excluded by the company's Articles. However, it can in practice be avoided if the Articles contain a clause which confers enhanced voting rights on the director who is being removed, provided he or she is also a shareholder. A Director can be removed by an ordinary resolution of the general meeting after a special notice has been given, before the expiry of his term of office. However, this is not applicable to Directors appointed by proportional representation or the Directors appointed by the Central Government. The Director that is proposed to be removed is in turn entitled to make written representations concerning the circumstances of his proposed removal.

## 3. The Appointment and Removal of Directors under the Law of Bangladesh and UK

### 3.1 The Appointment and Removal of Directors under the Law of Bangladesh: The Companies Act, 1994

**3.1.1 Appointment of Directors:** Section 2(1) (F) of the Companies Act, 1994 defines the term 'director'. According to this section, "director" includes any person occupying the position of director by whatever name called. The directors of a company are entrusted by law with the management of the business of the company. The principle of separation of ownership and management underlies this provision. However, since companies are usually closely held in Bangladesh, most of the directors are also substantial shareholders. This can and often does result in holders of less than 10% of the shares being left out in the cold, and discourages small investors from investing in shares.

Generally, in a public company or a private company subsidiary of a public company, two-thirds of the total numbers of Directors are appointed by the shareholders and the remaining one-third is appointed in accordance with the manner prescribed in Articles failing which, the remaining one-third of the Directors must be appointed by the shareholders. The Articles of a public company or a private company subsidiary of a public company may provide for the retirement of all the Directors at every AGM. In a private company, which is not a subsidiary of a public company, the Articles can prescribe the manner of appointment of any or all the Directors. In case the Articles are silent, the Directors must be appointed by the shareholders. The Companies Act also permits the Articles to provide for the appointment of two-thirds of the Directors according to the principle of proportional representation, if so adopted by the company in question.

Section 90 makes it obligatory for every public company, and all private companies that are subsidiaries of a public company, to have a minimum of three directors. It requires a private company to have at least two directors, and provides that only individual may be appointed as director. This Act also requires that only an individual can now be appointed a director. This removes the complaint that the appointment of bodies corporate as directors was undesirable. The methods of appointing the Directors of a company are usually dictated by the provisions of the Articles of Association of each company. The specific qualities that a Director must possess, though generally common, are dictated by the peculiarities of the industry in which such a company operates.

The first Directors of a company are appointed by the subscribers to the Memorandum and Articles of Association of the company at the time of its incorporation. Subsequent directorship appointments are undertaken by the Shareholders of the company at the company's annual general meeting(s). The shareholders also undertake the re-election and removal of a Director or Directors at their Annual General Meeting. In case of new company when articles have not yet made, the subscribers of the memorandum shall be deemed to be the directors of the

company. Section 91 (1) (a) provides that 'the subscribers of the memorandum shall be deemed to be the directors of the company until the first director are appointed.' The names of the first directors are contained in the articles. When the articles of association of a company are prepared the names of the first directors are included therein. Reg. 69 of Schedule 1 provides that 'the number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association. Section 91 provides that the subscribers to the memorandum of association shall be deemed to be the directors of the company until the first directors are appointed. Other directors are to be elected by the members in general meeting or in the case of a casual vacancy to be appointed by the board but so that the new appointee retires at the meeting in which the outgoing director was to retire. At least one third of the directors must be such that they are required to retire by rotation at any time. The Act however leaves the determination of the number of directors to the company's discretion. In relation to the subsequent appointments to the position of directors, these will typically be appointed by the members of the company. Section 92(1) (b) states 'the directors of the company shall be elected by the members from among their number in general meeting'. In respect of re-appointment and replacement of directors, Section 91 does not make it clear whether the appointment of directors in general meeting can be done by an ordinary resolution. But section 106 provides that the company may appoint a director in place of another by ordinary resolution, although the removal of his predecessor must be done by an extra-ordinary resolution.

Article 84 of the Schedule 1 regulations provide that subject to the provisions of sections 90 and 91 of the Companies Act, the company may from time to time in general meeting increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office. The Companies Act does not prescribe any qualifications for Directors of any company. A Bangladeshi company may, therefore, in its Articles, stipulate qualifications for Directors. The Companies Act does, however, limit the specified share qualification of Directors which can be prescribed by a public company or a private company that is a subsidiary of a public company. To be appointed as a director of a company, a person must satisfy the following conditions contained in the Companies Act 1994. The person must:

- ✓ Consent in writing to the appointment (s.93)
- ✓ Be a natural person (s.90)
- ✓ Not be a minor (s.94)
- ✓ Not be disqualified from being a director (s.94)

It appears that all kind of person cannot be appointed as a Director of a company. Persons who are insolvent or bankrupt, persons who are fraudulent, persons under the age of 18 years old, persons of unsound mind, Directors that have been absent from Board of Directors meetings for a consecutive period of six months, and persons of like characteristic, cannot be appointed as a Director of a company. In

order to be eligible for appointment as a director, the person must not be disqualified from holding the office of director. Disqualification is dealt with in more detail in Section 94. Section 94 of The Companies Act 1994 negatively stipulates the eligibility requirement for becoming a director by providing certain disqualifications. In summary, the main grounds of disqualifications are:

- ✓ Being unsound, or
- ✓ Being undischarged insolvent, or
- ✓ he has applied to be adjudicated as an insolvent and his application is pending; or
- ✓ he has not paid any call in respect of shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call; or
- ✓ he is a minor.

Apart from these grounds, a company may, however, by articles provide for additional grounds for disqualification. This section should thus be read with section 108 which provides that the office of a director shall be vacated in certain circumstances (discussed below under the head of vacancy of the office).[3]

The provisions relating to the restrictions on the appointment of directors are contained in sections 92 and 93 of the Act. According to section 92, a person shall not be capable of being appointed a director of a company by the articles, and shall not be named as director in any prospectus issued by or on behalf of the company unless before the registration of the articles or the publication of the prospectus. It also requires that he has signed and filed with the registrar a consent in writing to act as such director and a contract in writing to take from the company and pay for the qualification shares if he has not already taken and paid for the shares and filed an affidavit to the effect that shares not less than qualification shares are registered in his name. There is a further requirement that the applicant shall file with the Registrar a list of the persons who have consented to become directors of the company, on an application for registration of the memorandum and articles of a company. In addition, section 93 requires that every person proposed as a candidate for the office of director shall sign and file with the company his consent in writing to act as a director, if appointed, and shall not act as a director of company unless he has, within thirty days of his appointment, signed and filed with the Registrar his consent in writing to act as director. According to section 98, the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification, provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such a director has shown to be invalid.

The members of a company elect the directors of a company from among their number in the general meeting. There are no further rules about the election of

[3] M Zahir, *Company and Securities laws* (The University Press Limited, 2005) 64.

directors in the Act. However, recent SEC rules have required that institutional shareholders having at least 5% of shares hold a seat on the board. This provision may have the same effect as a cumulative voting rule. Regulation 57 of the Schedule I Regulations to the Act of 1994 provides that at any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands7 unless a, poll is demanded before or at the declaration the result of the show of hands according to the provisions of section 85 of the Act.

The Act makes it void for the articles of the company or any contract with the company to make any provision indemnifying any director, manager or officer against any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or trust. Moreover, the Act provides for restrictions regarding the making of any loans, guarantee or security by a company in connection with a loan made to a third party where any director of the company is also a director or managing agent of the third party. Exceptions are made, among others, in the case of a banking company or a private company not being a subsidiary of a public company, or a holding company in relation to its subsidiary, and if the loan is sanctioned by the board of directors of the lending/guarantor company and approved by the general meeting and in the balance sheet there is a specific mention of the loan. However, in no case shall the loan exceed 50% of the paid up value of the shares held by such director in his own name. A fine and imprisonment are prescribed as penalties for contravention of these provisions, and a loss of directorship may also result. However, experience would appear to show that these are more honoured in the breach than observance.

The term managing director has been defined in this Act as a person entrusted with the main powers of management of a company under a contract with the company, or any decision of the general meeting or Board of the company or by the provisions of its Memorandum or Articles, which powers he would otherwise have been unable to exercise. The appointment of managing directors is regulated for the first time in the Act. In the case of public companies, a person cannot be appointed as a managing director if he is the managing director of another company. Even then such appointment requires the consent of the company in general meeting. The government, however, is empowered to relax this prohibition if it is satisfied that the companies should for their proper working be operated as a single unit and have a common managing director. The term of office of a managing director cannot exceed five years at a time.

**3.1.2 Register of Directors:** Under the Companies Act of 1994, the companies are required to keep a register in which particulars of all such contracts or arrangements shall be entered and which shall be open to inspection by any member of the company at the registered office of the company during business hours. Any contravention to it results in a fine not exceeding Tk. 1,000. These fines cannot be considered to be a sufficient deterrent to such conflicts of interest.

The law requires the the company shall send to the Registrar a return in the

prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors, managers or managing agents or in any of the particulars contained in the register (a) in the case of the particulars specified in sub-section (1), within a period of fourteen days from the appointment of the first directors of the company; (b) in the case of any change in such particulars, within a period of fourteen days from the day change takes place.

Again, the Companies Act requires the register shall be open to the inspection of any member of the company without charge and of any person on payment of ten taka or such less sum as the company may impose for each inspection. If any inspection required under this section is refused or if default is made in complying with sub-section (1) or (2) of this section, the company and every officer of the company who is knowingly and willfully in default shall be liable to a fine of five hundred taka. In the case of any such refusal, the Court, on application made by the person to whom inspection has been refused and upon notice to the company, may by order, direct an immediate inspection of the register.

**3.2.3 Removal of Director:** Under the Companies Act of Bangladesh, a director of a company can be removed- (a) by passing a resolution, and (b) by the order of the court. Section 106 of the Companies Act 1994 empowers the company to remove a director by extraordinary resolution before the expiry of his period of office. In this respect, Section, 106(1) states that the company may by extraordinary resolution remove any share-holder director before the expiration of his period of office and may by, ordinary resolution appoint another person in his stead: and the person so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected director. Therefore, this section does not apply to contractual appointees, including those nominated managing agents, banks under a loan agreement etc., so long as the latter do not exceed two thirds of the board and are not subject to the compulsory rule of retirement by rotation.

Section 106 establishes one of the most important principles of company law: in general though the shareholders have no power to interfere with day to day management of affairs of the company by the directors yet they retain the ultimate control.[4] To remove any director or to appoint somebody in his place at the meeting at which he is removed by an extraordinary resolution, a Special notice is required to be served to the members not less than fourteen days before the meeting. On receipt of such notice, the company will immediately send a copy thereof to the director concerned. He shall be entitled to be heard before passing the resolution on the meeting.

If a director becomes disqualified by law or by the articles from continuing to be director, he automatically vacates office. S. 108 laid down the circumstances under which a director will automatically vacate his office. On an application to the court for prevention of oppression and mismanagement the court may terminate or set

[4] Ibid. 74.

aside or modify any agreement between the company and the managing director, or any other director or manager. The director so removed is entitled to claim compensation or damages for branch of contract[5]. A vacancy created by the removal of a director as aforesaid can be filled up at the meeting at which he is removed provided special notice of the proposed appointment was also given. The director so appointed shall hold office till the date the director removed would otherwise have hold office. If the vacancy is not filled, it shall be filled up as casual vacancy except that the director removed shall not be re-appointed.

Director's right to make representation: He may make any representation in writing and the copy of such representation may be sent by the company to every member. Where the copy of the representation is not sent to the members, in that case the director concerned may require the representation to be read at the meeting. And if the director is aggrieved because no copy of such representation was sent to the members or no fact of such representation was read out to the board meeting then he may go to the Court.

**Resignation:** The Companies Act is silent with respect to resignation of Directors. There is no provision in The Companies Act 1994 regarding resignation of director. In section 111, there is however an indication regarding resignation. Section 111 (3) states as (3) "No payment shall be made to a managing or other director in pursuance of sub-section (1) in the following cases namely:– "(a) where the director resigns his office in view of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing director, managing agent, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation"

However, in a majority of cases, the Articles provide for Directors to resign. Even in cases where the Articles are silent, there is no absolute bar on Director's resigning, which becomes effective upon submission of such resignation letter and the filing of the necessary form for such resignation with the Registrar of Companies (whether or not the Board formally accepts the same, unless the Articles provide otherwise). The filing of such resignation related form with Registrar of Companies is an obligation to be discharged by the company in question.

**Casual Vacancy:** A casual vacancy on the board of directors is one which occurs otherwise than by a director's term of office expiring. Regulation 85 of the Schedule I Regulations relates to the law relating to casual vacancy occurring on the board of directors. According to this provision, any casual vacancy occurring on the board of directors may be filled up by the directors but the person so chosen shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director. However, this article does not contain the additional provision in section 91 (c) of the Act that the person so appointed shall be a person qualified to be elected a director. It appears

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[5] *Companies Act 1994*, Section 111.

that this provision is consistent with the requirements of section 97 which requires a director to obtain qualification shares. A co-optee director should therefore obtain qualification shares within two months after his appointment. Section 97 also requires a director appointed under Article 86 to obtain qualification shares within two months after the appointment.[6]

Apart from this, there will be a casual vacancy if a director dies or resigns or is removed or becomes disqualified from holding office. Article 87 in the First Schedule applies to remove any director before the expiration of his period of office, and the Act provides that the company may by extraordinary resolution remove a director and may by an ordinary resolution appoint another person in his stead; the person appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose place he is appointed was last elected a director.

**Vacation of Office**: When a director becomes disqualified by law or by the articles from continuing to be a director, he automatically vacates his office. Section 108 along with Regulation 78 of Schedule 1 provide for the provisions of vacation of office of directors. It states that the office of a director shall become vacant if:

- ✓ he fails to obtain within the time specified in section 97 (1) or at any time thereafter ceases to hold, the qualification shares, if any, necessary for his appointment; or
- ✓ he is found to be of unsound mind by a competent court; or
- ✓ he is adjudged an insolvent; or
- ✓ he fails to pay calls made on him in respect of shares held by him within six months from the date of such calls being made; or
- ✓ he or any firm of which he is a partner or any private company of which he is a director, without the sanction of the company in general meeting accepts or holds any office of profit under the company other than that of a managing director or manager or a legal or technical adviser or a banker; or
- ✓ he absents himself from three consecutive meeting of the directors or from all meetings of the directors for a continuous period of three months, whichever is the longer, without leave of absent from the Board of Directors; or
- ✓ he or any firm of which he is a partner or any private company of which he is a director accepts a loan or guarantee from the company in contravention of section 103; or

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[6] Article 86 of the First Schedule empowers the directors, from time to time, to appoint a person as an additional director who shall retire from office at the next following ordinary general meeting (the annual general meeting) but shall be eligible for election by the company at that meeting as an additional director.

- ✓ he is removed by extraordinary resolution.[7]
- ✓ he makes contract with the company without disclosing his interest in the contract.[8]
- ✓ he is concerned or participates in the profits of any contract with the company
- ✓ he is punishable with imprisonment for a term exceeding six months.

In addition, Sub-section (2) of section 108 provides that nothing in this section shall preclude a company from providing by its articles that the office of a director shall be vacated on grounds additional to those specified in the section.

### 3.2: The Appointment and Removal of Directors under the Law of UK: The Companies Act 2006

#### 3.2.1 Appointment of Director

The Companies Act 2006 streamlined the procedures enabling the appointment, resignation and removal of directors set out in previous UK Companies Acts and Table A provisions. Statute now just requires every company to have at least one director (a public limited company needing at least two), that director has to be an actual human being and not another company and not be under the age of 16.[9]

In UK, A company may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director[10]. The Model Articles (for companies registered after 1.10.2009) provide that the minimum number shall be one director. For existing companies with only corporate directors there was a grace period until 1st October 2010 for them to appoint a natural person. According to main principle B.2[11] of the UK Corporate Governance Code, there should be 'a formal, rigorous and transparent procedure' for the appointment of new directors. Generally, any individual can hold the position of Director, subject to the exceptions set out below:

- o Subject to any provision in the company's articles, any person can be a director unless they have been disqualified from so acting under the Company Directors Disqualification Act 1986 or by being an undischarged bankrupt.
- o There is no maximum age limit, however sec157 CA2006 imposes a minimum age of 16 years. Sec159 CA 2006 states that the directorship ceases where a company has an under-age director on the implementation date (1st October 2008) and the necessary changes must be made.

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[7] Ibid. s 106

[8] Ibid. s 105

[9] *Companies Act 2006*, ss 154-157 (UK).

[10] Ibid. s 155.

[11] Principle B 2 of The UK Corporate Governance Code states as- "Companies should establish a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration.

- There are no statutory limitations as to nationality or residence, etc. It would be possible to include these in a company's articles, but this is very unusual.
- The articles may impose a share qualification, but this is unusual in modern companies' articles. If a company has such a provision in its articles, the shares must be acquired within two months of appointment. The first directors are appointed by the subscribers to the Memorandum and may be named in the Articles. Subsequent appointments are made in accordance with a company's Articles, usually by the members at a general meeting. The directors themselves may fill casual vacancies or make additional appointments up to the maximum permitted by the Articles. Directors so appointed may hold office only until the next general meeting when they must stand for re-election by the members. On each new appointment the company must ensure a 'notice of appointment', signed by the director concerned and either an existing director or the company secretary, is filed at Companies House.

Subsequent directors are appointed in accordance with the company's articles. The Model Articles (for companies registered after 1.10.2009) prescribe that: Any person willing to be appointed by a director, and permitted by law to do so can be appointed by ordinary resolution of a general meeting or by resolution of the directors.[12] Table A, (for companies registered pre-1.10.2009 provides that the general meeting may appoint directors. The directors may appoint a director under Article 79 of Table A, but such an appointee holds office only until the next AGM.[13]

By the Section 161(1) of the Companies Act 2006, in a public limited company, separate resolutions are required for each director, unless a resolution to appoint two or more persons by single resolution has been agreed by the meeting without any vote cast against it. The companies Act 2006 itself says little about the means of appointing the directors, leaving this to the articles of association. Its main concern is to give publicity to those who are appointed rather than to regulate the appointment process. On initial registration the company must send to the registrar of companies the particulars of the first directors (section 12) with their signed written consents to act. Thereafter, there must be sent particulars of any changes with signed consent to act by new directors.[14]

Initial directors are appointed by the 'subscribers to the memorandum' as named on the Companies House form IN01 (Application to Register a Company) when the company is formed. They automatically take office on the date of incorporation[15]. Their names and other details should be entered in the register of directors once the company is formed[16]. The articles of association will determine the method of

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[12] Model Articles Article 17 (UK).
[13] Ibid. Article 78.
[14] *Companies Act 2006*, Section 167 (UK).
[15] *Companies Act 2006*, s 16 (6).
[16] Ibid. s 162.

appointment of subsequent directors and should be the first place to affirm correct procedure. The two methods specifically given in Article 17 of the new model articles (the default articles for private companies registered after 1 October 2009) are appointment by:

- the members at a general meeting via an ordinary resolution

or

- the board of directors.

Companies registered before 1 October 2007 that retain the original Table A articles need to have directors appointment by members at a general meeting. Article 78 does allow appointment by directors but that appointee only holds office until confirmed by the members at the next AGM. Revised Table A provisions (for companies registered between 1st October 2007 and 30 September 2009) along with the new model articles. Otherwise, there is no restriction as to who is appointed so long as that person is not:

- a convict
- is insane
- an undischarged bankrupt,
- been convicted of wrongful or fraudulent trading, or
- has been previously disqualified from being a director in the UK or abroad.

In the UK, disqualification of the directors is determined under the Company Directors Disqualification Act 1986 and their name being placed on the Disqualified Directors Register. If they are disqualified in by any means, and the company still wants them as a director then the Courts permission is needed.

The new model articles require the person to be "willing to act" as director but Section167 (2b) Companies Act 2006 goes further demanding "consent by that person, to act in that capacity" be sent to Companies House. Directors have to abide by a number of duties which are set out in sec.171-177 Companies Act 2006, and include duties such as to 'promote the success of the company', and 'exercise reasonable care, skill and diligence'. Other responsibilities which directors have include responsibility for notifying Companies House of certain changes, e.g. to registered office, appointment of directors etc., and for registering the annual return and accounts.

In respect of the appointment of directors, the Act requires neither that directors be elected by the shareholders in general meeting nor that they submit themselves periodically to re-election by the shareholders. This may often be the case, though it is far from universal practice. However, if it is the case, then it will come as a consequence of the provisions of the company's articles, not to the Act's requirements. Equally, there is nothing to prevent articles from providing that the directors can be appointed by a particular class of shareholders, rather than the shareholders as a whole, by debenture holders or indeed by third parties. The Act

provides that each appointment in a public company shall be voted on individually[17] unless the meeting shall agree *nem con* that two or more shall be included in a single resolution. However, there are often provisions in the company's articles (as to notice to be given by the shareholders to the company of their proposed candidates etc.) which make it difficult for shareholders, if they are so minded, to put up candidates against the board's nominees. Thus the crucial decision for the shareholders in public companies is normally whether to accept the board's nominees for election at the annual general meeting and whether subsequently to exercise their removal rights.

Unless the article so provide, directors need not be members of the company. At one time, it was customary so to provide but now the possibility of a complete separation of shareholders and director sis recognized and the model articles no longer provide for a share qualification. Of course, it is common for directors of public companies to become shareholders, often in a major way under a share option or other incentive scheme, but even in these cases being a shareholder is not a formal condition of being a director.

### 3.2.2 Register of Director

Under the UK Company law, any appointment must be notified to Companies House on form AP01 and the company's own register of directors must be completed to show the director's details. As of 1 October 2009, the 2006 Act requires that a service address be included for directors on the company's register of directors. Residential address details have to be kept on a separate register but this is not open to the public. In UK, since 1st October 2009 a director now has to notify Companies House of two addresses: (a) service address, and (b) usual residential address.

Thus, every company must keep separate registers of directors service addresses and their residential addresses as part of their statutory registers. The public has a right to inspect the former but not the latter. Only the Service Address is shown on the public record; the residential address is only available to certain government bodies, including the police, revenue and custom, and credit reference agencies. For many directors the service address and residential address are the same, but if the Company has premises, an office, shop etc, this address will often be used as the service address. The address can just be stated as 'The registered office of the company. However, both register are open to inspection by members of the public and so the public can obtain information about the directors either from companies' house or from the companies registered office. This is a crucial provision, enabling people to know who controls what might otherwise appear to be faceless companies and facilitating the enforcement to which directors are subject, whether by creditors, the public authorities or others.

In the UK, the scope of the information of violence (arising as a result of threats, or actual infliction) by protestors on the persons or property of the directors of

[17] *Companies Act 2006*, Section 160.

companies carrying on lawful activities to which the protestor objected on the public registers has been reduced. The company's public register have no longer to contain the director's usual residential address but only a service address (which might be the company's registered address), though the company must maintain a register of the director's residential addresses which is not open to public inspection. Moreover, the company is prohibited from disclosing, except in limited circumstances, the residential address of a director or former director.[18] Similarly, whilst the company must give to the registrar the information which is contained in both its public and non-public registers, the registrar must omit this 'protected information' from the registrar public register and not otherwise disclose it, except in limited circumstances (Ss.240,242).[19]

The UK law requires a company must, within the period of 14 days from (a) a person becoming or ceasing to be a director, or (b) the occurrence of any change in the particulars contained in its register of directors or its register of directors' residential addresses, give notice to the registrar of the change and of the date on which it occurred. In the same way UK law requires the register must be open to the inspection— (a) of any member of the company without charge, and (b) of any other person on payment of such fee as may be prescribed. If default is made in complying with subsection (1), (2) or (3) or if default is made for 14 days in complying with subsection (4), or if an inspection required under subsection (5) is refused, an offence is committed by— (a) the company, and (b) every officer of the company who is in default. A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 on the standard scale.

In the case of a refusal of inspection of the register, the court may by order compel an immediate inspection of it. Section 243 CA 2006 provides that an officer of a company can apply to Companies House to prevent the disclosure of address to credit reference agencies. The Companies (Disclosure of Address) Regulations 2009 set out the requirements for obtaining a restriction on disclosure of address. The individual making the application must consider that there is a serious risk that he, or a person who lives with him/her, will be subjected to violence or intimidation as a result of the activities of at least one of the companies which s/he is or was a director. An application is made on form SR04, available from Companies House, which must be submitted with a written statement of the grounds for making the application and a fee of £100.

**3.2.3 Removal of Director**

The accountability of the directors depends upon the shareholders' potentials of influencing the policy-decisions of the company. As such, accountability of the

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[18] Sections 163,165,241.

[19] Paul L Davies, Gower and Davies' *Principles of Modern Company Law* (Sweet and Maxwell, 8th ed, 2008) 379 nn 14-10.

directors to the shareholders is obviously enhanced, if shareholders can influence directly the choice of those who sit on the board. Company law does little to enhance shareholders' control over the appointment process, which is regulated predominantly by the company's articles of association. As far as company law is concerned, it would not be a breach of any mandatory rule for the articles to provide that none of the directors should be required to stand for re-election and that the existing directors, again without shareholder sanction, should choose any replacements for directors who resigned or were removed. In other words, shareholders could be wholly written out of the appointment process. In practice, such extreme cases rare, though for reasons that reflect market rather than legal constrains: large companies might find it difficult to sell their shares to institutional investors on basis of such articles. This fact of life is reflected in the CA whose 'best practice' provision is that "all directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.[20]

The UK company law paid close attention to the removal of directors before the expiration of their period of office not only under s.168 Companies Act 2006 (by ordinary resolution at a general meeting with Special Notice of at least 28 days) but in both the 'model articles' and the previously used 'Table A'. In UK, Directors can be removed from office:

1. under sec.168 of Companies Act 2006 by ordinary resolution;
2. under provisions in the articles of association (for example, provisions in the 'Model Articles' if registered from 1.10.2009, or 'Table A' for earlier companies);
3. if disqualified from acting.

**Removal by Ordinary resolution:** Under s.168 of The Companies Act 2006, a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him. Under Section 168 (2) of Companies Act 2006, special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed. This section is not to be taken (a) as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or (b) as derogating from any power to remove a director that may exist apart from this section.[21]

This expressly applies notwithstanding anything to the contrary in any agreement between the company and the director (s.168). The articles may provide additional grounds for the removal of directors, the most common being a request from fellow directors. In comparative terms, this is a very strong provision. It means that the notion of a term of office for a director has little meaning. Subject to the points made

[20] Paul L Davies, Gower and Davies, above n 19, 389 nn 14-18.
[21] *Companies Act 2006*, Section 168 (5).

below, any director can be removed by an ordinary resolution of the general meeting under the following provisions of the Companies Act 2006.

The special notice provisions are set out in Sec.312 of Companies Act 2006. This provides that the resolution is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved. The company must then give notice of the resolution at the same time and in the same manner as it gives notice of the meeting (or, if that is not practicable, must advertise in an appropriate newspaper). The ability to remove a director by ordinary resolution cannot be excluded by the articles.[22] It can in practice be avoided by inserting in the articles a provision usually known as a **Bushell v. Faith clause**. Such a clause confers enhanced voting rights on the director who is being removed (provided he or she is also a shareholder).

Typical wording is: "Every director of the company has the following rights in the event of a poll being duly demanded at any general meeting: (a) if the poll is so demanded on a resolution to remove that director from office, to [3] votes for each share held by her/him; and (b) if the poll is so demanded on a resolution to delete or amend the provisions of this article, to [3] votes for each share held by her/him." However, it is of importance to note that this clause can only protect a director who is also a shareholder in the company, and the above wording will have to be modified to meet the circumstances of each case.

**Removal under the articles:** The Model Articles are the default provisions for companies incorporated on or after 1 October 2009. However, companies are free to adopt, vary or exclude some or all of the Model Articles, subject to the provisions of the 2006 Act. The articles may in fact provides that director shall be appointed for three years at a time and things may be carefully arranged so that no more than one third of the board comes up for election in any one year. But these provisions cannot be relied upon because the shareholders may intervene at any time to secure removal. It means also that there is little point in the board securing the appointment of a director over the vigorous opposition of the shareholders, since this may simply provoke them to remove those of whom they disapprove.

Article 18 of Model Articles provide that a person ceases to be a director as soon as-

a) that person ceases to be a director by virtue of any provision of the Companies Act 2006 or is prohibited from being a director by law;
b) a bankruptcy order is made against that person;
c) a composition is made with that person's creditors generally in satisfaction of that person's debts;
d) a registered medical practitioner who is treating that person gives a written opinion to the company stating that that person has become physically or mentally incapable of acting as a director and may remain so for more than three months;

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[22] Ibid. s 168(1).

e) by reason of that person's mental health, a court makes an order which wholly or partly prevents that person from personally exercising any powers or rights which that person would otherwise have;
f) notification is received by the company from the director that the director is resigning from office, and such resignation has taken effect in accordance with its terms.

Table A, article 81 provides that the office of a director shall be vacated if

a) he ceases to be a director by virtue of any provision of the Act or he becomes prohibited by law from being a director; or
b) (b) he becomes bankrupt or makes any arrangement or composition with his creditors generally; or
c) he is, or may be, suffering from mental disorder and either -
   (i) he is admitted to hospital in pursuance of an application for admission or treatment under the Mental Health Act 1983 or, in Scotland, an application for admission under the Mental Health (Scotland) Act 1960, or
   (ii) an order is made by a court having jurisdiction (whether in the United Kingdom or elsewhere) in matters concerning mental disorder for his detention or for the appointment of a receiver, curator bonis or other person to exercise powers with respect to his property or affairs; or
d) he resigns his office by notice to the company; or
e) he shall for more than six consecutive months have been absent without permission of the directors from meetings of the directors held during that period and the directors resolve that his office be vacated.

Other grounds could be added to the articles and/or provisions inserted to make it easier to remove a director.

**Disqualification:** Under the Company Directors Disqualification Act 1986, a court may make a disqualification order prohibiting the person from acting as a director of a company, or being involved in the management of any company, for the period of the disqualification. It is of importance to not that if the director is removed from office as a director, this will not usually affect the director's position (if he/she has one) as a shareholder in the company. This is often a relevant consideration in private companies, where often a director is also a shareholder. In most circumstances the only solution is for there to be negotiations for the purchase of the ex-directors shares.

In some circumstances, the removal of the director may be grounds for petition under Companies Act 2006, sec994 (the unfairly prejudicial conduct provision) under which the court may order the remaining shareholders (or indeed, The Company itself) to buy the ex-directors shares. Some companies' articles contain a clause that a shareholder who ceases to be a director is deemed to have given the company a transfer notice in respect of his or her shares, so that the shares can, in

effect, be compulsorily acquired. There are two qualifications to the powers contained in s.168 which need to be noted: the courts has authorized provisions in the articles which provide that indirect way around the section, at least in relation to private companies; and the section itself preserves certain rights for directors upon removal, notably their right to compensation for breach of contract.

**Director's right on termination:** The successful operation of the section requires some pretty stringent conditions to be met, even where the articles contain no provisions as to weighted voting rights. Special notice has to be given of any resolution to remove a director (and to appoint someone else instead, if that is proposed), this means the proposer must give 28 days' notice to the company of the intention to propose the resolution.[23] The company must supply a copy to the director, who is entitled to be heard at the meeting.[24] Further, the director may require the company to circulate any representations which that person whishes to make (s.169 (3). The object of these restrictions is to prevent a director from being deprived of an office of profit on a snap vote and without having had a full opportunity of stating the contrary case.

Section 168 (5) (a) contains a more serious restraint on the members' powers of dismissal which provides that the section shall not deprive a director of any claim for compensation or damages payable in respect of the termination. This provision applies to both the termination of directorship as such and of "any appointment terminating with that as director". Thus compensation for termination of the executive director's service contract is included where, as is invariably the case, both directorship and service contract are terminated at the same time. In fact, the continuation of the service contract is often made contradictional on the holding of the directorship, so that the service the service contract terminates automatically upon cessation of the directorship.[25]

**Resignation of directors:** Unless there is a provision in the director's service contract requiring the director to give a period of notice, a director may resign at any time by notice to the company. Ideally, the notice of resignation should be in writing, but this is not specifically required. Both Table A and the Model Articles contain provisions regarding resignation of directors. On receipt of the resignation, the company must: (1) notify Companies House on form TM01 (2) record the resignation in its register of directors.

The Model Articles (for companies registered from 1.10.2009) or Table A (for companies registered before 1.10.2009) have specific provisions regarding the resignation of directors. Table A and the model articles both stipulate that the board should receive "notification". It does not state that the notification needs to be in writing, but this would support the entry made in the register of directors (and of members if shares are then sold or transferred).

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[23] Ibid. Section 168 (2), 312.
[24] Ibid. S. 169 (1),(2).
[25] Paul L Davies, Gower and Davies, above n 19, 391-392 nn 14-19.

**4. Divergences and convergences between the Law of Bangladesh and the UK**

The major point of the divergence and convergences between the law of the UK and Bangladesh can be summed up as follows:

- In case of minimum number of directors, the company law of Bangladesh requires at least three directors for both public company and any private company which is subsidiary of a public company. It also requires two directors for private company. But the law of UK requires two directors for public company and one director for private company. In addition, UK law mentions that a company must have at least one director who is a natural person.
- There is no statutory provision regarding maximum number of directors. The laws of both the countries converge here.
- Under the Bangladesh law, only natural person can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director. Though UK law requires at least one director who is a natural person but the significant difference is that a company or corporation in the UK may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director.
- Under both the law of UK and Bangladesh, every person proposed as a candidate for the office of the director is required to signify the consent by writing for acting as a director.
- In respect of the minimum age requirement, the UK law states that to be a director one must be at least 16 years of age. On the other hand, the Companies Act of Bangladesh requires that he will not be a minor. However, both laws do not mention the maximum age limit of Directors.
- The provisions relating to register of directors under both laws are almost similar but only difference is that the UK law categorically states the details particulars what to be mentioned in the form of register and provides separate register as public and private register. In case of inspection, the company law of Bangladesh mentions minimum time frame of when the register may be open. It also qualifies the right to inspection by making it subject to provision of "reasonable restriction." On the other hand, the UK law is silent about it and states that the public register must be open to the inspection.
- The UK law categorically states the details particulars that are to be mentioned in the form of register[26] but the law of Bangladesh does not mention so.

[26] *Companies Act 2006*, Sections 163,164,166.

- In case of removal of directors, Section 106 of the Companies Act 1994 does not apply to contractual appointees, including those nominated managing agents, banks under a loan agreement etc. By contrast, the UK law applies to the all kind of directors as Section 168 states that ".....notwithstanding anything in any agreement between it and him."
- Under the law of Bangladesh, director can be removed by extraordinary resolution but in the UK, any director can be removed by ordinary resolution.
- The UK law expressly states that in case of removal of a director under this section (s.168) or to appoint somebody instead of a director so removed at the meeting at which he is removed, a special notice is required. In this respect, the Companies Act of Bangladesh requires extra ordinary resolution, and thus it impliedly requires a special notice to be served to the members not less than fourteen days before the meeting.
- The law of Bangladesh prohibits re-appointing a removed director. The UK law says nothing about it.
- In section 169, the UK law says about director's right to protest against removal and its procedure. But in Bangladesh, the law does not provide any specific provision relating to director's right to protest against removal, though such right may be construed by implication.
- The company law of Bangladesh implies a condition that managing director not to be appointed for more than five years at a time. The UK law says nothing about it.

**5. Recommendation**

- Recommendation 1: The Companies Act should provide specific age limit (both minimum and maximum) for directors.
- Recommendation 2: Like that of the Companies Act of the UK, the law of Bangladesh should provide provision by allowing the artificial legal person (co-existing with the presence of natural person) to be the director of the company.
- Recommendation 3: The Companies Act of Bangladesh should be specific on the minimum and maximum number of directors in case of both public and private companies. It is recommended that like UK, the law of Bangladesh should require minimum two directors for public company and one director for private company.
- Recommendation 4: Like UK, the Bangladesh law should mention categorically the detail particulars of directors that are to be mentioned in the register.
- Recommendation 5: The UK law provides for both public and private

register. Usually, public register is open for all and private register (for example- residential address of directors) may be disclosed in any special circumstances. Like UK law, the Companies Act of Bangladesh should provide provisions for both public and private register. In this respect, it is recommended that the law of Bangladesh should repeal the provision of 'reasonable restriction'.

- Recommendation 7: In the case of a refusal of inspection of the register, any contravention to law results in a fine not exceeding Tk. 1,000. These fines cannot be considered to be a sufficient deterrent to such conflicts of interest. So it is recommended to increase the amount of such money.
- Recommendation 8: Like the law of UK, the Company law of Bangladesh should provide a provision for removing the directors by ordinary resolution. Like UK law[27], it should also provide provision so that company can remove all kind of directors including contractual directors.
- Recommendation 9: the Companies Act of Bangladesh should provide specific provision on the Directors' right on termination.
- Recommendation 10: The Law of Bangladesh should provide specific provision regarding resignation of directors.
- Recommendation 11: There is a difference between the provision of article 87 and that of section 106: it applies to all directors while section 106 which deals with the removal of directors speaks only of removal of shareholder directors by an extraordinary resolution. It is obvious that the draftsmen, while drafting the new Act, omitted to make corresponding changes in the Schedule 1 Regulation. Neither the article nor the section refers to the filling up of a casual vacancy. It is not clear however whether this means that the members in general meeting can appoint an additional director whether or not that has the effect of filling up a casual vacancy. Section 91 (1) (b) is clear in its terms that the members may elect a director from among themselves in a general meeting.

## 6. Conclusion

In the management and administration of a company, the directors or board of directors are found to occupy a significant position. It appears that the role of the boards of directors and the directors individually must play a key role to strengthen and provide support for better corporate governance practices. Because of such gravity of importance of the office of the directors, the company law should usually make clear and detailed provisions relating to the appointment and removal of the directors, accommodating all the well-kwon principles of corporate governance. Seen in this light, the Companies Act of both Bangladesh and UK comes to satisfy the standard of providing procedural and substantive rules relating to the office of the directors in details. However, a comparative look at the respective provision of

[27] Ibid. S.168 (1).

the Companies Act of these two countries shows that there are some notable differences, albeit they converge in the point of fundamental rules concerning the appointment and removal of the directors.

In both Bangladesh and UK, directors may be appointed under an authority in the memorandum or articles. It is possible to give that authority to one or more members or to someone who is not a member, or appointed by the board while filling up a casual vacancy or appointed by the company in general meeting. The term of office is normally fixed by the memorandum or articles. This may provide for the appointment of named individuals with provision to cover the eventuality of the appointee's death or onset of legal incapacity occurring while in office. Directors have to file written consent for acting as such. Subsequent directors can be appointed by the company in general meeting in the exercise of their inherent power to direct the control of the company, unless that power is excluded by the contract embodied in the articles, either expressly or by clear implication.[28] In respect of the minimum age requirement, the UK law states that to be a director one must be at least 16 years of age. On the other hand, the Companies Act of Bangladesh requires that he will not be a minor. However, both laws do not mention the maximum age limit of Directors.

In case of minimum number of directors, the company law of Bangladesh requires at least three directors for both public company and any private company which is subsidiary of a public company. It also requires two directors for private company. But the law of UK requires two directors for public company and one director for private company. In addition, UK law mentions that a company must have at least one director who is a natural person. It thus appears that under the Bangladesh law, only natural person can be appointed as a Director; a corporate, association, firm or other body with artificial legal personality cannot be appointed as a Director. Though UK law requires at least one director who is a natural person but the significant difference is that a company or corporation in the UK may be appointed as a director of another company. The only limitation is that since the 1st October 2008 all companies must have at least one natural person as a director. However, there is no statutory provision regarding maximum number of directors. The laws of both the countries converge here. The provisions relating to register of directors under both laws are almost similar but only difference is that the UK law categorically states the details particulars what to be mentioned in the form of register and provides separate register as public and private register. In case of

[28] In Bangladesh, however, the articles typically make provision for the appointment of directors. Articles commonly provide for the power to appoint directors to be exercised by the general meeting. An article empowering the directors to appoint additional directors does not necessarily deprive the general meeting of its inherent power to appoint additional directors up to the maximum number prescribed by the articles, sometimes with the qualification that the board may make appointments to fill casual vacancies, or as appointments of additional directors up to the maximum allowed by the articles.

inspection, the company law of Bangladesh mentions minimum time frame of when the register may be open. It also qualifies the right to inspection by making it subject to provision of "reasonable restriction." On the other hand, the UK law is silent about it and states that the public register must be open to the inspection. However, the UK law categorically states the details particulars that are to be mentioned in the form of register[29] but the law of Bangladesh does not mention so. Under the law of Bangladesh, director can be removed by extraordinary resolution but in the UK, any director can be removed by ordinary resolution.

Compared to the Companies Act of Bangladesh, the company law of UK seems to offer a more functional regime of regulating the appointment and removal of the directors. In this respect, it is however of importance to note that the Companies Act of Bangladesh has been passed in nearly a couple of decades back and there has been no remarkable changes affecting the statuary regime of this Act, while the Companies Act of the UK has been enacted in 2006, and is being constantly revisited. It is thus arguable that the respective provisions of the Companies Act of 1994 relating to the appointment and removal of the directors should be reformed in the light of the recommendation as offered in the preceding part of this chapter.

[29] Sections 163.164,166 of CA 2006.

# Company Members' Decision Making In Bangladesh And The United Kingdom: Convergence And Diversity

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## 1. Introduction

The issue of members' right in the decision making roughly relates to the traditional theoretical conception of the member's ownership in the company. In the context of corporate governance, it is generally believed that the members being the owner of the company should be allowed to hold the ultimate control of the company in their hands. To some extent, this belief is reflected in the fabric of the company law which requires member's approval for basic changes to the constitutional structure of the company, and which may give members the right to control the composition of the company's board of directors through a power to elect or remove them. The provisions of the Companies Acts of both the United Kingdom (UK) and Bangladesh regarding the member's right of the decision making maintain a clear resemblance with this belief. In fact, the Company Laws of both the UK and Bangladesh are founded upon the concerns of striking an appropriate balance between, on the one hand, allowing directors to manage the business of the company and, on the other, retaining for members a degree of control over the company that is appropriate in light of their ownership of it. This can be exemplified from the fact that the Companies Act of both the UK and Bangladesh recognizes that the director has power to call meeting of the company at any time in one hand, and similarly, one-tenth of the holders of the issued share capital has right to require the directors to call a meeting of the company on the other.

Given this, the Acts of these two countries converge on some common points regarding the procedure and requirement of decision making on the company's affairs. Thus, under both the jurisdictions, special resolution is required for the alteration of the articles of the company. And the members of the company shall not be bound by the alteration of articles regarding the

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liability. If a corporation is a member of a company, it is common to both the countries that by resolution the directors may authorize a person or persons to act as its representative or representatives at any meeting of the company. Similarly, every member shall be entitled to receive a notice of the meeting of a company with the statement of the business to be transacted at the meeting. But the accidental omission to give notice to or the non-receipt of notice by any members shall not invalidate the proceedings at any meeting. Despite having such convergence, the Companies Acts of the UK and Bangladesh differs on many places. Unlike the UK laws, the company laws of Bangladesh contain no provision that when the net assets of a public company are half or less of its called-up share capital, the directors must call a general meeting of the company to consider whether any steps should be taken to deal with the situation. Again, Bangladesh law does not should provide provision for amending articles of the company by agreement of all members of the company, or by order of the court or other authority having power to alter the company's articles. Maybe, the gravity of divergence on the other points is only marginal. Having said this in the background on making a comparative study between the United Kingdom and Bangladesh, the present article is, however, designed to show all the points of divergence and convergence between the provisions of the Companies Act regarding member's decision making.

## 2. General Principles of Members' Decision Making and Restrictions

Under the general law of company, the important voting rights are granted to members. This voting rights works as a fundamental tool of member's decision making. Roughly put, members of public companies have more extensive voting rights than members of proprietary or private companies. And members of listed companies have more extensive voting rights than members of unlisted companies. However, members' voting rights are limited to the matters expressly provided for in the Companies Acts. Generally, the members of a company may have a right to vote on some decisions relating to the structure or constitution of the company, including adoption and amendment of memorandum and articles of the company, change of company name and type, certain transaction affecting share capital, appointment and removal of directors, certain part of the directors' remuneration and benefits, the appointment and removal of the company's auditors, certain transaction by or with the company, members' voluntary winding up etc. Generally, corporate actions that vary or cancel rights attaching to a class of shares require the approval of the members whose rights are affected. The power to issue new shares in the company belongs to

the board of directors. Generally member consent is not required for the issue of new shares.

Members may control the composition of the board of directors by exercising their power of electing and removing directors or a power to remove directors or a combination of both. However, the existence of this power depends on the type of company and the terms of its internal governance rules. Generally, the board of directors arranges for members' meeting to be held. But a specified minimum number of members can either request the directors to call a meeting or convene a meeting themselves. The general principle of law requires that meetings must be called for proper purposes and must be held at a reasonable time and place. The board of directors may convene general and class meeting when those meetings are necessary for the administration of the company's affairs. The power to do so is a part of the board's general power of management under the internal governance rules and at common law.

It is also a general rule that the person who convenes the meeting will determine its agenda. But the agenda cannot include resolution that the general meeting has no power to pass, such as resolution relating to matters solely within the powers of the board. A key principle of the law governing meetings is that members should receive adequate notice of the matters to be considered at the meeting. The law also imposes procedural requirements relating to the conduct of meeting such as quorum requirements, requirements for the conduct of meeting via technology, proxy rules and rules about who is entitled to speak at a meeting. A meeting is to be run by a chairperson who can control the conduct of the meeting.

There is also general law authority for the proposition that members of a company are bound by decisions on which they all agree even where the formalities required for a general meeting have not been complied with. And it is based on doctrine of estoppels. For well over a century, the courts have imposed a general restriction on the voting power of the majority. This restriction is called the equitable limitation on majority voting power, which restricts action that is beyond the authorized or legal powers given to the majority. Members have a number of personal rights and these rights cannot be taken away by majority members. Certain action of the majority may be invalid if they are inconsistent with statutory provisions that operate to protect interest of minority shareholders. In certain circumstances, members who have an interest in the outcome of a decision that is different from that of the members generally are prevented from voting on that decision.

## 3. Members' Decision making and Restrictions under the Law of Bangladesh and UK

### 3. 1. Members' Decision making and Restrictions under the Law of Bangladesh: The Companies Act, 1994

**Structural or Constitutional Decision**

(i) **Adopting and amending the memorandum and articles of the company:** According to section 5 of the Companies Act 1994, some persons have to subscribe their names to a memorandum of association. Under section 12, a special resolution is required for the alteration of the provision of the memorandum with respect to the object of the company. The alteration of the memorandum shall not have any effect until it is confirmed by the court. Before confirming the alteration, the court must be satisfied that sufficient notice has been given to any persons or class of persons whose interest would be affected by such alteration.

According to section 20, a special resolution is required for the alteration, exclusion or addition of any provision in the articles of the company. But such alteration must be subject to the provisions contained in the Act and memorandum of the company.

(ii) **Changing the Company's Name or Type:** Under section 11, any company may change its name by a special resolution and subject to the written approval of the registrar. The change of the name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company.

According to section 231, if a company alters its article so as to exclude the provisions relating to private company and if it has at least seven members, it shall be treated to be public company from the date of alteration. But section 232 requires that for the conversion of a public company, having not more than fifty members, into private one, the provisions, relating to the public company, must be altered by passing a special resolution so as to include the provisions relating to the private company.

(iii) **Varying Class Rights:** Where the share capital of a company is divided into different classes of shares, section-71 protects the rights of holders of those classes of shares by requiring that for variation in their rights there should be a provision in the memorandum or articles of association authorizing the variation of the rights attached to any class of shares and these should be sanctioned by a special majority of the shareholders of that class.

(iv) Any number of dissenting members holding at least ten percent of the issued shares of that class may, within fourteen days of the resolution, apply to the court to have the variation cancelled. Where any such application is made, the variation shall not have effect until it is then confirmed by the court.

(v) **Approving Certain Corporate Action Affecting Share Capital:** According to section 53, a company, limited by shares, has power, if so authorized by the article, to increase its share capital by the issue of new shares of such amount as it thinks expedient. This power of the company must be exercised in its general meetings.

Generally a company limited by shares has no power to buy its own shares or the shares of the public company of which it is a subsidiary company. Under section-59, a company, having share capital, may reduce its share capital by its special resolution and subject to the confirmation of the court on petition.
Section 58 states that a public company limited by shares shall not give, by way of loan, guarantee, and the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase by any person of the shares in the company.

If so authorized by the articles, under section 53 the company has power to consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares, and also to sub-divide its shares into shares of small amount than is fixed by the memorandum. But such power of company must be exercised in the general meeting.

**Selecting the Board and the Auditor**

(i) Appointing **and removing directors:** Only a natural person can be appointed as directors of a company. According to section 91, the subscribers of the memorandum shall be regarded to be directors of the company until the first directors are appointed. The members of the company shall elect the directors from among their number in the general meeting. Under section 101, the members of the company may, by passing a resolution in general meeting, authorize the board of directors to appoint alternate directors.

Section 106 requires that an extraordinary resolution must be passed for the removal of a share holder director of any company before expiration of his period of office. But the company may appoint another person in his stead by passing an ordinary resolution.

(ii) **Approving directors' remuneration and benefits:** Under section 292, a company can appoint in general meeting one or more liquidators for the purpose of winding up the affairs and distributing the assets of the company and fix their remuneration.

According to section 119, the company shall specify the remuneration of the managing agent in the document of the appointment. And any stipulation for

remuneration additional to such remuneration shall not be binding on the company until sanctioned by the special resolution of the company.

According to section 107, the directors of a company or of a subsidiary company of a public company cannot sell or dispose of the undertaking of the company and remit any debt by a director without the consent of the company in general meeting. On the other hand, section 104 states that director cannot hold office of profit under the company without the consent of the company in general meeting.

According to section 210, where the auditors are appointed by the board or the government, the remuneration shall be fixed by the board or the government respectively. And in all other cases, the remuneration of the auditors shall be determined by the company in general meeting.

(iii) **Appointing and removing auditors:** Under section 210, the board of directors shall appoint the first auditors within the one month of the registration of the company and if the board fails to so appoint, the company may appoint the first auditors in the general meeting. Then every company shall, at each annual general meeting, appoint an auditor or auditors.

The company may, at a general meeting, remove any first auditor appointed by the board and appoint in his place another person who is nominated by any member of the company. On the other hand, any auditor may be removed from his office before the expiration of his term only by a special resolution of the company in the general meeting.

### Vetoing Certain Related Party Transactions

According to section 103, a company cannot make loan or give any guarantee or provide any security of a loan made by a third party to any director, firm of the director, private company of which the director of the lending company is the director or member or any public company whose managing agent, manager or director is accustomed to act in according with the direction of the director of the lending company, unless it is sanctioned by board of directors and approved by the members in the general meeting.

Under section 132, the directors, interested in the contract for the appointment of a manager or managing agent of the company, shall send an abstract of the terms of such contract and a memorandum clearly indicating the nature of the interest of them in such contract to every member of the company.

Section 130 requires the directors shall, directly or indirectly interested in any contract or arrangement entered into by the company, disclose the nature of his interest at the meeting of the directors at which the contract or

arrangement is determined. Section 131 prohibits such interested directors from voting on such contract or arrangement.

Under section 133, where the company is an undisclosed principal in any contract entered into by any manager or other agent of the company, such manager or agent shall make a memorandum of the terms of the contract specifying the person with whom it is made, and deliver it to the registered office of the company and directors.

**Convening Meetings**

(i) **Who can request a members' meeting?** Section-81 provides that every company must hold a general meeting called the annual general meeting every year but more than fifteen months shall not elapse between the meetings. A company must hold the first annual general meeting within eighteen months of its incorporation. But the register has power to extend the time for holding such meetings if an application is made within one month from the date of expiry of the period specified for holding such meeting.

But if a company fails to hold its annual general meeting within the prescribed time, any member of the company may apply to the court and the court may call or direct the calling of a general meeting of the company and give such ancillary or consequential direction as the Court thinks expedient in relation to the calling, holding and conducting of the meeting.

Section 83 provides that any contributory (present and past member liable to contribute to the assets of the company) may apply to the court to wound up a public company in default of holding statutory meeting and filing statutory report. And instead of directing the winding up company, the court may give directions for the presentation of the report or for holding the meeting or make such order as may be just.

According to section 83, every public company limited by shares and every company limited by guarantee and having a share capital shall, within a period of not less than one month and not more than six months from the date at which the company is entitled to commence business, hold a statutory meeting (general meeting of the members of the company).

Under section 84, one-tenth of shareholders of a company having share-capital or one-tenth of voting power of the company having no share-capital may send a requisition, stating the object of the meeting, to the directors of the company to hold an extra-ordinary meeting of the company. If the directors fail to hold the meeting, the majority of requisitionists in value may call the meeting. And the requisitionists shall be entitled to costs incurred therein.

(ii) **Who decides the agenda?** Under section 83, the members of the public company present at the meeting shall be at liberty to discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not. But a resolution cannot be passed of which notice has not been given in accordance with the provisions of this Act. Section 84 requires that, the requisitionists of the extraordinary meeting must state the object of the meeting and the requisition may consist of several documents.

(iii) **What are notice requirements?** According to section 85, an annual general meeting may be called by fourteen days' notice in writing, and a meeting other than an annual general meeting or a meeting for the passing of a special resolution may be called by twenty one day's notice in writing. But an annual general meeting may be held on shorter notice with the written consent of all the members entitled to attend and vote thereat. And any other meeting may be held on shorter notice with the written consent of 95% of the shareholders or voting power of the company.

Under section 85, every member shall be entitled to receive a notice of the meeting of a company with the statement of the business to be transacted at the meeting. But the accidental omission to give notice or the non-receipt of notice by any members shall not invalidate the proceedings at any meeting.

## Conducting Meetings

(i) **What is the quorum?** According to section-85, the case of a private company whose number of members does not exceed six, two members and if such number exceeds six, three members, and in the case of any other company, five members personally present shall be a quorum.

(ii) **Who are proxies?** According to Schedule-I and seseiton-85 of the Company Act, 1994, the instrument appointing a proxy shall be in writing under the hand of the appointer or his attorney duly authorized in writing or if the appointer is a body corporate under the common seal or under the hand of an officer or attorney so authorized.

If there are no contrary provisions in the articles, a proxy need not be a member of the company. The appointment of proxy is not allowed in respect of a company limited by guarantee. Proxies must be deposited at least 48 hours before the meeting. The board of directors may send out proxy forms in their own favor with notice of the meeting and for these to be stamped and addressed at the company's expense.

(iii) **Representative of corporate members:** According to section-86, a company which is a member of another company may, by resolution of the directors, authorize any of its official or any other person to act as its

representative at any meeting of that other company, and the person so authorized shall be entitled to exercise the same powers on behalf of the company which he represents as if he were an individual shareholder of that other company.

**What Is the Chairperson's Role?**

According to section 85, if there is no contrary provision in the articles of the company, the members present at a meeting may elect any member to be chairman thereof. The chairman of the meeting shall be entitled to demand a poll. Under section 87, where a poll is demanded in respect of any extraordinary or special resolution, the poll may, in according with the articles, be taken in such manner as the chairman may direct. If the chairman so direct, the poll shall be taken at the meeting at which it is demanded.

**Why might a meeting be adjourned?**

Section 83 provides that the meeting may adjourn from time to time and any resolution, of which notice has been given whether before or after the former meeting, may be passed at such adjourned meeting. The adjourned meeting shall have the same powers as an original meeting. if there is absence of quorum, the meeting may be adjourn.

According to section 298, 'if the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors held in pursuance of subsection (1) shall have effect as if it had been passed immediately after the passing of the resolution for winding of the company.'

**Members' voluntary winding up**

In respect of members' voluntary winding up, under section-292, the company shall in general meeting appoint liquidators for winding up the affairs and distributing the assets of the company and may fix their remuneration.

Section 295 requires the liquidator to call a general meeting of the company at the end of the first year of the liquidation and lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year and a statement of the position of liquidation.

**Members' Voting**

**The voting rights of the members:** According to section 85, every member of the company having share capital shall have one vote in respect of each

share and in any other case every member shall have one vote. And on a poll, votes may be given either personally or by proxy.

Under section-85, five members present in person or by proxy, or the chairman of the meeting, or any member or members holding not less than one-tenth of the issued capital which carries voting rights shall be entitled to demand a poll. But in the case of a private company, if not more than seven members are personally present, one member, and if more than seven members are personally present, two members, shall be entitled to demand a poll.

**What are an ordinary resolution and a special resolution?**

According to section-87, for passing extra-ordinary or special resolution, there must be three-fourth majority of members having voting rights. At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll may be demanded. Twenty one days' notice of the meeting, in which the special resolution is to be passed, has to be duly given specifying the intention.

**Restrictions on Members' Decision Making Right in Bangladesh**

(i) **Equitable restriction on majority voting power:** There is an equitable restriction on the voting power of the majority. It restricts action which is beyond the authorized and legal power of the majority given by law. For example, fraud on minority is absolutely prohibited. Majority may take action in breach of equitable limitation but not dishonestly.

(ii) **Restriction in case of alteration of the constitution:** By an ordinary resolution, a company cannot alter its memorandum and articles of association. A special resolution must be passed for such alteration. Section 12 provides that when provision of memorandum is altered by majority, confirmation by court is pre-condition for its' legal effect.

(iii) **Procedural restriction:** Proper notice for the meeting, quorum, and proper conduct of the meeting are the procedural requirements for holding meeting of a company. All of these requirements apply to all meetings of members and must be complied with.

(iv) **Creditors' *rights to objection*:** The members of a company may approve, by a special resolution, the reduction of its share capital. The majority may only approve a reduction of share capital, if it does not materially prejudice the ability of the company to pay its' creditors and it is also fair and reasonable to the company's members as a whole. Section 62 gives the creditors a right to object to the reduction of share capital. Under section 64, court may confirm the reduction only when it is satisfied that consent of the

creditors entitled to object is obtained or his debt is discharged or has been secured or determined.

(v) **Special procedure in removal of directors and auditor:** The members of the company has right to vote for the removal of the directors and auditors from their offices. But there is special procedure which must be followed before removing such directors and auditors. For example, according to sections 106 and 210, a director or auditor cannot be removed from his office by an ordinary resolution.

(vi) **Special procedure in alteration of class rights:** A special procedure is provided for the alteration of the class right. This procedure must be observed for giving effect to the consent of the majority. For example, section 71 provides that if there is no provision in the articles or memorandum authorizing the alteration of class rights and sanctioned by the specified majority of that class of share holders, a company cannot change the class rights.

(vii) **Protection of minority:** Provisions regarding the protection of minority' interests have been provided in the laws. So the decision of the majority must not infringe the interests of the minority so far as protected by the laws. Section 233 provides that where the affairs of the company or exercise of power of directors or action of the company prejudicially affect minority, the minority may apply to the court to cancel or modify any resolution or transaction or for a direction to regulate the conduct of the affairs of the company.

(viii) **Winding up on just and equitable ground:** The minority members may go the court for an order of winding up of a company on just and equitable ground. Section 241 provides that a company may be wound up by the court, if the court is of opinion that it is just and equitable that the company should be wound up.

(ix) **Contractual obligation of the company and members:** According to section-22, when the memorandum and articles of association are registered, they bind both members and the company to the same extent. So company cannot do anything which is inconsistent with the provision of the articles, memorandum and the Act.

### 3. 2. Members' Decision making and Restrictions under the Law of the UK: The Companies Act, 2006

#### Structural or Constitutional Decision

(i) **Adopting and amending the internal governance rules:** Section 21 provides that a special resolution is required for the amendment of the articles of a company. Sometimes a company's article may contain provision to the effect that special provision of the articles may be amended

or repealed only if the conditions are met. But section 22 provides that the provision of the articles may be amended by agreement of all members of the company, or by order of the court or other authority having power to alter the company's articles.

Section 25 provides that a member of a company is not bound by an alteration to its articles after the date on which he became a member, if the alteration requires him to take or subscribe for more shares than the number held by him at the date of the alteration, or in any way increases his liability as at that date to contribute to the company's share capital or otherwise to pay money to the company.

Section 7 provides that a company is formed when one or more persons subscribe his or their names to a memorandum of association and comply with the requirement under the company Act.

According to section 33, the provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.

(ii) **Changing the company's name or type:** According to section-77, the name of a company may be changed by a special resolution or according to the provision of the articles of association. Section 81 provides that the change does not affect any rights or obligations of the company or render defective any legal proceedings by or against it.

(iii) **Varying class rights:** According to section 630, the rights of a class of shareholders of a company, having share capital, may be varied in according with the provision of the articles or with the consent of holders of at least three-quarter in nominal value of the issued share of that class or by a special resolution passed at a special general meeting of the holders of that class sanctioning the variation.

According to section-631, in case of a company having no share capital, the rights of a class of members may be varied in according to the provision of the articles, or the written consent or resolution of members of that class.

Under section 633 and 634, fifteen percent of the non-consenting members or shareholders may apply to the court to have the variation cancelled. The decision of the court on such matter shall be final.

**Approving Certain Corporate Action Affecting Share Capital**

According to section-618, a company limited by shares may subdivide its shares into shares of a smaller nominal amount or consolidate and divide its

share capital into shares of a larger nominal amount than its existing shares. The company can exercise this power, only if it is so authorized by a resolution passed by members of the company. But the articles of the company may regulate this power.

Under section-620, a company limited by shares may reconvert its stock into paid-up shares of any nominal value on passing a resolution by the members of the company. Section 622 authorizes such company to redenominate its share capital or any class of share capital by a resolution.

Section 626 provides that a limited company that passes a resolution redenominating its shares may, for the purpose of adjusting the nominal values of the redenominated shares to obtain values that are more suitable, reduce its share capital by passing a special resolution within three months of the resolution affecting the redomination.

According to section-641, a company limited by shares may reduce its share capital, in case of a private company by special resolution supported by a solvency statement and in any case by a special resolution confirmed by the court. But section 658 provides that a company cannot buy its own shares except in accordance with the Act.

According to section 656, when the net assets of a public company are half or less of its called-up share capital, the directors must call a general meeting of the company to consider whether any steps should be taken to deal with the situation.

**Selecting the Board and the Auditor**

(i) **Appointing and removing directors:** According to section-160- 'At a general meeting of a public company a motion for the appointment of two or more persons as directors of the company by a single resolution must not be made unless a resolution that it should be so made has first been agreed to by the meeting without any vote being given against it.'

According to section 168, 169, a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office. Special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed. Where the director to be removed makes any representation, the notice shall inform the members of the company about it.

(ii) **Approving directors' remuneration and benefits:** According section-412, the Secretary of State may make provision by regulations requiring information to be given in notes to a company's annual accounts about

directors' remuneration. The director of the company has a duty to give notice to the company of such matters relating to himself as may be necessary for the purposes of the regulations.

The appropriate level of remuneration for the directors is to be determined by reference to objective commercial criteria in order to see whether the remuneration was within the bracket that executives carrying that sort of responsibility and discharging the sort of duties (respondent) was would expect to receive.[1]

(iii) **Appointing and removing auditors:** According to section 485, the members of a private company may appoint auditor by an ordinary resolution for each financial year of the company. But if the private company fails to appoint auditor, the Secretary of State may appoint auditors under section 486. On the expiration of the office of the auditor, he may be reappointed.

According to section-510 and 511, the members of a company may remove an auditor from office at any time by ordinary resolution at a meeting of the company. Special notice is required for a resolution at a general meeting of a company removing an auditor from office.

**Vetoing Certain Related Party Transactions**

According to sections 188 and 189, a company may not agree to the provision in the director's long term service contract unless it has been approved by the resolution of the members of the company. Any provision, agreed in contravention of the requirement of the approval of the members, is void.

According to section-190, a company may not enter into an arrangement under which a director of the company or of its holding company, or a person connected with such a director, acquires from the company, or the company acquires a substantial non-cash asset from such a director or a person so connected, unless the arrangement has been approved by a resolution of the members of the company or is conditional on such approval being obtained. Sections 197, 198 and 200 provides that a company may not make a loan or a quasi-loan to a director of the company or of its holding company, or give a guarantee or provide security in connection with a loan made by any person to such a director or to a person connected with the directors unless the transaction has been approved by a resolution of the members of the company.

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[1] Paul L Davies, *Gower and Davies Principles of Modern Company Law* (Sweet and Maxwell, 8th ed, 2008) 697 nn .

## Convening Meetings

(i) **Who can request a members' meeting?** Generally the board may convene a meeting of the members of a private or public company at any time. But the directors must convene a meeting on the requisition of holders of not less than one-tenth of the paid-up capital carrying voting rights. But the fraction is 5% in case of a private company which has not held a meeting convened by the members under their statutory powers within the previous twelve months.[2]

If the directors fails to convene a meeting within 21 days of the deposit of the requisition, the meeting to be held within 28 days of the notice convening it, the requisitionists or any of them representing more than half of the total voting rights of all of them, may themselves convene the meeting and their reasonable expenses must be paid by the company and recovered from fees or remuneration payable to the defaulting directors.[3]

If it is impracticable, for any reason, to call a meeting in any manner in which meetings of that company may be called or to conduct the meeting in manner prescribed by the articles or the Act, the court may, on the application of any member entitled to vote at the meeting, order a meeting to be called, held and conducted in any manner as the court thinks fit.[4]

(ii) **Who decides the agenda?** In fact, it is normal for these matters to be taken at the annual general meeting and for the shareholders to have an opportunity to question the directors generally on the company's business and financial position. And it is result of practice rather than of law.[5]

(iii) **What are notice requirements?** Generally, though the meeting is convened by the board, the main protection for the shareholders in such a case is information by way of notice. An annual general meeting of a public company must be called by a notice of at least 21 days. And the general meeting of a private company and other meeting of a public company must be called by notice of at least 14 days. A meeting called on shorter notice may be deemed to be duly convened if so agreed by all members entitled to attend and vote.[6]

Under section 312, where any provision of the Act requires special notice of a resolution, the resolution is ineffective unless notice of the intention to move it has been given to the company at least 28 days before the meeting.[7]

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[2] *Companies Act 2006,* s 307 (UK) ; Ibid. 442 nn 15-29.
[3] Ibid 443 nn 15-30.
[4] Ibid.
[5] Ibid 441 nn 15-28.
[6] Ibid 450 nn .
[7] Ibid 452 nn.

The notice of the meeting must give the date, time, and place of the meeting, a statement of the general nature of the business to be transacted at the meeting and any other matters required by the company's constitution.[8]

> Every member and every director of the company are entitled to receive of the notice of the meeting. But accidental failure to give notice to one or more members shall not affect the validity of the meeting or resolution and the company's article may expand this relaxation, except for meetings or resolutions required by the members.[9]

## Conducting Meetings

(i) **What is the quorum?** In the absence of the required quorum, no resolution can be effectively passed. Only two members are required for meeting of shareholders as a whole, unless the company's constitution sets a higher figure and only one member in case of a single-member company.[10]

(ii) **Who are proxies?** In the case of company having a share capital, the member may appoint more than one proxy, provided each proxy is appointed to exercise rights attached to different shares. The proxy's vote will still be valid and the proxy will still count towards the quorum and can still validly join in demanding a poll unless the company receives notice of termination of the authority before the commencement of the meeting.[11] Section329 provides that the appointment of a proxy to vote on a matter at a meeting of a company authorizes the proxy to demand, or join in demanding, a poll on that matter.

(iii) **Representative of corporate members:** According to section-323, where a corporation is a member of a company, it may, by resolution of its directors or other governing body, authorize any persons to act as its representative or representative at any meeting of the company. Such representative shall be entitled to exercise the same powers on behalf of the corporation as the corporation could exercise if it were an individual member of the company.

## What is the chairperson's role?

Under section 319, a member may be elected to be the chairman of a general meeting by a resolution of the company passed at the meeting subject to the provision of the articles of the company. On the other hand, under section 328, in the same way a proxy may be elected to be the chairman of a general meeting.

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[8] Ibid.
[9] Ibid 455 nn 15-40.
[10] Ibid 444 nn .
[11] Ibid 457 nn 15-43.

Under section 320, a chairman of a meeting has power to declare on the show of hands that any resolution has been or has not been passed or passed with a particular majority. Such declaration shall be conclusive evidence of that fact without proof of the number or portion of the votes recorded in favour of or against the resolution.

Every company must cause minutes of all proceedings at meetings of its directors to be recorded. Section 249 provides that such recorded minutes purporting to be authorized by the chairman of the meeting are the evidence of the proceeding of the meeting. On the other hand section 356 provides that the minutes of proceedings of a general meeting purporting to be signed by the chairman of that meeting or by the chairman of the next general meeting, are evidence of the proceedings at the meeting.

**Why might a meeting be adjourned?**

Section 332 provides that when a resolution is passed at an adjourned meeting of a company, the resolution is for all purposes to be treated to be passed on the date on which it was in fact passed, and is not to be regarded to be passed on any earlier date. Meeting may adjourn for the absence of quorum.

**Member Voting**

**Voting rights of members:** According to section 322, a member entitled to more than one vote need not use all his votes or cast all the votes he uses in the same way on poll taken at a general meeting of the company. A member may appoint a proxy to vote at the meeting of the company.

Section 284 provides that in case of a company having share capital, every member shall have one vote in respect of each share and in any other case; every member has one vote on a vote on a written resolution or on a vote on a resolution on a poll taken at a meeting. Every member or every proxy present shall have one vote on a vote on a resolution on a show of hands at a meeting.

Section 286 provides that in the case of joint holders of shares of a company, only the vote of the senior holder who votes and any proxies duly authorized by him may be counted by the company.

**What are an ordinary resolution and a special resolution?**

According to section 282, an ordinary resolution of the members or of a class of members of a company means a resolution that is passed by a simple majority. Anything that may be done by ordinary resolution may also be done by special resolution.

According to seetsion 283, a special resolution of the members or of a class of members of a company means a resolution passed by a majority of not less than 75% of total voting rights of eligible members. For passing a written resolution of a private company as a special resolution it must be stated that it was proposed as a special resolution. For passing a special resolution, the notice of the meeting must include the text of the resolution and specified the intention to propose the resolution as a special resolution.

**Nomination by Members of another Person**

(i) **Nomination of another person to enjoy governance rights:** Under section 145, a company may make provision in its articles to enable a member to nominate another person to enjoy the governance rights of the member in connection with the company. That nominated person need not be the holder of the beneficial interest in the shares. But it does not confer rights enforceable against the company by anyone other than the member, and do not affect the requirements for an effective transfer or other disposition of a member's interest in the company.

(ii) **Nomination of another person to enjoy information rights:** Under section-150, a member of a company whose shares are admitted to trading on a regulated market may nominate another person to enjoy information rights, whether the company has provided in its articles for this to happen or not. The rights conferred upon the other person do not deprive the nominating shareholder of his right to the same information. But all nominations are suspended when there are more nominations in force than the nominator has shares in the company, so that the burden of shorting out the errors is removed away from the company.[12]

**Decision Making Without a Meeting**

Wholly informal consent given by all the members entitled to vote may bind the company. The written resolution procedure allows shareholders to adopt resolution outside meetings. And the unanimous consent rule permits wholly informal methods of giving shareholders consent. The common rules operating to this effect are preserved under the Act of 2006.[13] The written resolution procedure is not available to the private company in respect of decision required or provided for by the Act and where the company has to proceed by means of a meeting of members.[14]

**Restriction on Members' Decision Making Right in the UK**

(i) **Equitable restriction on majority voting power:** There is an equitable restriction on the voting power of the majority. It restricts action which is

[12] Ibid 434 nn 15-21.
[13] Ibid 420 nn 15-8.
[14] Ibid 416 nn 15-4.

beyond the authorized and legal power of the majority given by law. For example, fraud on minority is absolutely prohibited. Majority may take action in breach of equitable limitation but not dishonestly. The majority has an obligation to act for proper purpose.

(ii) **Restriction in case of alteration of the constitution:** According to section 21 and 22, the provision of articles cannot be altered except by a special resolution, or by agreement of all members or by order of the court or other authority having power to alter company's articles. Section 25 provides that a member is not bound by an alteration which impose more liability than that was on him at the date on which he became a member.

(iii) **Procedural restriction:** Proper notice for the meeting, quorum, and proper conduct of the meeting are the procedural requirements for holding meeting of a company. All of these requirements apply to all meetings of members and must be complied with.

(iv) **Creditors' rights to objection:** The members of a company may approve by resolution the reduction of its share capital. The majority may only approve a reduction of share capital, if it does not materially prejudice the ability of the company to pay its' creditors and it is also fair and reasonable to the company's members as a whole.

Section 627 provides that the reduction of capital is not effective until it is registered. Then section 641 provides that a company may not reduce its capital, if as a result of the reduction there would no longer be any member of the company holding shares other than redeemable shares. And section 658 provides that a company cannot buy its own shares except in accordance with the Act. Section 646 provides the creditors with right to object to reduction of the share-capital of the company.

(v) **Special procedure in removal of directors and auditor:** The members of the company has right to vote for the removal of the directors and auditors from their offices. But there is special procedure which must be followed before removing such directors and auditors.

For example, section 160 requires that the appointment of directors of public company must be voted individually. Special notice is required, under section 511, for a ordinary resolution at a general meeting of a company removing an auditor from office.

(vi) **Special procedure in alteration of class rights:** A special procedure is provided for the alteration of the class right. This procedure must be observed for giving effect to the consent of the majority. Under section 633 and 634, fifteen percent of the non-consenting members or shareholders may apply to the court to have the variation cancelled.

(vii) **Protection of minority:** Provisions regarding the protection of minority' interests have been provided in the laws. So the decision of the majority must not infringe the interests of the minority so far as protected by the laws. Section 994 provides that when the affairs or acts or omissions of the company are unfairly prejudicial to the interests of the members of the company, a member may apply to court for an order in this respect. Section 260 provides provisions regarding derivative claims by a member against the unfair prejudicial acts of the company.

(viii) **Contractual obligation of the company and members:** When the memorandum and articles of association are registered, they bind both members and the company to the same extent. So company cannot do anything which is inconsistent with the provision of the articles, memorandum and the Act. According to section 33, the provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.

(ix) **Winding up on just and equitable ground:** The minority member may go the court for an order of winding up of a company on just and equitable ground. According to section 122 of the Insolvency Act, a company may be wound up by the court on the ground that the court is of opinion that it is just and equitable that the company should be wound up.

### 4. Divergence and Convergence between the Law of Bangladesh and the UK

The major point of the divergence and convergences between the law of the UK and Bangladesh can be summed up as follows:

### Convergence

- Special resolution is required for the alteration of the articles of the company. And the members of the company shall not be bound by the alteration of articles regarding the liability.
- If a corporation is a member of a company, it may by resolution of its directors authorize a person or persons to act as its representative or representatives at any meeting of the company.
- Every member shall be entitled to receive a notice of the meeting of a company with the statement of the business to be transacted at the meeting. But the accidental omission to give notice to or the non-receipt of notice by any members shall not invalidate the proceedings at any meeting.
- The director has power to call meeting of the company at any time and one-tenth of the holders of the issued share capital has right to require the directors to call a meeting of the company.
- If the directors fail to hold the meeting, the majority of requisitionists in value may call the meeting. And the requisitionists shall be entitled to costs incurred therein.

- Where a resolution is passed at an adjourned meeting of a company, the resolution shall be valid and the adjourn meeting shall have the same power as an original meeting.
- If the meeting of the company cannot be called and conducted in manner prescribed by the Act and articles for any reasons, any member may make an application to the court and the court may direct the manner in which the meeting will be held and conducted.
- A meeting of a company may be called on shorter notice with the consent of the members of the company.
- A member of a company is entitled to appoint another person as his proxy to exercise all or any of his rights to attend and to speak and vote at a meeting of the company.
- Five members present in person or by proxy, or any member or members holding one-tenth of issued share capital shall be entitled to demand poll. And on poll, a vote may be given personally or by proxy.
- On a vote on a resolution at a meeting on a show of hands, a declaration by the chairman that the resolution has or has not been passed, or passed with a particular majority, is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favor of or against the resolution.

**Divergence**

- In the UK, under section 145, a member may nominate another person to enjoy the governance rights of members regarding the company. Bangladesh laws do not provide such provision.
- In the UK, under section 150, a member of a company whose shares are admitted to trading on a regulated market may nominate another person to enjoy information rights, whether the company has provided in its articles for this to happen or not. Bangladesh laws do not provide such provision.
- In the UK, under section 168, a company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him. In Bangladesh, under section 106, the company may by extraordinary resolution remove any share-holder director before the expiration of his period of office and may by ordinary resolution appoint another person in his stead.
- In the UK, under section 188, a company cannot agree to the provision in the directors' long term service contract without the approval by resolution of the members of the company. Bangladesh has no specific provision.
- In Bangladesh, under section 81, a company must hold the first annual general meeting within eighteen months of its incorporation. But the UK has no specific provision.

- In the UK, under section 336, every public company must hold a general meeting as its annual general meeting in each period of 6 months beginning with the day following its accounting reference date. But in Bangladesh, Section 81 provides that every company must hold a general meeting called the annual general meeting every year but so that not more than fifteen months elapse between the meetings.
- In the UK, under section 307, a general meeting of a private company must be called by notice of at least 14 days. A general meeting of a public company must be called by notice of, in the case of an annual general meeting, at least 21 days, and in any other case, at least 14 days. But in Bangladesh, under section 85, an annual general meeting may be called by fourteen days' notice in writing, and a meeting other than an annual general meeting or a meeting for the passing of a special resolution may be called by twenty one day's notice in writing.
- In the UK, under section 318, in the case of a company limited by shares or guarantee and having only one member, one qualifying person present at a meeting is a quorum. And in any other case, subject to the provisions of the company's articles, two qualifying persons present at a meeting are a quorum. But in Bangladesh, under section 85, in the case of a private company whose number of members does not exceed six, two members and if such number exceeds six, three members, and in the case of any other company, five members personally present shall be a quorum.
- In the UK, under section 527, the members of a quoted company may require the company to publish on a website a statement setting out any matter relating to the audit of the company's account, any circumstances connected with an auditor of the company ceasing to hold office since the previous accounts meeting. Bangladesh law has no such provision.
- The company laws of the UK specifically mention the cases where the approval of the members of the company is required. And the company laws of the UK are clear and wide enough in respect of members' decision making rights. Company laws of Bangladesh are not so wide and specific.
- The UK law provides the provision regarding the written resolution of a private company. But Bangladesh law does not provide such provision.

## 5. Recommendations

- Like the UK laws, provisions should be inserted in Bangladesh laws that when the net assets of a public company are half or less of its called-up share capital, the directors must call a general meeting of the company to consider whether any steps should be taken to deal with the situation.
- Like the UK law, Bangladesh law should provide provision for amending articles of the company by agreement of all members of the company, or by

order of the court or other authority having power to alter the company's articles.

- Like the UK laws, the company should have power to change its name according to the provision of the articles of association.
- Like the UK laws, Bangladesh law should provide provision for the protection of class rights of the members of a company having share capital. It is a safeguard against the capricious decision of the majority.
- Like the UK laws, Bangladesh laws should provide that the appointment of directors of public company must be voted individually. A company should have power to remove any director at any time by an ordinary resolution before the expiration of the period of his office.
- Like the UK laws, there should be provision in Bangladesh laws that an auditor may be removed from his office at any time by ordinary resolution with a special notice.
- Like the UK laws, Bangladesh laws should provide that company shall not agree to the provision in the directors' long term service contract unless it is approved by a resolution of the members of the company.
- Like the UK laws, Bangladesh laws should provide that the members of a quoted company may require the company to publish on a website a statement setting out any matter relating to the audit of the company's account, any circumstances connected with an auditor of the company ceasing to hold office since the previous accounts meeting.
- Like the UK laws, Bangladesh laws may provide that subject to the provisions of the company's articles, two qualifying persons present at a meeting are a quorum of the meeting of the members of a company.
- Like the UK laws, in Bangladesh a member of a company whose shares are admitted to trading on a regulated market should have power to nominate another person to enjoy information rights, whether the company has provided in its articles for this to happen or not.
- Like the UK laws, in Bangladesh a member should have rights to appoint another person to enjoy all governance rights of member of a company.
- Like the UK laws, Bangladesh laws may provide that in the case of joint holders of shares of a company, only the vote of the senior holder who votes and any proxies duly authorized by him may be counted by the company.
- Like the UK laws, provisions regarding written resolution in case of a private company should be provided.
- Like the UK laws, Bangladesh laws should provide specific and wide provisions that where the approval of members is required and where is not required.

## 6. Conclusion

Under the caprice of Company law, the board of directors is the main organ of management and usually holds the power to manage the business of the company. However, the members in general meeting have powers to participate in the decision making in the company's affairs. Such powers may be reserved to them under the company's internal management rules, the Companies Act and the general law of the particular country. In respects of member's decision making, the Companies Act of Bangladesh and the UK contains, by and large, similar provisions regarding the right to request to call for meeting, the right to receive notice, the process of proxy and representation and the minutes of meeting. The provisions of the Act of Bangladesh and the UK, however, diverge on different points including the issues of nominating another person to enjoy the governance rights of members, the requirements of holding general meeting, and the number of fulfilling the quorum, etc. Apart from this, one of the fundamental differences is that the company laws of the UK specifically mention the cases where the approval of the members of the company is required. Compared to that of Bangladesh, the company laws of the UK may thus be found to be clear and wide enough in respect of members' decision making rights, despite the fact that the gravity of the divergence between the provisions regarding members' decision making is marginal.

# TICFA and Intellectual Property Rights: Implications and Challenges for Subsistence Needs in Bangladesh

**Dr. Mohammad Towhidul Islam***
**Md. Ahsan Habib****

## Introduction

At the age of multilateral trading system, a least developed country (LDC)[1] like Bangladesh signs bilateral investment treaties (BIT) with other countries or organization keeping in mind its developmental needs and challenges in various sectors including public health, food security and so on.. To mitigate the developmental needs and address the challenges arising thereof, the country endeavours to develop a viable public health system and boosting agriculture by ensuring the due reward to the traditional farmers. At the same time, being a member of the World Trade Organization (WTO) it will have to comply with the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) once the transition period expires in 2021 or for pharmaceuticals in 2033 or after it graduates to the developing country status. Though, intellectual property rights (IPRs) owning developed countries reap the benefits of IPRs harmonization through the TRIPS, still flexibilities in the TRIPS offer policy space for developing and LDCs. During the transition period an LDC like Bangladesh requires to exploit the TRIPS flexibilities for establishing a viable legal and infrastructural base to combat the TRIPS after its compliance. When developing countries and LDCs are vocal in the multilateral forums like the WTO by upholding their concern for socio-economic needs, the developed countries have taken different strategies to ratchet-up IPRs protection beyond multilateral platforms. During the late years of the last century Bangladesh entered BITs with the United States (US) and the European Union (EU). Remarkably, those BITs contained IPRs but did not explicitly refer to its specific IPRs obligations. However, at the dawn of the new century the US opted for a more comprehensive agreement namely the Trade and Investment Framework Agreement (TIFA) which during the course of negotiations was renamed as the Trade and Investment Co-operation Framework Agreement (TICFA)[2] contains a preambular paragraph on IPRs obligations.[3]

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[1] Out of 48 LDCs 34 are WTO Members and Bangladesh is one of them. <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm> 5 December 2015.

[2] The United States-Bangladesh TICFA signed on 25 November 2013 and came into force on January 30, 2014. <http://www.ustr.gov/about-us/press-office/press-releases/2014/April/US-

While Bangladesh is in transition in respect of the TRIPS, the TICFA requires an immediate "effective and adequate protection and enforcement of intellectual property rights". The framework agreement holds the tone requiring Bangladesh to maximize IPRs protection. This tone is likely to pose challenges for Bangladesh in terms of limiting TRIPS flexibilities, affecting IPRs regime reform agenda and waiving Doha round privileges. The tone of the TICFA also holds the likelihood of giving birth to the Free Trade Agreements (FTAs) for further ratcheting up IPRs protection. As FTAs stand for other countries, they might contain clauses like Non-Violation Complaints (NVCs) with the effect of squeezing the policy space for Bangladesh. Such IPRs maximization as envisioned by the TICFA may have consequences on public health, food security, agro-biodiversity and growing industries like Information and Communication Technology (ICT).

This paper exclusively deals with intellectual property rights (IPRs) landscape of the TICFA. It relies on secondary sources and raises questions what the probable consequences the TICFA might bring in the area of intellectual property rights; how the TICFA might affect public health, food security and agro-biodiversity of Bangladesh; whether the TICFA might impact on the Doha Round privileges for Bangladesh in the area of IPRs; whether the TICFA bears any TRIPS-Plus obligation on its face; how the TICFA might affect the regime reform agenda of Bangladesh in the field of IPRs; how the TICFA might affect policy space of Bangladesh in IPRs.

The first part of the paper tends to identify the TRIPS-Plus effect of the TICFA on its face. The second part argues that the FTAs might follow the TICFA, since the latter is a framework agreement. The third part landscapes the likely TRIPS-Plus effects of FTAs that might follow the TICFA by citing US-FTAs with some other countries. The fourth part portraits the likely impact of the TICFA on the TRIPS option creating standards in different IPRs areas having stance on public health, food security and agro-biodiversity. The fifth part depicts the potential impact of the TICFA on the Doha Round privileges of Bangladesh as an LDC. The sixth part warns the potential adverse effects of the TICFA on the IPRs regime reform agenda of Bangladesh. The seventh part claims that "one-on-one" arrangement like the TICFA might affect the pro-active role of Bangladesh in the LDCs forum at the WTO. The final part argues that introduction of "non-violation" regime in the future FTAs likely to derive from the TICFA might seriously prejudice the IPRs policy space for Bangladesh. Most importantly it argues that, the inclusion of non-violation regime in the FTAs may give impetus to the claim of developed countries to withdraw the moratorium on non-violation complaints under the TRIPS.

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Bangladesh-Hold-Inaugural-Trade-Investment-Cooperation-Forum-Agreement-Meetin> 14 May 2014.

[3] Discussion TIFA was first initiated in 2002. <http://archive.thedailystar.net/beta2/news/ticfa-with-the-us/> 19 July 2014.

## 1. Express 'TRIPS Plus'[4] Effects of TICFA: Implications and Challenges for Bangladesh

The TICFA, in its IPRs clause in the preamble mandates "adequate and effective protection and enforcement of IPRs" by the parties. This type of vague expressions e.g. "adequate and effective protection" have also been used in several other TIFAs.[5] In various literatures[6] it has pointed out that these vague standards are not defined precisely under these bilateral arrangements, therefore, the effect of these provisions may not be felt initially but is most likely to be felt in relation to issues related to investment and FDI in the future. So the use of these vague expressions can be used by the IPRs maximalist USA to exert pressure on Bangladesh to maximize IPRs protection.[7]

Another striking fact is that, in the same clause of the preamble of the TICFA it has been mandated that the contracting parties must have to comply with the WTO TRIPS Agreement, the Berne Convention and "any other intellectual property rights related agreements *as applicable to the parties*" (emphasis added). One may argue that, the USTR may pressurize Bangladesh to incorporate IPRs standards from 'any international intellectual property rights related agreement' which contains TRIPS Plus by using this clause. But this is not a sound argument. It is interesting to note that, according to the second paragraph of the TICFA text "parties" means collectively both the parties and 'party' means an individual party. So, literal interpretation of this clause only refers to an international IPRs-related agreement to which both the US and Bangladesh are party.

Further, the TICFA in its preamble has referred to the 1986 US-Bangladesh Bilateral Investment Treaty[8] categorically providing that the TICFA 'is without prejudice to

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[4] Sell defines "TRIPs-Plus" as "provisions that either exceed the requirements of TRIPS or eliminate flexibilities in implementing TRIPS". Susan K Sell, 'TRIPS-Plus free trade agreements and access to medicines' (2007) 28(1) *Liverpool law review* 41-75; See also, Said, below note 4, 93-94

[5] The US-Yemen (2004), US-Sri Lanka (2002) and US-Thailand (2002) TIFAs, for example, uses the phrase "adequate and effective protection" of intellectual property rights

[6] Mohammed K L Said, *Public health related TRIPS-plus provisions in bilateral trade agreements: A Policy Guide for negotiators and implementers in the WHO Eastern Mediterranean Region* (World Health Organization and International Centre for Trade and Sustainable Development 2010) 97; See also El-Said, Mohammed, 'The Road from TRIPS-Minus, to TRIPS-Plus: Implications of IPRs for the Arab world' (2005) 8 *Journal of World Intellectual Property* 53-65.

[7] For Drahos 'The *wide-ranging terms* in which BITS are drafted are likely to give international investors grounds for arguments, which if successful, may well be TRIPS-plus in their effects' (emphasis added) ; See Peter Drahos, 'BITS and BIPs: Bilateralism in Intellectual Property' (2002) 4 *Journal of World Intellectual Property* 791, 795.

[8] The United States-Bangladesh Bilateral Investment Treaty 1986 signed 12 March 1986 (entered into force 25 July 1989) Treaty Doc. 99-23 Congress (hereinafter the US-Bangladesh BIT)

the rights and obligations of the Parties under the Bilateral Investment Treaty' i.e. the BIT has been given overriding effect. Mere reference to the 1986 BIT vitiates the argument that, the TICFA *ex facie* does not contain any 'TRIPS Plus' IPRs standard. for this type of BIT with mandate to protect the investment[9] of nationals of either party is considered to be 'TRIPS Plus'.[10] This follows that, in the future negotiations of FTAs in the 'TICFA-Forum' the US will claim TRIPS Plus IPRs standards (if needed) to protect its investors under the 1986 BIT, for the TICFA does not prejudice the protection of IPRs under the BIT. So, the TICFA along with the 1986 BIT requires Bangladesh to ratchet up IPRs regime to protect the US investments. The 1986 BIT, for instance, requires Bangladesh[11] to join to the UPOV[12] which is a TRIPS Plus move, since it limits options for Bangladesh to choose a *sui generis* PVP regime under Art.27.3.b of the TRIPS Agreement.

## 2. TICFA as a Platform for Negotiating Future FTAs

The Trade and Investment Cooperation Forum Agreement (TICFA) signed[13] between the US and Bangladesh is a bilateral trade agreement. It is the Bangladesh version of "Trade and Investment Forum Agreements" (TIFAs)[14]. Trade and

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[9] The BIT is to protect the rights of the investors and the definition of 'investment' in Article1 includes intellectual property. Drahos holds in respect of the US-Nicaragua BIT that, '[t]he Nicaraguan BIT, like other BITs, does not set specific standards of intellectual property. Instead, it protects the rights of investors who use intellectual property as a mode of investment. The BIT accomplishes this by including intellectual property in its definition of investment'. See Drahos, above n 7, 794.

[10] Mohammad Towhidul Islam, *TRIPS Agreement of the WTO: Implications and Challenges for Bangladesh* (CSP, New Castle upon Tyne, 2013) 76, 131. He holds that the 1986 BIT bears the risk of curtailing TRIPS flexibilities and imposing TRIPS Plus IPRs standards resulting in fatal impact on Public Health and Agriculture of Bangladesh.

[11] Mohammad Towhidul Islam, 'TRIPS Agreement and Plant Genetic Resources: Implications and Challenges for Food Security in Least Developed Countries like Bangladesh' (2011) 22(1) *Dhaka University Law Journal* 36.

[12] International Convention for the Protection of New Varieties of Plants (in short UPOV after its French acronym) was adopted on 2 December 1961, revised in 1978 and 1991.

[13] The United States-Bangladesh TICFA came into force on January 30, 2014. <http://www.ustr.gov/about-us/press-office/press-releases/2014/April/US-Bangladesh-Hold-Inaugural-Trade-Investment-Cooperation-Forum-Agreement-Meetin> 14 May 2014.

[14] Bhala defines TIFA as:

> [a] bilateral accord used by the United States, often as a precursor and pre-condition for a free-trade agreement (FTA). TIFAs are negotiated mainly with countries whose economies were once closed or isolated and are now beginning to open to international trade and investment. Also established by TIFAs are other joint working groups between the United States and its partner country to discuss how an FTA might proceed. These working groups address issues pertaining to trade and investment liberalization, including intellectual property protection, labour and the environment, small and medium size enterprises (SMEs), and trade capacity

Investment Framework Agreements (TIFAs) "provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties to the TIFA"[15]. Despite the diversity of titles[16] the main purpose of TIFAs is to create "a forum for the United States and other governments to meet and discuss issues of mutual interest with the objective of improving cooperation and enhancing opportunities for trade and investment." Importantly, TIFAs lays down foundations to negotiate Free Trade Agreements (FTAs) between the parties.[17] So far IPRs protection is concerned, TIFAs generally do not contain any substantive provision[18] but only mandate in the preambles an effective and adequate protection. Mohammed Said[19] finds that, "in the area of intellectual property protection, these agreements occasionally include brief references to improving and enhancing intellectual property protection between member states." The US-Bangladesh TICFA in paragraph 8 articulates the IPRs protection clause:

> *Recognizing* the importance of providing adequate and effective protection and enforcement of intellectual property rights and adherence to intellectual property rights norms in accordance with the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, the Berne Convention on the Protection of Literary and Artistic Works, and any other intellectual property rights-related international agreements as applicable between the Parties.

One of the functions[20] of the "TICFA-Forum"[21] is "to identify and work to remove impediments to trade and investment between the Parties"[22]. Absence of strong IPRs regime in Bangladesh as desired by the US may be construed as an impediment to trade and investment. The US, thus, in the future FTAs negotiation may bring the

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building. See Bhala R. *Dictionary of International Trade Law* (LexisNexis, Newark, New Jersey, 2008).

[15] Office of the United States Trade Representative <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements> 23 May 2014.

[16] For example, The TIFA of the US with the South African Customs Union is titled as Trade, Investment, and Development Agreement (TIDCA)

[17] See Said, above n 6, 47. The US-WAEMU and US-South Africa TIFAs, for example, in articles 8 and 3 respectively , provides discretion to the parties to enter into further "Agreements" for the sake of trade and investment during the course of consultation and cooperation

[18] The US-Yemen (2004), US-Sri Lanka (2002) and US-Thailand (2002) TIFAs, for example, refers to IPRs protection in their respective preambles and they do not contain substantive IPRs protection clause.

[19] Said, above n 6, 48.

[20] Articles 3 and 4 of the TICFA has laid down the functions of TICFA-Forum

[21] Article 2 of the TICFA establishes the US-Bangladesh Forum on Trade and Investment (shortly, the TICFA-Forum).

[22] Article 3.3 of the TICFA.

IPRs protection as an issue. For example, IPRs protection was an issue in the 'TICFA Forum' in its first meeting held on April 28, 2014.[23]

### 3. Implied 'TRIPS Plus' Impact of TICFA: Implications and Challenges for Bangladesh

Even if Bangladesh claims that the TICFA, on its face, does not have any 'TRIPS Plus' impact, yet the US can pressurize Bangladesh to adopt TRIPS Plus IPRs standards within the TRIPS framework in two ways. Firstly, the TRIPs Agreement confers on its members the discretion to implement "more extensive protection"[24] than is conferred by TRIPS standards[25]and the US may allure or pressurize Bangladesh[26] to compromise with the TRIPS 'minimum standards'[27] . Secondly, the

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[23] <http://www.ustr.gov/about-us/press-office/press-releases/2014/April/US- Bangladesh-Hold-Inaugural-Trade-Investment-Cooperation-Forum-Agreement-Meetin> 14 May 2014.

[24] UNCTAD holds that, "...despite the flexibilities it grants – the TRIPS Agreement itself leaves open, favours or maybe even induces higher standards of protection. For example, in article 1 paragraph 1, the TRIPS Agreement itself allows WTO members to provide for "more extensive protection" than is required by the agreement..." See UNCTAD, *Intellectual Property in the World Trade Organization Turning it into Developing Countries' Real Property*,14, UNCTAD/DITC/TNCD/2006/8).

[25] See Drahos, above n 7, 792.

[26] As to how the US uses this room in TRIPS Shaded aptly puts: "TRIPS permits countries to exceed TRIPs standards and the US has been pressuring them to do so. It has offered countries WTO Plus market access in exchange for TRIPs-Plus policies". See Shadlen, Ken, 'Policy Space for Development in the WTO and Beyond: the case of Intellectual Property Rights' (Tufts University, Global Development and Environment Institute, Working Paper No. 05-06, 2005) 11 <http://ase.tufts.edu/gdae>. The US may also apply the "Special 301" sanction against its trading partners who do not have satisfactory level of IPRs protection regime. The sanction may be in the form of withdrawal of benefits or impositions of higher tariffs. Bello and Holmer succinctly points out : 'the Special 301 provisions of the 1988 Trade Act require the Office of the U.S. Trade Representative (the "USTR") 7 to identify annually "priority foreign countries" (1) whose failure to protect intellectual property is the most onerous and has the greatest adverse impact on U.S. products; and (2) that are not entering into good faith negotiations or making significant progress in negotiations (multilateral and bilateral) to provide adequate and effective protection of intellectual property rights. Such identification normally triggers an investigation of such country's intellectual property practices, which may lead to retaliation against such country if it refuses to reform its practices satisfactorily". See for a details account Judith H Bello and Allan F Holmer, 'Update: Special 301' (1990-1991) 14 *Fordham International Law Journal* 874, 874-875; see also Islam, above n 7, 41-42. However, Carvalho argues that, putting pressure to adopt higher IPRs standards as means of sanction for any non-WTO matters is not allowed under Art.1.1 of the TRIPS Agreement. See Carvalho, below n 27, 61.

[27] de Carvalho succinctly puts that, "[t]he second sentence of Article1.1...makes it clear that the TRIPS Agreement : a) is a minimum standards Agreement and that b) it aims at harmonizing the national laws of WTO Members, yet without making them uniform". See de Carvalho, Nuno Pires, *The TRIPS Regime of Patent Rights* (2nd Edition, Kluwer Law International, 2005) 60.

US on the table of the TICFA in future FTAs negotiations may render Bangladesh to compromise with the "option creating standards"[28] due to the TRIPS.

## 4. Potential impacts of TICFA on "TRIPS Option Creating Standards": implications and Challenges for Bangladesh

"TRIPS option creating standards" otherwise known as TRIPS flexibilities allows members to qualify the operation of some standards and to choose among standards.[29] Standards that allow members to qualify the operation of some standards include determining patentability criteria under article 27.1, excluding some subject-matter from patentability under art.27(2) and 27(3), to choose a sui generis regime Plant Varieties Protection (PVP) regime under article 27.3.b, to determine the exhaustion regime under article 6, to define what constitutes national emergency to issue compulsory license under article 31, to determine the exceptions to patent rights under article 30 and 31 and framing a regime to combat anti-competitive practices under article 40. Again, Said[30] has broadly categorized 'TRIPS flexibilities' as flexibilities relating to implementation[31], flexibilities relating to substantive standards of protection[32], flexibilities related to enforcement[33] and flexibilities outside the scope of the TRIPS[34] but having bearing on IPRs.

*Potential Impact of TICFA on Public Health Related TRIPS Flexibilities: Implications and Challenges for Bangladesh*

The Free Trade Agreements (FTAs) likely to be negotiated in the "TICFA-Forum" will require Bangladesh to ratchet up IPRs regime and exclude Public Health Related flexibilities[35] in the TRIPS which will affect public health. Islam[36] points out

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[28] Drahos has identified three types of "option creating standards" in the TRIPS i.e. which allows the members to qualify the operation of some standards, to choose among standards and to choose when to adopt standards. See Drahos, above n 7, 792

[29] Ibid.

[30] Said, above n 6, 90.

[31] Examples of the category flexibilities include leeway to define concepts related to patentability such as novelty, new inventions and inventiveness, the TRIPS transition period.

[32] Examples of the category flexibilities include choosing the exhaustion regime, using exceptions to patentability and trademarks protection, choosing sui generis PVP regime, defining regime against anti-competitive practices.

[33] Examples of the category flexibilities include the right and discretion to establish their own national legal and judicial systems to implement and enforce the intellectual property standards of protection.

[34] For example, Traditional Knowledge (TK), folklore, biodiversity, farmers right, data exclusivity.

[35] Musungu and Oh has identified following public health related flexibilities in the TRIPS: (1) transition periods; (2) compulsory licensing; (3) public, non-commercial use of patents; (4) parallel importation; (5) exceptions from patentability; and (6) limits on data protection. See for details Sisule F. Musungu and Cecilia Oh, *'The Use of Flexibilities in*

that, highly restrictive regulatory regime due to the TICFA will result in the discontinuation of the current practice of reverse -engineering drugs and supplying them at cheaper rates disregarding their patents. Rahman[37] maintains, the "TRIPS Plus" regimes are likely to make Bangladesh compromise the access of its poor people to essential medicines. These predictions are confirmed by the experience of FTAs signed between the US and other countries.[38] "TRIPS Plus" scenarios take place in the area of public health include patent term extensions, patentability of second uses (otherwise known as ever greening of patents), determination patentability criteria as per the US maximalist standards, limiting grounds for issuing compulsory licensing, prohibiting parallel importation through introducing national exhaustion regime, rendering the early work exception available only after the patent term expires and providing for data exclusivity rendering the generic producers to push up the prices of essential medicines.[39]

*Potential Impact of TICFA on Agriculture Related TRIPS Flexibilities: Implications and Challenges for Bangladesh*

Article 27.3.b of the TRIPS Agreement categorically provides that WTO Members may exclude from patentability whole plants, plant varieties (provided an alternative system of protection is provided), parts of plants and essentially biological processes for their reproduction.[40] An alternative system for the protection of plant varieties must be either by patents or by an effective *sui generis* system or by any combination thereof.[41] The term "sui generis" for PVP left enormous scope for

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*TRIPS by Developing Countries: Can They Promote Access to Medicines?'* (South Centre, 2006) xvi.

[36] Islam, above n 10, 173.

[37] Rahman, Mustafizur, 'Globalization, Developed Country Policies and Market Access: Insights from Bangladesh Experience' in Robert Picciotto and Rachel Weaving (eds.) *Impact of Rich Countries' Policies on Poor Countries : Towards a Level Playing Field in Development Cooperation* (2004) 67, 91, cited in Islam, above n 10, 174.

[38] On the impact of Preferential Trading Agreements (PTAs) on Public Health, See generally Roffe, Pedro, and Christoph Spennemann, 'The impact of FTAs on public health policies and TRIPS flexibilities' (2006) 1(1) *International Journal of Intellectual Property Management* 75-93. See also Said, above n 6, 94-98; Lindstrom, Beatrice, 'Scaling back TRIPS-plus: An analysis of intellectual property provisions in trade agreements and implications for Asia and the Pacific' (2009) 42 *New York University Journal of Law and Policy* 917.

[39] See Roffe, P. and Spennemann, above n 36, 80-85. Sell points out that:

> Particular provisions in these bilateral and regional trade agreements include: (1) data exclusivity provisions; (2) prohibitions of parallel importation; (3) linkage between drug registration and patent protection; (4) highly restrictive conditions for issuing compulsory licenses; (5) expanded subject matter requirements; and (6) patent term extensions. All of these provisions have been crafted by the brand-name pharmaceutical industry and serve to reduce the availability of affordable drugs.

[40] See de Carvalho, above n 27, 217.

[41] *TRIPS Agreement* Article 27.3.b.

interpretation and like all WTO members Bangladesh has freedom to design its own PVP framework as per its own needs and particularities.[42] Bangladesh can, for example, grant exceptions to the exclusive rights of breeders with respect to the propagating materials of new varieties in order to enable farmers to save, reuse, exchange and sell seeds.[43] A *sui generis* PVP framework can also recognize farmers as breeders additional and protect traditional agrarian practices.[44] In the context of Agriculture-prone Bangladesh, Islam holds that, the PVP regime of Bangladesh while strengthening Plant Breeders Rights (PBRs) should also make provision recognizing farmers as breeders, farmers' right to preserve the traditional farming practices, farmers' contribution to innovation by selecting and maintain of seeds and farmers' right to access to benefit sharing (ABS).[45]

The TICFA being a platform for negotiating Free Trade Agreements (FTAs) bears the high risk of imposing "TRIPS Plus" IPRs standards in the field of Plant Varieties Protection (PVP). For example, the FTAs of the US with Bahrain, Morocco, Jordan, Singapore and Chile provide patent protection for plants either expressly or impliedly.[46] As experience shows, the US may require Bangladesh in the future FTAs likely to due at the TICFA to protect GM varieties[47] and to join the UPOV.[48]

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[42] Carolyn Deere, *The Implementation Game: the TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (OUP, 2009) 86. Islam puts succinctly: 'use of the term sui generis gives them[ Members] discretion to determine the type and design of plant protection regime...which enables [them] to promote innovation plant breeding while preserving national objectives like protecting biodiversity, traditional farming and food security'. See Islam above n 9, 52. Narasimhan holds that the term 'sui generis' was used for "[t]he purpose of developing a PVP law may be interpreted to mean a customized law that a country establishes according to its biodiversity and agricultural concerns". See Narasimhan S Mullapudi, *Towards a Balanced 'Sui Generis' Plant Variety Regime: Guidelines to Establish a National PVP Law and an Understanding of TRIPS-plus Aspects of Plant Rights* (2008) 21. For Singh "the option of sui generis under TRIPS Agreement provides sufficient flexibility for countries to design a system that best fits their circumstances and meets their goals and objectives". See Harbir Singh, 'Plant variety protection and food security: Lessons for developing countries' (2007) 12 *Journal of Intellectual Property Rights* 391-399.

[43] Ibid.

[44] Anitha Ramanna and Melinda Smale, 'Rights and Access to Plant Genetic Resources Under India's New Law' (2004) 22(4) *Development Policy Review* 423, cited in Islam, above n 8, 70

[45] Islam, above n 10, 52.

[46] Deere, above n 42, 338.

[47] Genetically Modified Organisms (GMOs) may have an adverse impact on ecosystem and human health and thus patenting of GMO varieties can be excluded under Art 27(2) of the TRIPS. On adverse impact of GMOs on ecosystem and human health see, for example, Laressa L Wolfenbarger, and Paul R Phifer, 'The ecological risks and benefits of genetically engineered plants' (2000) 290(5499) *Science* 2088-2093. The WTO observes: "With respect to GMOs, countries may exclude from patentability plants and animals as well as essentially biological processes for the production of plants and animals".

Higher IPRs standards in the PVP regime like the UPOV (1991) may have serious implications for Bangladesh in terms of sustained agricultural growth and food security.[49]

## 5. TICFA as a Road to "Doha- minus": Implications and Challenges for Bangladesh

As an LDC, Bangladesh has been provided with some privileges at the Doha Ministerial Round under the WTO TRIPS Agreement. These include extension of transition period[50] and special provisions addressing public health crises[51]. The special Doha regime has provided Bangladesh to invoke TRIPS objectives while complying with it, to choose a regime of exhaustion as per its own needs, to determine the grounds of issuing compulsory licenses, freedom to define what constitutes national emergency or case of extreme urgency and finally freedom to take the benefits of "Waiver Decision"[52]. The "Waiver Decision" has created

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_<http://www.wto.org/english/tratop_e/sps_e/sps_agreement_cbt_e/c8s1p1_e.htm>16 16 May 2014.

[48] Article 4 of the US-Jordan and article 16 of the US-Singapore FTA respectively require Jordan and Singapore to join the UPOV, 1991. Singh concludes by analysis several US and EU FTAs that, "higher emphasis on plant variety protection [through UPOV] indicate that the *sui generis* option available under TRIPS is gradually being reduced to UPOV style legislation by the developed countries in their attempt to harmonize the IP laws worldwide". Harbir Singh, 'Plant variety protection and food security: Lessons for developing countries' (2007) 12 *Journal of Intellectual Property Rights* 391-399.

[49] Fred Magdoff and Brian Tokar, 'Agriculture and Food in Crisis: An Overview' (2009) 61(3) *Monthly Review*, cited in Islam, above n 10, 114; see also Singh, above n 48, 394.

[50] Initial transition period for the LDCs was for ten year since the date of application of the TRIPS Agreement. In the Doha Round three transition periods have been granted to the LDCs, two of them are plenary i.e. applicable to all TRIPS provisions and the other one was granted only in respect of pharmaceutical products. The plenary transition period extensions were granted on 29 November 2005 and on11 June 2013 respectively. The TRIPS compliance deadline the LDCs is on 1 July 2021 in pursuance of the TRIPS Council Decision of 11 June 2013. The special transition period for pharmaceuticals, granted in pursuance of Paragraph 7 of the Doha Declaration on TRIPS and Public Health, will expire on 1 January 2016. See generally, Arno Hold, and Bryan Christopher Mercurio, 'After the second extension of the transition period for LDCs: How can the WTO gradually integrate the poorest countries into TRIPS?' (2013). See also, UNDP/UNAIDS Issue Brief on TRIPS transition period extension for least-developed countries, 2013 <http://www.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2013/JC2474_TRIPS-transition-period-extensions_en.pdf> 18 May 2014; also visit <http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm> 18 May 2014.

[51] The provisions concerning "public health" have been provided in the Doha Declaration on the TRIPS and Public Health, the General Council Decision of August 30, 2003 (also known as waiver decision) implementing Paragraph 6 of the Doha Declaration .

[52] Islam succinctly puts the effect of waiver decision:

> "[t]he Decision provides a waiver for an exporter's obligation as provided in art.31 (f) to supply predominantly to the domestic market. It enables any

opportunity for Bangladesh to export generic medicines.[53] A notable change that have been made in the Doha regime in the 11 June 2013 extension is that, now the LDCs can roll back from their existing level of IPR regime. There is a North-South controversy as to whether the 11 June 2013 extension applies to pharmaceuticals and agro-chemicals.[54] If "rollback clause"[55] is not construed to apply to pharmaceuticals, the "paragraph 6 system" would be paralyzed, for many WTO members like Bangladesh not having national regime in line with para.6 system.[56] The "non-rollback clause" also has serious public health implications for the Members who has not incorporated international exhaustion regime (parallel import) in their extant IPRs regime.[57] The US claims that, the Doha Declaration is only a political declaration and not legally binding.[58] Against this backdrop, it is not unlikely that, the US may "strong arm" Bangladesh[59] to invoke a "Doha-minus" formula in

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country having manufacturing capacity to issue a compulsory license to produce generic drugs for export to countries that have insufficient or no manufacturing capacity…the exporting country, not the importing country, must pay compensation". See Islam, above n 10, 156

[53] See Mohammad Towhidul Islam, 'TRIPS transition for Pharmaceutical Patents' <http://www.thedailystar.net/op-ed/trips-transition-for-pharmaceutical-patents-24100> 20 May, 2014; see also IP-Watch, 'WTO States Agreement on TRIPS and Public Health on Eve of Ministerial' 6 December, <http://www.ip-watch.org> 23 May 2014.

[54] *Catherine Saez, What Does WTO Extension For LDCs To Enforce IP Mean For Pharmaceuticals. <http://www.ip-watch.org/2013/08/02/what-does-wto-extension-for-ldcs-to-enforce-ip-mean-for-pharmaceuticals/> 23 May 2014.*

[55] Paragraph 5 of the TRIPS Council decision of 29 November, 2005 provided that, '[l]east-developed country Members will ensure that any changes in their laws, regulations and practice made during the …transition period do not result in a lesser degree of consistency with the provisions of the TRIPS Agreement". Decision of the Council for TRIPS of 29 November 2005, 30 November 2005(IP/C/40)

[56] Frederick M Abbott, 'Technical Note: The LDC TRIPS Transition Extension and the Question of Rollback' (2013) 15 *Policy Brief*

[57] Ibid. legally speaking, the non-rollback clause renders the entire architect of TRIPS flexibilities meaningless for the countries that do not have incorporated them in their IPRs regime. Ashen Habib Leon, 'The relevancy of 'rollback clause' for LDCs IPRs regime' <http://www.thedailystar.net/law-and-our-rights/the-relevancy-of-rollback-clause-for-ldcs-iprs-regime-18122> 6 December 2015.

[58] Text: USTR Fact Sheet Summarizing Results from WTO Doha Meeting, Nov. 15, 2001, <http://www.usembassy.it/file200 11 1/alia/al 111516.htm> 6 December 2015. But, Gathii claims that Doha Declaration is binding from customary international law perspective, for this declaration was adopted unanimously. See Gathii, James Thuo, 'The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties' (2001) 15 *Harvard Journal of Law and Technology* 291.

[59] Sell puts that : " *Asymmetrical power relations* continue to shape intellectual property policy, reducing the amount of leeway that poorer and/or weaker states have in devising regulatory approaches that are most suitable for their individual needs and stages of development" (emphasis added). See Sell, above n 4, 41.

negotiating potential FTAs likely to due at the TICFA. Some snapshots of a "Doha-minus" landscape have been taken below.

*"Doha-minus" by Introducing "Data Exclusivity"*

In art 15.10 of the US-CAFTA FTA, for example, articulates a fixed term data exclusivity, which would disentitle the CAFTA countries to use the "Paragraph 6 System", for the System can be used as an exception to patent rights not as an exception to data exclusivity right. According to Abbott, 'even if a license is granted to a generic producer/importer, the patent owner will be able to prevent marketing of the equivalent medicine (because it will not consent or acquiesce to marketing).The generic product cannot be put on the market on regulatory grounds, regardless of the grant of license with respect to the patent.'[60]

*Doha minus by introducing Patents for "new uses of known substances"*

The TRIPS Agreement is silent as to whether patents should be granted for "new uses of known substances", leaving countries with flexibility to decide the question.[61] The Parties confirm that patents shall be available for any new uses or methods of using a known product, including new uses of a known product for the treatment of humans and animals. The U.S.-Morocco FTA, for example, in Article 15.9(2) provides that the Parties "confirm that patents shall be available for any new uses or methods of using a known product, including new uses of a known product for the treatment of humans and animals". In Art.14.8 (2), the U.S.-Bahrain FTA also articulates same type of provision. This practice of patenting "new uses of known substances" violates the Doha Declaration on TRIPS and public health, inasmuch it construes the TRIPS in such a way which renders medicine inaccessible and jeopardizes public health.[62]

*Doha minus by way of Extending Patent Terms*

The cardinal mandate of the Doha Declaration as said earlier is to make medicine accessible for all and to protect public health. A careful survey of some US FTAs reveals that, they tend to extend the TRIPS minimum patent term, by one way or the other, in the name of adjustment against the period that is required for regulatory approval of patent.[63]

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[60] Frederick M Abbott, 'The Doha Declaration on the TRIPS Agreement and public health and the contradictory trend in bilateral and regional free trade agreements' (*Quaker United Nations Office (Geneva)(QUNO), Occasional Paper* 14 2004).

[61] Since art.27.1 of the TRIPS Agreement does not define "novelty", it is up to the Members to define what constitute "novelty". They may well exclude "new uses of known substance" from the definition of novelty. Article 1.1 of the TRIPS has also mandated this leeway. See de Carvalho, above n 27, 64.

[62] One of the mandate of the Doha Declaration on the TRIPS and Public Health as stated in Art.4 is "that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."

[63] See the U.S.-Bahrain FTA, Art.14.8 (6); CAFTA, Art.15.9 (6); U.S.-Chile FTA, Art.17.9 (6); U.S.-Morocco FTA, Art.15.9 (7); U.S.-Singapore FTA, Art. 16.7(7) (8). As regards

*Excluding provision for parallel import*

The Doha Declaration in article 5(d) categorically declares the freedom of the Members to choose a exhaustion regime. By mandating national exhaustion regimes or otherwise giving the patent holder exclusive right as to prevent importation of the patented product the FTAs are Doha-minus by eliminating a TRIPs-compliant opportunity to access more affordable patented drugs.[64] Article 15.9(4) of the U.S.-Morocco FTA, for example, provides that, "Each Party shall provide that the exclusive right of the patent owner to prevent importation of a patented product, or a product that results from patented process, without the consent of the patent owner shall not be limited by the sale or distribution of that product outside its territory".

*Limiting the Grounds of Compulsory Licensing*

Article 5(b) of the Doha Declaration on the TRIPS and Public Health gives liberty to the Members to determine the grounds for issuing compulsory licenses. Article 4.20 of the US-Jordan FTA restricts the grounds for issuing compulsory licenses. The Singaporean and Australian FTAs provide that if a Party uses a compulsory licence in the case of a national emergency, the Party "may not require the patent owner to provide undisclosed information or technical know-how related to a patented invention that has been authorised for use". [65]This is an attempt to paralyze the "para.6 system" in the name of "data exclusivity".[66]

*Data exclusivity negates the Doha Mandate of "Access to Medicine"*

Article 39.3 of the TRIPS Agreement requires members to provide protection against "unfair commercial use" of confidential information with respect to "new chemical entities" submitted during the regulatory review process. The provisions in the FTAs establish strict "marketing exclusivity" periods following approval based on submitted data (initially five years), do away with the limitation to "new chemical entities," and do not allow exceptions for fair or noncommercial uses, such as use by government authorities in public health systems.[67]

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patent term extension Correa puts succinctly: "[t]he possibility of such extension creates uncertainty for generic producers and, when effected, will have obvious consequences on public health: it will delay the introduction of competing products with the ensuing loss of consumer welfare and increased barriers to access to medicines, especially by the poor." See Carlos Maria Correa, 'Implications of bilateral free trade agreements on access to medicines' (2006) 84(5) *Bulletin of the World Health Organization* 399-404.

[64] Sell, above 4.

[65] Art.16.7.6 of the Singapore-US FTA, Art.19.9.7 Australia-US FTA.

[66] Jean-Frédéric Morin, 'Tripping up TRIPS debates IP and health in bilateral agreements' (2006) 1(1) *International Journal of Intellectual Property Management* 37, 47.

[67] Frederick M Abbott, 'The WTO medicines decision: world pharmaceutical trade and the protection of public health' (2005) 99(2) *American Journal of International Law* 317, 350. Abbott reached in this conclusion by analyzing the U.S.-Australia FTA, Art. 17.10(1); U.S.-Bahrain FTA, Art. 14.9(1); CAFTA, Art. 15.10(1); U.S.-Chile FTA, Art. 17.10(1); U.S.-Morocco FTA, Art. 15.10(1); U.S.-Singapore FTA, Art. 16.8(1). Correa elsewhere pointed out that, "data exclusivity" is not contemplated under article39.3 of the TRIPS. See Correa, above n 63.

*"Doha minus" by Denying Regulatory Use Exception to Patents*

The United States links patents to the marketing approval process, precluding a country from approving a product with effect prior to the expiration of the patent term, without the "consent or acquiescence" of the patent holder.[68] The terms of the FTAs[69] applicable to pharmaceutical products, patents, and related regulatory matters raise a substantial number of concerns about the introduction of generic, off-patent products onto the market in the countries agreeing to these provisions, including the United States. These provisions may substantially reinforce the advantages of originators, even as to off-patent products, reducing the availability of alternatives and increasing prices, which undermines the Doha regime's mandate of accessible medicine for all.

**6. Potential Impact of TICFA on IPRs "Regime Reform" Agenda in Bangladesh: Will the TICFA Translate "Doha-minus" in Bangladesh's IPRs Regime?**

The TICFA is signed at a very crucial point of time, when Bangladesh has taken a legislative reform agenda in hand. Bangladesh is on process to draft a new patent legislation replacing the century-old Patent Act of 1911. The 1911 Act has been characterized as outmoded to serve the interest of Bangladesh in line with the Doha regime's sensation to public health and access to medicine for all, inasmuch it allows patent for any product or process.[70] The draft patent laws have been made several times,[71] the draft of 2013 being the latest. The draft of 2013, for example, have introduced the notion of international exhaustion[72] (allowing parallel import), incorporated the WTO General Council "waiver decision" of 2003[73], introduced higher threshold[74] of "inventive step" for patentability, prohibited patenting of product or process relating to agriculture and horticulture,[75] introduced wider

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[68] Abbott, Ibid. 351.

[69] See U.S.-Australia FTA, Art. 17.10(5); U.S.-Bahrain FTA, Art. 14.9(4); CAFTA, Art. 15.10(2); U.S.-Chile FTA, Art. 17.10(2); U.S.-Morocco FTA, Art. 15.10(4); U.S.-Singapore FTA, Art. 16.8(4).

[70] Section 2(8) of the Patent and Designs Act, 1911 defines an invention as "any manner of new manufacture and includes an improvement and an alleged invention". This definition is very wide and may be used to justify "ever-greening of patents" and patents "for new uses of known substances". These practices render the medicine inaccessible for people.

[71] Islam, above n 10, 169-170

[72] Art.31 of the Draft Patent Act, 2013 (Bangladesh)

[73] Art.30 of the Draft Patent Act, 2013.This provision allows Bangladesh to export generics in other LDCs with insufficient or no manufacturing capacities.

[74] Section 2(g) and 4 of the Draft requires that a patentable invention must have technical advancement; advanced efficacy and quality over its prior art and it must not be frivolous.

[75] Section 4(1)(k).

grounds for issuing compulsory licenses[76]. This new proposed regime has successfully translated the Doha mandate of protection of public health protection and access to medicine for all. Given the experience of "Doha minus" strategy[77] of the US in bilateral arrangements, one may entertain legitimate concerns as to whether this Draft Act would be passed or thrown away in the face of aggressive "Doha-minus" policy of the US.

There is also an ongoing enterprise to enact laws for protection of plant varieties, farmers' rights, traditional knowledge and biodiversity. Along with the PBRs, the Draft Plant Varieties Act, 2007 (Bangladesh) also provides protection of extant or community variety meaning farmers' variety or a landrace.[78] The Draft Act categorically prohibits protection of terminator seeds and of the GMOs without Environmental Impact Assessment (EIA).[79]As a party to the CBD and the ITPGRFA, Bangladesh has drafted the Biodiversity and Community Knowledge Protection Act (draft Biodiversity Act) containing access to PGRs and equitable benefit sharing. We have seen earlier that the US FTAs either require its counterpart to join the UPOV or to grant patents in plant varieties.[80] So, it is very likely that in the future FTAs negotiations at the "TICFA Forum" the US may require Bangladesh to grant plant patents or to follow the UPOV *in verbatim* while framing its PVP regime. This type of move may require Bangladesh to compromise some pro-public initiatives i.e. provisions excluding terminator seeds, GMOs from protection and provisions to protect biodiversity and traditional knowledge. Remarkably, under the EC-Bangladesh FTA (2001) Bangladesh is required to follow the UPOV (1991) in framing PVP regime.[81]

## 7. Potential Impact of TICFA on Bangladesh's standing in the LDCs Group at the WTO: Compromising Group Interest at the cost of Individual Interest

Bangladesh is one of the leading members in the LDCs group at the WTO. It has been very vocal to protect the LDCs interest in the Doha Round negotiations in different areas including the intellectual property rights. As the coordinator of the

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[76] Section 14, inspired by the Doha Declaration, has introduced wide grounds for issuing compulsory licenses like public interest, especially, national security, health, economy, nutrition. Under the section compulsory licenses may also be granted to prevent anti-competitive practices.

[77] A picture of Doha-minus strategy in FTAs has been in the previous part.

[78] See Islam, above n 10, 88.

[79] Ibid, 91.

[80] See above n 42, 46.

[81] Sarita Brault, 'PVP Flexibilities available to WTO Members: Country Profiles Related to Implementation of TRIPS Article 27.3(b)' (QUNO, January 2014) <http://s3.amazonaws.com/academia.edu.documents/33406692/PVP_flexibilities_available_to_WTO_Members_3libre.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1400503494&Signature=gBL5wvdYoK8Qe%2FN6DyhJ%2FnWjpLc%3D> 5 December 2015.

LDC Group in 2003, 2007 and again in 2011, Bangladesh has ably advanced the interest of LDCs within the WTO.[82] Bangladesh has worked a lot on behalf of the LDCs group to translate WTO flexibilities for the world's poorest nations into trade and development outcomes.[83] Move of Bangladesh at the WTO on behalf of the LDCs has secured the interest of the LDCs. From IPRs perspective, the Doha Declaration on TRIPS and Public Health, transition period for pharmaceutical patents till 2033 and the 11 June 2013 extension of the transition period for LDCs till 2021 have been great success for the LDCs at the Doha Ministerial. On the contrary, these decisions have gone against the interest of the developed countries like the USA, who are opting for stronger IPRs protection worldwide to save their investment and trade. In the "TICFA-Forum" the USTR may pressurize Bangladesh to become silent in the LDCs Group, since Article 4 of the TICFA requires Bangladesh to refrain from taking any move which adversely affects the trade and investment interest of the US and *vice versa*.[84]

## 8. TICFA as a Platform for Negotiating "Non-Violation" Regime in the future FTAs: Implications and Challenges for Bangladesh

TICFA being a framework agreement[85] might be followed by FTAs. Recent US FTAs[86] contain non-violation complaint[87] clause in respect of various obligations

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[82] Pascal Lamy, "The WTO is your partner in achieving your development goals" (2012). < http://www.wto.org/english/news_e/sppl_e/sppl223_e.htm> 5 December 2015.

[83] Ibid.

[84] Khan aptly summarizes the potential impact of TICFA on Bangladesh's position in the LDCs Group at the WTO:

> Bangladesh has been one of the most influential and vocal WTO members in multilateral trade negotiations in upholding the interests of the LDCs. In many cases Bangladesh has operated as a leader on behalf of the LDCs at the WTO. However, by signing this bilateral forum agreement Bangladesh has weakened is position in this arena. For it has incurred an expectation that it will not harm the trade and economic interests of the US and its allies, thus undermining its capacity and will to stand up for the interests of other LDCs; and especially important development at a time when many of these countries – having already signed bilateral framework/forum agreements – have now started to feel the pinch of one-on-one approach based trade negotiations with the USA. See, Mohammad Tamizuddin Khan, 'TICFA, political economy of US bilateralism and Bangladesh' <http://www.bilaterals.org/?ticfa-political-economy-of-us> 19 May 2014.

[85] See above n 14.

[86] US FTAs with Oman 20.2(c); Morocco 20.2(c); Chile 22.2(c); CAFTA 20.2(c); Bahrain 19.2 (c)

[87] Non-Violation Complaint (NVC) is a GATT-WTO remedy which permits a WTO Members to challenge another's measure on the basis not of a failure to comply with an agreed obligation, but rather where the attainment of the Agreement's objectives is being impeded, or where a benefit under the Agreement is being "nullified or impaired", due to "the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement..." (Article XXIII of GATT 1994). On NVC see, generally, Robert W Staiger, and Alan O Sykes, 'Non-Violations' (2013) *Journal of*

including IPRs. Since NVCs jurisprudence developed under the GATT 1947 was mainly related to tariff concessions, the developing countries (albeit the LDCs) claim that NVCs are ill-suited to IPRs.[88] Developing countries and the LDCs argue that NVCs jurisprudence being imprecise, unpredictable and incoherent is ill suited to rule based WTO system, nay the TRIPS.[89] Developing countries and LDCs further argue that NVCs might frustrate the TRIPS flexibilities and the object and purpose of the TRIPS.[90] One may argue that, even if the FTAs likely to follow from TICFA bear no TRIPS-Plus provisions in IPRs chapter, Bangladesh might face the challenge to invoke TRIPS flexibilities due to the inherent open-endedness and ambiguity inherent in NVCs system. Currently, NVCs under the TRIPS have been foreclosed under a moratorium.[91] Apparently this moratorium does not affect a NVC system in vogue in the bilateral arrangements like FTAs having autonomous dispute settlement systems. Another intriguing issue is that, developed countries, who want the moratorium to be withdrawn, may argue that non-violation complaints in respect of IPRs have become customary international law citing numerous FTAs provisions.[92]

## Conclusion

The wave of the US politics of FTAs has reached in Bangladesh by means of the TICFA. The bedrock of this politics is "TRIPS is the floor, not the ceiling". This paper has shown that, how this aggressive policy of maximization of IPRs has created serious challenges to the US trading partners in terms of jeopardizing public

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*International Economic Law*. For an analysis of non-violation complaint under TRIPS, see, summary note of the WTO secretariat vide IP/C/W/349/Rev.2, <http://www.wto.org/english/tratop_e/trips_e/ta_docs_e/6_ipcw349rev2_e.pdf> 5 December 2015; See also Matthew Stilwell, and Elizabeth Tuerk, *Non-Violation Complaints and the TRIPS Agreement: Some Considerations for WTO Members* (South Centre, 2000).

[88] See communication from developing countries to the TRIPS Council vide IP/C/W/385.

[89] Ibid. see also Sûng-Joon Cho, 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process' (1998) 39 *Harvard International Law Journal* 311.

[90] Ibid. See also, Frederick M Abbott, 'Non-violation nullification or impairment causes of action under the TRIPS Agreement and the Fifth Ministerial Conference: A warning and reminder' (*Quaker United Nations Office (Geneva) (QUNO), Occasional Paper* 11 (2003).

[91] 9th WTO Ministerial Conference, Bali, 2013, Briefing note: 'Non-violation' in intellectual property—up for a decision in Bali,
Visit http://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_nonviolation_e.htm (accessed on 19 July 2014)

[92] On the formation of customary international law see, generally, the *North Sea Continental Shelf cases,* ICJ Rep.1969, I. Pertinently, the ICJ in this case held that on the formation of customary international law, practice of the most important countries i.e. most interested States in the relevant field. Since developed country FTAs are generally entered into with developing and least developed countries, the stand of the latter countries in the WTO on moratorium issue may be overawed.

health, food security and agricultural biodiversity. This paper has also showed that, how the US FTAs have flouted the letter and spirit of the Doha regime combating public health crises. The TICFA, as a fertile ground of potential US-Bangladesh FTAs, has also been characterized as a "TRIPS-Plus" and "Doha-minus" enterprise. This note has tried to landscape the potential impact of the TICFA on Bangladesh in the areas of public health, pharmaceutical industry, Agriculture and the ongoing regime reform agenda. Bangladesh should think twice before negotiating FTAs with a major player of international trade so that it can retain TRIPS flexibilities and privileges of Doha regime.

# Human Rights in Pre WTO Period: Scope for Trade-Human Right linkage

**Dr. Shima Zaman***

## Introduction

Proponents of economic liberalisation believe that removing trade barriers will lead to welfare and reduce poverty,[1] but this notion has been challenged by increasing poverty, unemployment, hunger and unequal economies. Therefore, the trend is towards building an effective nexus between trade and human rights. In reality, trade agreements have various effects on the ability of countries to protect their social values, including labour and environmental standards and human rights. The World Commission on the Social Dimension of Globalisation said in its 2004 report, 'wisely managed, the global market economy can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty'.[2]

The preamble to the Charter of the United Nation (UN Charter) declares that faith in the dignity of humans, and in the equal rights of men and women, promoting social progress and better standards of living for all are the objectives of the UN. This affirms that economic and social development is an indispensable means to the full realisation of human rights in the modern world. The post-war UN made it a high priority to launch better regimes for both human rights and world trade. Articles 55 and 56 of the UN Charter when read together assert that economic development and human rights are not separate agendas and that their promotion and achievement are interdependent. So by acknowledging the dignity and eliminating the separate existence of trade and human rights the UN Charter asserts that trade and human rights linkage did exist in the pre-WTO era. Linkage was established through the UN embargo aimed at ending apartheid to serve the cause of human rights.[3] Similarly efforts to, at least, prevent a race to bottom in labour protection because of global competition have been on the agenda for decades and addressed in the

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1 Neoclassical economic theory has long contended that trade enhances welfare and growth. In W Strahan and T Caddell (1776), *An Inquiry into the Nature and Causes of the Wealth of Nations*, Adam Smith stressed the importance of trade as a vent for surplus production and as a means of widening the market, thereby improving the division of labour and the level of productivity.

2 World Commission on the Social Dimension of Globalization, *A Fair Globalization – Creating Opportunities for All* (2004) x.

3 Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi, 'Linking Trade Regulation and Human Rights in International Law: An Overview' in Thomas Cottier, Joost Pauwelyn and Elisabeth Burgi (eds), *Human Rights and International Trade* (2005) 2.

International Labour Organization (ILO), which the multilateral trade system has failed to materialise.[4] Most importantly, human rights issues are also present in different regional and multilateral trade agreements though not explicitly.[5]

However, the opponents of trade-human rights linkage claim that trade is for doing business and it has nothing to do with human rights.[6] They further claim that economic development achieved through trade will automatically lead to implementation of human rights. So the question is what the trade agreements say about human rights. This article argues that the trade human rights nexus has always existed and will always do. It proceeds against the common belief that trade and human rights developed in complete isolation in the post-world war period; and shows how and why human rights concerns emerged in economic planning of recognition and development after the Second World War. Important regional and multilateral trade agreements are also discussed to show how the human rights issues have entered into their legal framework, how far this human rights approach has been implemented within their trade activities; and what impediments there are to the full realisation of human rights issues. This article will help all to understand that trade never denied the existence and importance of human rights and therefore, every future, national/international trade agreements have to insert the human rights issues in the trade activities.

This article analyses the background of trade-human rights debate and seeks to explore the reasons for the stunted growth of the linkage issue. It critically examines both primary and secondary materials with emphasis on the relationship between trade and human rights. The primary materials include the relevant statutes and secondary laws. The secondary materials include scholarly articles as well as articles and other materials appearing in popular magazines, newspapers, and materials obtained websites of the relevant bodies. The readers of this article report should note that while in appropriate cases, references may be made to some specific type ode agreements this article would examine only few important trade agreements.

**Trade-Human Rights Nexus and the UN**

The Universal Declaration of Human Rights (UDHR), the most important statements of the norms of the international human rights adopted on 10 December 1948 by the UN General Assembly, includes a number of rights that are to some extent related to

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[4] Ibid.

[5] Subsequent discussions on NAFTA, APEC, EU and GATT shows how these trade agreements address the human rights concerns in their different articles.

[6] Tarek F Maassarani, 'WTO-GATT, Economic Growth, and the Human Rights Trade-Off' (2005) 28(2) *Environs* 269; F Van Hees, 'Protection v. Protectionism: The Use of Human Rights Arguments in the Debate for and Against the Liberalization of Trade (2004) <http://web.abo.fi/instut /imr/norfa/floris.pdf> at 26 September 2012.

trade agreements. Articles 22 to 24 deal with economic rights, which include the rights to work, rest and leisure, and social security; Article 25 deals with subsistence rights, particularly the right to food, and a standard of living adequate for the health and well-being of oneself and one's family; and Articles 26 and 27 address social and cultural rights, especially the right to education and to participate in the cultural life of the community. The International Covenant on Economic, Social and Cultural Rights (ICESCR) further elaborates these rights. Article 11 of ICESCR includes the right of everyone to an adequate standard of living, and Articles 6 to 8 elaborate the right to work. Article 1 of the International Trade Organisation (ITO), the GATT preamble, the World Trade Organisation (WTO) and North American Free Trade Agreements (NAFTA) refer to raising standards of living and full employment as the end goal of trading activities. The similarity of these rights to those enumerated in the UDHR reveals an inherent connection between the principles of economic cooperation and human rights.

This nexus is not new. It started with the inclusion of chapter nine in the UN Charter, which shows, particularly with the heading 'International Economic and Social Co-operation', the UN's determination and commitment to ensuring cooperation between international economic development and human rights for the better realisation of human rights. Article 55 of the Charter states that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> 1. higher standards of living, full employment, and conditions of economic and social progress and development;
> 2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
> 3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[7]

In order to make these objectives meaningful and effective, the UN obliges its members in Article 56 to 'take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'.[8] Scholars have been divided on the question of how far these two Articles of the Charter impose a legal obligation on the part of the members to respect and promote human rights and to take joint initiatives in achieving human right. Opponents rest their

[7] Charter of the United Nations, art 55.
[8] Charter of the United Nations, art 56.

claim that the Charter only sets out a program of action for the UN to pursue, in which members are pledged to cooperate.[9] Against this view, it is argued that the UN Charter is a treaty that involves obligations, and members of the treaty have a duty to promote and respect human rights.[10]Article 55 is considered a source of obligation with respect to human rights. It is argued that the subsequent adoption of UDHR and other international human rights instruments reflect the potential of the Charter's human rights obligation, and are considered an authoritative interpretation of the Charter's provisions.[11]

In fact, an undertaking to cooperate in the promotion of human rights does not leave a country free to remain indifferent to these rights. A pledge to take joint and separate actions to achieve universal respect for, and observance of, human rights does not leave countries with discretion. Article 2(2) of the Charter provides that all members shall fulfill in good faith the obligations assumed by them. The obligation that they have accepted voluntarily cannot be avoided on the grounds that it is a non-binding obligation. In this respect, Hersch Lauterpacht said:

> There is a distinct element of legal duty in the undertaking expressed in Article 56 in which 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. The cumulative legal result of this entire pronouncement cannot be ignored. . . . Any construction of the Charter according to which Members of the United Nations are, in law, entitled to disregard—and to violate—human rights and fundamental freedoms is destructive of both the legal and moral authority of the Charter as a whole.[12]

Thus, the nexus between economic activities and human rights created by Articles 55 and 56 is not a mere declaration but it creates an international obligation. These two articles when read together assert that economic development and human rights are not separate agendas; the promotion and achievement of these are interdependent. This interdependency is also reiterated in the regional and international trade agreements.

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[9] Manley O Hudson, 'Integrity of International Instruments' (1948) 42 *American Journal of International Law* 105–108, cited in Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 *American Journal of International Law* 337–338; Hans Kelsen, *The Law of the United Nations—A Critical Analysis of Its Fundamental Problems: With Supplement* (Praeger, 1950) 29–32.

[10] Philip C Jessup, *A Modern Law of Nations: An Introduction* (1948) 91.

[11] Anthony Cassimatis, *Human Rights Related Trade Measures Under International Law: The Legality of Trade Measures Imposed in Response to Violations of Human Rights Obligations Under General International Law* (2007) 67.

[12] H Lauterpacht, *International Law and Human Rights* (1950), cited in Egon Schwelb, 'The International Court of Justice and the Human Rights Clauses of the Charter' (1972) 66 *American Journal of International Law* 337, 339.

**Trade and Human Rights Nexus in the European Union (EU)**

The EU, founded on 1 November 1993, was founded to enhance trade, financial, political, economic and social cooperation.[13] The European Community (EC) policymakers hope that trade will stimulate growth and creates jobs at home. They want trade policies to reduce poverty and secure sustainable development abroad. The EU has made human rights a priority in its Common Foreign and Security Policy (which remains a matter of the EU member states), its foreign aid policy (which supplements the development cooperation policies of individual states), and its trade policy. The commitment of the EU to human rights in its external policy is reflected in the Union's common foreign and security policy provisions and in its development cooperation programme. Every new agreement between the EU and a third country includes a human rights clause allowing for trade benefits and development cooperation to be suspended if abuses are established. Moreover the Union can impose targeted sanctions as it has done against Serbia and Burma. These range from a refusal to give visas to senior members of the regime to freezing assets held in EU countries.[14]

The EU's action in the field of external relations is guided by compliance with the rights and principles contained in relating provisions of EU Treaties, in particular Articles 2, 3, 6, 11, 19, 29, 49 of the Treaty on European Union (TEU), Articles 11, 13, 177 of the Treaty Establishing the European Community (EC Treaty), and Articles 6, 7, and 49 of the Treaty of Amsterdam.

Since 1992, the EU has included in all its agreements with third countries a clause defining respect for human rights and democracy as an 'essential element' of its external relationship. This human rights clause is unique to the EU's bilateral agreements and it represents a new model for EU external relation as well as for international cooperation. This human rights clause has been further developed in all agreements concluded with the Conference on Security and Cooperation in Europe (CSCE) countries, including an innovative provision is addition to this essential element clause, the 'additional clause'.[15]

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[13] Austria, Belgium, Bulgaria, Cyprus (Greek part), Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the UK and Northern Ireland.

[14] The European Union and the World (2001) cited in Vaughne Miller, 'The Human Rights Clause in the EU's External agreements' (Research Paper 04/33, International Affairs and Defence, House of Commons Library, 2004) 18.

[15] The additional clause provides a response for non-execution, diverging from the procedure of three-month notification laid down in Article 65(2) of the Vienna Convention on the Law of Treaties. It takes one of two forms: (a) an explicit suspension clause known as the 'Baltic clause', which authorises the suspension of the application of essential provisions. This clause was used in the first agreements with Estonia, Latvia, Lithuania and Slovenia (P Van Elsuwege, 'The Baltic States on the Road to EU Accession: Opportunities and Challenges' (2002) 7 *European Finance Association Review* 171–192); or (b) a general

The essential element clause stipulates that respect for fundamental human rights and democratic principles as laid down in the UDHR underpin the internal and external policies of the parties and constitute an essential element of the agreement. This essential element is enhanced by the additional clause dealing with non-execution of the agreement. Thus, in all new negotiations the directives for EC agreements with third countries, the following clauses and content should be included: (1) the preamble, general references to human rights and democratic values; (2) an article defining the essential elements; (3) an article on non-execution; and (4) an interpretation declaration on article on non-execution.

The human rights clause may cover measures such as development cooperation, trade concessions, financial assistance or consultation procedures. However, the clause is essential for the accomplishment of the purpose or objectives of the agreement. A violation of human rights may allow the EU to terminate the agreement or suspend its operation in whole or in part.[16] Thus, in the EU agreements, the human rights clause is considered an essential rather than an individual ancillary term. The basis may be that 'treaty based human rights clause could offer in essence more accountability, the rights of initiative, the duty of cooperation, and legal certainty for contracting parties'.[17] The EU applies a broad concept of human rights covering three generations of human rights. The first generation refers to civil and political rights; second generation consists of economic, social and cultural rights, and the third generation extends to collective rights such as development and environmental rights.[18]

The Cotonou Agreement, signed on 8 June 2000 and entered fully into force on 1 April 2003, links 78 African, Caribbean and Pacific (ACP) countries and the EU contains this human rights clause. Article 9 reiterates human rights as essential and fundamental elements of the Cotonou Agreement. Article 9 (2) provides that '[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement'. Article 9 (3) provides that '[g]ood governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the parties and constitute a fundamental element of this Agreement'. Breaches of any essential

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non-execution clause known as the 'Bulgarian Clause'; which provides for appropriate measures should the parties fail to meet their obligations following a consultation procedure, except in cases of special urgency. This clause was used in agreements with Romania, Bulgaria, the Russian Federation, the Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus.

[16] H Der-Chin, 'The Human Rights Clause in the European Union's External Trade and Development Agreements' (2003) 9(5) *European Law Journal* 677–78.

[17] Van Boven, 'General Courses on Human Rights', in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (1995) IV(2) 65, 66.

[18] S Marks, 'Human Rights, Democracy and Ideology' in Academy of European Law (ed), *Collected Courses of the Academy of European Law* (2000) VIII(2) 57–89.

elements or fundamental element may ultimately lead to a country facing suspension as a measure of last resort provided in Articles 96 and 97 of the Agreement respectively. The ACP-EU cooperation is directed towards sustainable development centred on human person, who is the main protagonist and beneficiary of development, which entails respect for and promotion of all human rights. The Cotonou Agreement represents an elaborate model of North-South cooperation.[19]

Europe's view that human rights and trade objectives can and should be linked is not new. Throughout the history of GATT, some European countries tried to include labour rights. The EU argues that the ILO needs greater authority to work with its members and the WTO on the promotion and supervision of core labour standards.[20] The EU also funds specific labour rights capacity building projects to attempt to improve workplace conditions in global supply chains.[21] However, the EU's effort to promote human rights is not limited to particular groups of rights, as the policymakers believe that human rights are universal and indivisible. Its GSP program aims to stimulate developing countries to promote a wide range of human rights stated in international conventions. The EU has developed several different approaches to GSP which allow developing countries to export to the EU without duties or with lower duties.[22] The EU hopes this will be a strong incentive to these countries to respect and promoting human rights. Besides, the GSP-Plus arrangements grants additional market access to 'dependent and vulnerable' countries that have ratified and effectively implemented key international conventions on human and labour rights, environmental protection, and good governance.[23]

In sum, the EU is committed to using trade policies and agreements to promote human rights nationally, regionally and internationally. EC policymakers have introduced human rights clause into more than 50 trade agreements, which apply to more than 120 countries, and since 1995, the EU has invoked the human rights

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[19] M Holland, *The European Union and the Third World* (2002) 199–201.

[20] European Commission, 'Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee—Promoting Core Labour Standards and Improving Social Governance in the context of Globalization' (COM, 2001) 416, 13–16.

[21] European Union, *Human Rights Report* (2005) 58.

[22] The EU Generalized System of Preferences (GSP), <http://europa-eu-un.org/articles/en/article_4337_en.htm>at May 25 2009.

[23] A country is 'dependent and vulnerable' when the fine largest sections of its GSP-covered exports to the community represent more than 75 per cent of its total GSP-covered exports. In addition, GSP-covered exports from that country must represent less than 1 per cent of total EU imports under the GSP. In December 2005, the European Commission granted GSP-Plus benefits to Bolivia, Columbia, Ecuador, Peru, Venezuela, Georgia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Moldova, Mongolia and Sri Lanka for the period 2006 to 2008, <http://europa.-eu-un.org/articles/en/article_4337_en.htm >at 24 May 2009.

clause in 12 cases.[24] As part of its external policy the EU engaged in 'Dialogue' based on human rights with many countries, e.g., China, Cuba, Iran, Sudan, the US and Canada. The basic principles of EU human rights dialogue are as follows:

- Mainstreaming or integrating human rights in all aspects of its external relation with third parties; and
- Initiation of human rights-specific dialogue with a particular third country if necessary, in order to examine human rights issue in greater depth.[25]

Despite this unique effort of the EU in linking trade and human rights it is often criticised for failing to consistently use the human rights tools embedded in trade agreements. The European Parliament noted that, in general, the EU has invoked the human rights clause mainly in response to undemocratic changes of government but did not use it where it might be equally useful. For example, the EU has never used the human rights clause in response to violations of economic, social, or cultural rights in countries such as Egypt and Tunisia.[26] In November 2005, the EU office of Amnesty International noted that although human rights are violated 'in most of the Mediterranean partner countries', policymakers have failed to intervene and to effectively apply the human rights clause.[27]It is argued that the failure of the EU stems not from their lack of will but from the collective decision making process at the EU level.[28]

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[24] Andrew Bradley, 'An ACP perspective and Overview of Article 96 Cases' (Discussion Paper 64D, ECDMP, 2005), <http://www.ecdpm.org/Web_ECDPM/Web/Content?Contentnsf/ww/print/>at 21 May 2009.

[25] European Union Guidelines on Human Rights Dialogues: The European Union undertakes to intensify the process of integrating human rights and democratisation objectives ('mainstreaming') into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of mission or the Commission. It will further ensure that the issues of human rights, democracy and the rule of law are included in programming; 3.2. However, in order to examine human rights issue in greater depth, the European Union may decide to initiate a human rights-specific dialogue with a particular third country. Decisions of that kind will be taken in accordance with certain criteria, while maintaining the degree of pragmatism and flexibility required for such a task. Either the EU itself will take the initiative of suggesting a dialogue with a third country, or it will respond to a request by a third country.

[26] *European Parliament—Committee on Foreign Affairs, Report on the Human Rights and Democracy Clause in European Agreements* (2005) 17.

[27] Amnesty International, *Ten Years of EUROMED: Time to End the Human Rights Deficit* (Amnesty International EU Office, 2005).

[28] Hadewych Hazelzet, 'Suspension of Development: An Instrument to Promote Human Rights and Democracy' (Discussion Paper 64B, ECDPM, 20 September 2005).

In spite of the criticism, the EU, probably more than any other case study, is willing to link trade and human rights as part of its larger objective of promoting human rights. The dialogue based on human rights with different countries show how the EU concept of mainstreaming human rights in trade liberalisation is getting acceptance from the world trading community. The criticisms discussed above shows how the reluctance and inconsistency to use all the tools can send conflicting signals to the trade partners about the importance of human rights. Increasingly, it uses market access as a bargaining chip to obtain changes in the domestic arena of its trading partners from labour standards to development policies, and in the international arena from global governance to foreign policy.[29]

**Trade and Human Rights Nexus in the North American Free Trade Agreement (NAFTA)**

NAFTA came into effect on January 1, 1994, encompasses the US, Canada, Mexico and Chile, a combined market of some 390 million consumers.[30]Not only did NAFTA liberalise trade flows in a broad range of sectors, it introduced a unique dispute settlement mechanism that included side agreements on labour and environmental issues with human rights implications. As per the preamble, apart from its trade-related objectives, NAFTA requires each country to create employment, protect workers' rights and improve working conditions, to promote sustainable development and to protect the environment.[31] In addition, NAFTA was accompanied by two side agreements: The North American Agreement on Labour Cooperation (NAALC), aiming to promote effective enforcement of domestic labour laws, and the North American Agreement on Environmental Cooperation (NAAEC) to ensure that trade liberalisation and efforts to protect the environment were mutually supportive.

A fundamental objective of the NAALC is to 'promote, to the maximum extent possible, eleven labour law principles mutually embraced by each of the parties'.[32] The 11principles include labour protection for children, equal pay for women and men, prohibition of forced labour, assurance of minimum labour standards, elimination of employment discrimination, and protection for migrant workers.[33] In

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[29] Sophie Meunier and Kalypso Nicolaidis, 'The European Union as a Conflicting Trade Power' (2006) 13(6) *Journal of European Public Policy* 906, 907.

[30] NAFTA Preamble and art 102.

[31] NAFTA Preamble. The Preamble states that: The Government of Canada, the Government of the United Mexican States and the Government of the United States of America resolved to: CREATE new employment opportunities and improve working conditions and living standards in their respective territories; UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation; PRESERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations; and PROTECT, enhance and basic workers' rights.

[32]NAALC (14 September 1993) Can–Mex–US, 32 ILM 1499 (NAALC), art 1(b), 1503.

[33] Ibid, 1515–1516.

addition it has two other objectives: to 'promote compliance with, and effective enforcement' of each party's labour law by that party,[34] and to 'foster transparency in the administration of labour law'.[35]

However, the limited power of the administrative apparatus,[36] established by the NAALC is a bar to rectifying violations of these guiding principles. Furthermore, it provides no enforcement mechanisms for the majority of the labour principles.[37] The absence of definiteness, enforceability and remedy render the apparent 'obligations' undertaken voluntary rather than binding.[38] Under the NAALC, violations of labour principles concerning child labour standards, sex discrimination, occupational safety and health and protection of migrant workers may lead to investigation by experts, arbitration and, in very exceptional cases, fines. The labour side agreement cannot even judge or sanction private companies as a result of complaints about their labour practices.

The NAALC does not seek to develop common labour standards for the three NAFTA countries. Rather, it recognises 'the right of each party to establish its domestic labour standards' and supports the principle of 'due regard for the economic, social, cultural and legislative differences between the parties'.[39] The ambiguity concerning uniform labour standards applicable to all the member countries might give rise to different questions regarding enforcement, but it is not altogether surprising. The underlying reason may be that NAFTA is an agreement between developed and developing countries, so developing a common labour standard may result in hardship for the latter considering the difference between their socio-economic structures. As a result, the NAALC provides no content for substantive labour law other than the general commitment to maintain high standards in each of the 11covered labour law areas. Thus, NAFTA tries to balance the labour standards of developed and developing countries instead of imposing higher labour standards. NAFTA incorporates GATT Article XX in its Article 2010, meaning that the scope for human rights intervention is possible whenever it is necessary within the limits provided in Article 2010.

Despite NAFTA's efforts to address environmental and labour issues, it is often criticised for failing to ensure some other important human rights issues. Some argue that instead of supporting a thriving food system that keeps people on the land and

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[34] Ibid, art 1(f), 1503.

[35] Ibid, art 1(g), 1503.

[36] The Trinational Commission for Labor Cooperation and National Administrative Offices (NAOs) in each of the three NAFTA countries: NAALC, arts 8–19, 1504–1507.

[37] For a different view, see L Compa, *Another Look at NAFTA* (1997) Winter *Dissent Magazine* 45–50.

[38] Marley S Weiss, 'Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America and Beyond' (2002–2003) 37 *University of San Francisco Law Review* 689, 799.

[39] NAALC, above n 131, art 2, 1503.

communities eating healthy, local food, NAFTA has empowered global food corporations, increased market concentration and consolidated market power within and across sectors. As a small number of unaccountable corporate leaders now exercises unprecedented control over the availability and price of food, people are deprived of adequate food because farmers cannot get a fair price at the farm gate and consumers are gouged by rising food prices at grocery stores. NAFTA has greatly benefited translational agribusiness at the expense of farmers, consumers and a sustainable food system.[40]

It is also argued that NAFTA has failed to create employment opportunities to satisfy the demand of Mexican people and, poverty increased to 80 per cent since 1984.[41] Most importantly, NAFTA fails to ensure cross-border movement of unskilled and semi-skilled labour. NAFTA does not provide for the free, intra-regional movement of labour as the EU does.[42] Nevertheless, it provides scope for the temporary entry of business persons.[43] The conclusion stems from the exclusion is that such a provision would invite massive northbound migration from low wage, developing Mexico to higher-wage Canada and the US.

Trade liberalisation aims to ensure free movement of capital, goods and services. Yet, restricting the free cross-border movement of huge unskilled or semi-skilled workforce on the one hand, and creating opportunities for the skilled worker (mostly from developed countries) on the other, raises the question of whether the system is discriminating between them. As most of the unskilled labour belongs to developing countries, the discrimination casts doubt regarding the objective of trade liberalisation in general and trade agreements in particular whether trade is for developed countries only. The tension between developed and developing countries regarding the benefit of integrating human rights issues in multilateral trade liberalisation has compelled developing countries to deny and protest against any question of integration. However, with all its loopholes, NAFTA successfully brings developed and developing countries together and includes some of the human rights concerns within the trade agenda.

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[40] Institute for Agriculture and Trade Policy, Commentary by Dennis Olson, *Lessons from NAFTA: Food and Agriculture* (2 December 2008), <http://www.iatp/commentaries.cfm?refID=104574> at 18 February 2009.

[41] Kevin P Gallagher and Timothy A Wise, *NAFTA: A Cautionary Tale—Written Testimony on the Free Trade Area of the Americas* (Global Development and Environment Institute, Tufts University, 2002), <http://ase.tufts.edu/gdae/policy_research/FTAATestimonySept02.PDF> at15 February 2009.

[42] Citizens of an EU country are allowed to work in another EU country. See EC Treaty Article 48.

[43] Chapter 16 of NAFTA provides for the temporary entry of businesspersons and the resolution of some questions of immigration.

**Trade and Human Rights Nexus in Asia-Pacific Economic Cooperation (APEC)**

APEC, founded in 1989, is a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific Region.[44] APEC is the only regional trading bloc in the world committed to reducing barriers to trade and investment without requiring its members to enter into legally binding obligations. The objectives for APEC as set in the 1991 Seoul APEC Declaration,[45]emphasises on economic issues and mentions nothing on human right.[46] Nevertheless, it is argued that although APEC seems to confine its agenda to economic issues, the concern regarding human rights and social impacts of free trade were never totally outside the discussion of APEC leaders.[47] The APEC declarations contain some aspirations of human rights. For the first time in 2007, APEC member economies issued a declaration on climate change, energy security and human security in addition to its prime objectives of closer regional economic integration among its members.[48] In addressing the issue of enhancing human security agenda, they put emphasis on the need to further strengthen APEC's preparedness and ability to fight infectious diseases.[49] The APEC Declaration 2008 focuses on the social dimensions of trade and on reducing the gap between developing and developed members, in accordance with the theme: 'A New Commitment to Asia-Pacific Development'.[50] The leaders express their concern about food security and the social dimension of globalisation in their

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[44] APEC began in 1989 as an Australian initiative in recognition of the growing interdependence among Asia–Pacific economies and in response to the free-trade areas that had developed in Europe and North America.

[45] The declaration was adopted at a ministerial level meeting held in Seoul (12–14 November 1991), http:///www.ioc.u_tokyo.ac.jp/~worldjpn/documents/texts/APEC/19911114.D2E.htm/ at 11 June 2009.

[46] APEC. The members agreed on the following objectives:...to sustain the growth and development of the region for the common good of its peoples and, in this way, to contribute to the growth and development of the world economy; to enhance the positive gains, both for the region and the world economy, resulting from increasing economic interdependence, including by encouraging the flow of goods, services, capital and technology; to develop and strengthen the open multilateral trading system in the interest of Asia–Pacific and all other economies; to reduce barriers to trade in goods and services and investment among participants in a manner consistent with GATT principles, where applicable, and without detriment to other countries.

[47] Dick K Nanto, *Asia Pacific Economic Cooperation (APEC), Free Trade, and the 2002 Summit in Mexico* (Congressional Research Service, Library of Congress, 11 December 2002).

[48] 2007 Leaders' Declaration, *Fifteenth APEC Economic Leaders' Meeting: 'Strengthening Our Community, Building a Sustainable Future'* (9 September 2007), <http://www.apec.org/apec/leaders_declarations/2007.html> at 10 June 2009.

[49] Ibid, [16].

[50] 2008 Leaders' Declaration, *Sixteenth APEC Economic Leaders Meeting: 'A New Commitment to Asia–Pacific Development'* (22–23 November 2008), http://www.apec.org/apec/leaders_declarations/2008.html at 10 June 2009.

declaration. Its emphasis on the fact that 'globalization based on economic, social and environmental progress can bring sustainable benefits to all APEC economies, their business sectors and their people' further shows how the human rights issues are entering into the thinking process of APEC members. In fact in the recent leaders' declarations reveal how these concerns are seeping slowly in the activities of APEC. The reiterating of their confidence that economic growth will continue, and the determination to make future progress in their goal to reduce poverty and increase living standards makes it clear that economic growth is not an end itself rather a means of attaining further goals of reducing poverty and increasing standards of living of human lives.

APEC initially said very little about human rights agenda. It has started taking human rights or social aspects of trade into consideration recently. Although very insignificant and indirect in nature, it may be a restatement of the fact that trade and its social aspects are closely related and achievement of one without considering the other is not possible. The fact that APEC decisions are not legally binding on its members may pose doubt regarding the implementation of social issues. The APEC work programs are conducted on the basis of open dialogue with equal respect for the views of all participants—both the member countries and, to a certain extent, private business interests. This consensus-based decision making may results in slow, cumbersome and even effective implication.

**Concluding Remarks**

The trade agreements envisioned the realisation of some aspect of human rights as an ultimate end of their actions. This may be because of the period of development or particular interests of the countries joined in the agreement. It is true that except the EU with all the criticism, very few invoked actual mechanism to use trade to implement and promote human rights. The use of human rights as sanction or protectionism or emphasising of particular human rights issue has raised doubt among the member countries regarding the intention behind the trade-human rights integration. Yet, the inclusion to some extent proves that human rights have both moral and legal standing in the trade-induced economic development process. This presumably explains why the synergy between trade, economic growth and human rights is recognised, directly or indirectly in a number of trade agreements with preambular references to social issues, often in the absence of any follow-up normative provisions, and this may well lead to operative provisions at a later stage.[51]

The inclusion of non-trade issues in multilateral and regional trade agreements though scant in nature may be a clear indication that trade agreements do not consider the non-trade values absolutely out of context. It reiterates the fact that without trade economic growth is not possible and in the absence of a healthy

[51] The EU's human rights clause evolved in this way from Lome III (1985) to IV bis (1995).

economy the enjoyment of human rights is impossible. Similarly attaining economic growth at the cost of human rights is meaningless for those who are the ultimate beneficiaries of economic globalisation. All trade agreements whether regional or multilateral, took this reality into consideration. ITO explicitly accommodated the human rights issues though due to the US non-ratification it was doomed in the very beginning. Likewise the EU has made human rights an essential part of its external relation. NAFTA included labour and environment issue. APEC is still grappling with the issues of human right on a continuing basis.

There are controversies regarding the implementation of human rights issues under these agreements. In spite of the tension between developed and developing countries about trade-human rights integration the relationship between trade and human rights has become both more obvious and more sensitive over the past decades. The trend seems to favour a gradual acceptance of the role of social issues in regional agreements. More generally, this trend fits with broader changes in international relations. Recent trend in the multilateral and regional trade agreements to cover social issues is a development no doubt related to the increasing willingness of countries to use international law as a means of regulating matters previously left to domestic discretion.[52] It is certainly an improvement on the stalemate presently gripping the multilateral stage. The conclusions that lead from the above discussion is that references of non-trade values in multilateral and regional trade agreements reveal the fact that there exists a nexus between trade and human rights and that trade and human rights are not altogether different issues to be addressed separately.

[52] This phenomenon is sometimes referred to as the 'Europeanisation' of international law. Joost Pauwelyn, *Europe, America and the 'Unity' of International Law* (2005).

# Force Majeure and Hardship clause, the performance excuse: Review of Section 56 of Contract Act 1872 and Doctrine of Frustration under English Law

**Dalia Pervin***

## Introduction

A universally accepted principle of contract law is "*pacta sunt servanda*" meaning agreement must be kept, imposes on the parties responsibilities for its non execution. These responsibilities remain even if the failureis beyond the parties' power and the parties could not contemplate or anticipate it's happening during the signing of the contract. This principle reflects natural justiceand economic requirements as it binds to their promises and protect the interest of other party [1][an offer accepted becomes a promise; Section 2(b) of Contract Act 1872]Effective economic activity requires and demands reliable promises and thus this principle is always been emphasized all over the world keeping in mind that in many occasions this principle has not fulfilled the aim as the situation has subsequently so changed that the performances of the obligations or keeping promises have become impossible for overwhelmingly and radically changed circumstances that a reasonable party could not have completed it to its perfection[2]. If the party knew that that what was going to happen they would have made the contract differently[3]. This article aims to give an elaborate idea of the concepts of hardship and *force majeure*in the context of Bangladeshi and English law.

## Force Majeure and Hardship-The Concepts in General

The two major legal concepts deals with the problem of changed circumstances (change that occur beyond anticipation or too radical that has striken the root of the contract) are those of *force majeure* and hardship. To understand these concepts, these have to be considered on a theoretical and general basis.

*Force Majeure* (an irresistible compulsion or coercion): The concept *force majeure* came from the French for "*Superior Force*" which is "***Vis Major***" in Latin. This expression has been taken from the Code Napoleon and has a broader meaning than

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[1] Joern Rimke, 'Article on Force majeure and hardship: application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts.' Available at <http://www.cisg.law.pace.edu/cisg/biblio/rimke.html> last accessed on April 10, 2015.

[2] Ibid.

[3] Carole Murray et al, *C.M. Schmitthoff's Export Trade: The Law and Practice of International Trade* (Sweet and Maxwell, 11th edition 2007) 136.

Act of God, though it maybe doubtful whether it includes "all causes you cannot preventand for which you are not responsible"

[Act of God is defined as an event happening independently of human volition, which human foresight and care could not reasonably anticipate or avoid[4]].

The requirements of *force majeure* are:

a. It must proceed from a cause not brought about by the disadvantaged party's default
b. The cause must be inevitable and unforeseeable and
c. The cause must make execution of the contract wholly impossible.

In Matsoukis v Priestman & Co[5] the English Court's interpretation of the words held that they have a more extensive meaning than Act of God or Vis Major. According to the judgment, the words *force majeure* could cover the the dislocationof a business due to a universal coal strike or accidents to machinery, but would not cover bad weather, football matches, or a funeral. In two cases[6] it was decided that a party could not rely on *force majeure* simply because the price it was required to pay for the goods was considerably in excess of the price at which it had contracted to sell them.

In more general terms the following is the possible general definition of *force majeure*,
*Force Majeure* occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.[7]

***Force Majuere* Clause**

Chitty on Contracts has discussed *Force Majeure* clauses mainly in a chapter devoted to exemption clauses and not in the chapter of Frustration.
Chitty said[8]," the expression *Force Majeure* clause is normally used to describe a contractual term by which one (or both) of the parties is excused from performance of the contract in whole or in part, or is entitledto suspend performanceor to claim an extension of time for performance, upon the happening of a specified event or events

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[4] David M Walker, *The Oxford Companion to Law* ( OUP, 1980) 14.

[5] 1 K.B. 681(ENG. 1915).

[6] ***Brauer & Co. v.*** *James Clark*, 1952 W.N. 422(ENG, (1952) ; *Alopi Parshad & Sons Ltd. V.* ***Union of India*** [1960].

[7] A H Puelinckx, 'Frustration, Hardship, Force majeure, imprevision, Wegfall der Geschaftsgrundlage, unmoglichkeit, Changed Circumstance,' 1986 *Journal of International Arbitration* 47.

[8] Hugh Beale, *Chitty on The Law of Contracts*, (Sweet and Maxwell , 2004) 23-058.

beyond his control. .....*force majeure* clauses have been said not to be exemption clauses."

Even the UNIDROIT Principles have accepted a similar view saying that a party's non- performance is excused if that party proves that the non- performance was due to an impediment beyond its control, and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contractor to have avoided or overcome the impediment or its consequences.[9]

**Drafting *Force Majure Clauses***

There are a number of common characteristics to most *force majeure* clauses. The traditional approach of drafting a *force majeure* clause is to list specific events that may be triggered by natural, human or other factors[10]. These events are often divided into two parts.

**The first part** covers a list of specific events and its contents varies from contract to contract. This list could be very long covering many matters and run to a few pages.

This list includes matters such as

1. Acts of God
2. War
3. Riots and other major upheaval
4. Terrorist act
5. Explosion
6. Insurrection
7. Hostilities
8. Flood
9. Earthquake
10. Hurricanes
11. Thunderstorm
12. Extreme weather condition
13. Strike
14. Lockout

**The second part** covers more general statement of the events which fall within the scope of the clause, such as" similar events which reasonably may impede prevent or delay the performance of this contract'. [11]

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[9] UNIDROIT Principles, art 7.1.7( UNIDROIT meaning International Institute for the Unification of Private law).

[10] Firoozmand M.R., *The impact of supervening impossibilityevents on the performance of contractrual obligations: the concept of force majeurein international petroleum contracts* (Phd. Thesis, University of Dundee, 2006) 52.

[11] Ewan McKendrick, 'Article on Preparing For the Unexpected: Force Majeure and Hardship clauses in Practice' D153, January 2013.

One thing worth mentioning here is that sometimes theses clauses are kept open ended and problem with this approach is that it makes a contract cumbersome, infelicitous and unskilled, specially to the non legally trained mind.

An example on *force majeure* clause is given below under a licensing digital information contract is given below:

1. Neither party shall be liable in damages or have the right to terminate this agreement for any delay or default in performing hereunder if such delay or default is caused by conditions beyond its control including, but not limited to Acts of God, Government restrictions (including the denial or cancellation of any export or other necessary license), wars, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.

2. Neither party shall be liable for any failure or delay in performance under this agreement(other than for delay in the payment of money due and payable hereunder) to the extent said failures or delays are proximately caused (1) by causes beyond that party's reasonable controland occurring without limitation, failure of suppliers , subcontractors, and carriers, or party to substantially meet its performance obligations under this Agreement. Provided that, as a condition to the claim of nonliability, the party experiencing the difficulty shall give the other prompt written notice, with full details following the occurrence of the cause relied upon. Dated by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.

3. [Licensor]'s failure to perform any term or condition of this Agreement as a result of conditions beyond its control such as, but not limited to, war, strikes, fires, floods acts or damage or destruction of any network facilities or servers, shall not be deemed a breach of this Agreement.

   Note: Disruption in service caused by one or more of the following should not be excused by a *force majeure*clause;

   a. Server failure
   b. Software glitches
   c. Disputes with copyright owners
   d. Licensor labor dispute

**Hardship**

Hardship requires a change in circumstances so severe and fundamental that the promisor cannot be held to its promise in spite of the possibility of performance. "If an unforeseeable event, not within the control of the disadvantaged party, occurs or becomes known after contracting, and the equilibrium of the contract is

fundamentally altered for either party because of an increased cost of performance or the decrease in value of the performance to be received, hardship results".[12]

Article 6.2.2 of UNIDROIT provides that There is a hardship where the occurrence of the events fundamentally alters the equilibrium of the contract either because of cost of a party's performance has increased or because the value of the performance a party receives has diminished and

a. The events occuror become known to the disadvantaged party after the conclusion of the contract;
b. The events could not reasonably have been taken into account by the disadvantaged party at te time of the conclusion of contract
c. The events are beyond the control of the disadvantaged party and
d. The risk of the events was not assumed by the disadvantaged party.

Mulla in his book[13] has explained hardship. He said as these principles (*force majeure* and hardship) based on the principle ***pacta sunt servanda*** and stress that a party is bound to perform even if the performance becomes extremely onerous, allow adaptation of the contract in cases of hardship.

Hardship entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances. This request should be made without delay ,indicating the grounds on which the request is sought. Such Request does not confer any right to not perform or withhold performance by the disadvantaged party.

If the party fails to renegotiate on adaptation of new terms within a reasonable time, either party can go to court. The court may, under reasonable circumstances either

a. Order the termination of the contract at a date and on terms to be fixed by the court

Parties invoke hardship clause generally in long term contracts which is executor in nature.

Chitty in his book [14] briefly explained that *force majeure* clauses and hardship and intervener clauses are frequently inserted into commercial contracts. The effect of theses clauses is to reduce the practical significance of the doctrine of frustration as where express provision has been made in the contract itself for the event which has actually occurred, and then the contract is not frustrated. As a result, the wider the ambit of the contractual clauses, the narrower is the practical scope of the doctrine of frustration.

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[12] Sarah Howard Jenkins, Exemption for non Performance: UCC, CISG, UNIDROIT principles—A comparative assessment (1998) 72 *Tulane Law Review* 2015-2030.

[13] Pollock and Mulla, *Indian Contract and Specific Relief Act* (LexisNexis 12th ed) 1129.

[14] Beale, above note 8, 23-067.

**Drafting Hardship clause**

Ewan McKendrick in his article has explained[15] hardship clause as "a clause which is less frequently encountered in commercial contracts but is not uncommom in long term contracts is a hardship clause which is inserted into a contract to deal with unforeseen events which make performance of the contract more onerous than originally anticipated."

He has cited a case[16] which is an example of hardship clause, where the terms of the hardship clause were

a. If at any time or from time to time during the contract period therehas been any substantial change in the economic circumstancesrelating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic hardship then parties shall (at the request of either of them) meet together to consider what (if any) adjustments (s) in the prices..... are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship caused by such change.

b. If the parties shall not within ninety days after any such request have reached agreement on the adjustments (if any) in the said prices.... The matter may forthwith be referred by either party for determination by experts....

c. The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made.... and any revised prices or ant change in the price revision mechanism so determined by such experts shall take effect six months after the date on which the request for review was first made.

We see that this kind of clause defines the circumstances in which hardship exists and also work on procedure to be adopted in this event that these circumstances occur. This clause also works on a mechanism to be applied in the event when the parties fail or refuse to enter into negotiations with a view to adjusting the contract. In the above case we see that an intervention of a third party expert or arbitrator when the parties fail to reach an agreement themselves.

Thus the hardship clause enables to keep the relationship to continue even on different terms. As we have said, in long term contracts, the parties incorporate hardship clause for the reason being that in long term contracts the parties want to be prepared for upcoming unforeseen situations (those situations or events which couldn't be anticipated at the time of making the contract) which might render the

[15] Ewan McKendrick, 'Preparing for the unexpected: Force Majeure and Hardship clauses in Practice' D153, January 2013 <www.scl.org.uk>

[16] *Superior overseas Development Corporation v British Gas Corporation* [1982] 1 Lloyd's Rep 262 (CA) 264-265.

future performance onerous if not impossible. Especially events like financial changes or commercial impossibilities. So renegotiations with the terms of the contract might help them still go with the contract and perform it.

Regarding performance of the contract, with renegotiated terms it would seem likely that a court will enforce a term which requires the parties to act in good faith[17]. And this good faith depends upon the circumstances of the case and nature of the contract.[18]

**Relationship between *force majeure* and hardship clause**

Both of these clauses are used in relation to each other as both of these clauses covers situations of changed circumstances and shares like characteristics. The important difference between these two isin hardship, the performance of the disadvantaged party has become much onerous, but not totally impossible. In *force majeure*, the performance of the party becomes impossible, at least temporarily. Hardship creates a reason for a change in the contractual plan of the parties where aims of the parties always remains to carry out the contract, however, in *force majeure*, the result is nonperformance, and it deals with the suspension or termination of the contract.

**Historical Development of these clauses in English law and the Contract Act 1872**

As we know by now that whereas doctrine of frustration is implied in every contract by the operation of law, *force majeure* is a matter of contract between the parties. When a party contracts to insert *force majeure* clause in their contract, the Common law principle of frustration (or our principle of Supervening impossibility, section 56 of the Contract Act 1872) will not apply in accordance with the ***pacta sunt servanda*** .The same observation is true for hardship clause too. We can see that the ICC arbitrators also admitted the application of principle *rebus sic stantibus*(Latin, meaning at this point of affairs; in this circumstances)though with limitation.

The doctrine of frustration grew gradually from the absolute contract principle at common law[19]

Prior to 1863, when the famous case Taylor v Caldwell [20] was decided, supervening events were not regarded an excuse for non performance because the parties could have provided for such contingencies in their contract itself.[21] Once the contracting party had taken any obligation, was bound to fulfill it.This onerous rule is an

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[17] *Menifest shipping company ltd v Uni Polaris Insurance companyLtd*(The Star Sea) [2001 ]UKHL 1, para [50].

[18] *Compass Group UK and IrelandLtd v Mid Essex hospital Services NHS Trust* [2012] 2 ALL ER (comm.) 300.

[19] Trietel, *G.H., Frustration and Force Majeure* (London: Sweet and Maxwell, 1994) 13

[20] *Taylor v Caldwell* **(1863) 3 B.& S. 826.**

[21] *Barker v Hodgson*(1814) 3 M. & S. 267.

example of the classic 'absolute contract' rule from the case Paradine v Jane[22] where a lessee who was sued for arrears of rent pleaded that he had been evicted and kept out of possession by an alien enemy; such an event was beyond his control, and had deprived him of his profits of the land from which he expected to receive the money to pay the rent. He was, however, held liable on the ground that "Where the law creates a duty orcharge and the party is disabled to perform it and hath no remedy over, there the law will excuse him.....but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."[23]

This apparent rational judgment, though peculiar (as there was physical destruction of the subject matter of the contract) continued to be enforced until 1863. However, in 1863 in Taylor V Caldwell case[24] the defendants had agreed to permit the plaintiffs to use a music hall for concerts on four specified nights. After the contract was made but before the first night arrived, the hall was destroyed by fire.

Giving the judgment, Blackburn J of Queen's Bench, held that the defendants were not liable in damages. The rationale was since the doctrine the sanctity of contracts applied only to a promise which was positive and absolute, and not subject to any condition express or implied. The court employed the concept of an implied condition to introduce the doctrine of frustration into English law, since it might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depended on the continuing existence of a particular person and thing.

Blackburn J. explained the qualification as "If the performance of the ..... Promise of the bailee to return the thing lentor bailed becomes impossible because it has perished; this impossibility (if not arisen from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the bailee from the performance of his promise to redeliver.[25]

The court held that the particular contract in question was to be construed: "as subject to an implied condition that the rules shall be excused in case, beforebreach, performance becomes impossible from the perishing of the thing, without default of the contractor...."[26]

We have observed that about two centuries after the case Jane vparadine was decided, the courts of England introduced the theory of implied terms into a contract to exempt the performance of specially from the famous Coronation cases[27] where

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[22] (1664) Aleyn 26.
[23] Ibid.
[24] *Taylor v. Caldwell* (1863) 3 B& S 826
[25] Ibid 839.
[26] Ibid.
[27] *Krell v.Henry*, 2. K. B. 740 (Eng. 1903).

due to illness of the King Edward VII, contracts for the rent of room overlooking the routes of the coronation procession were held to have been discharged due to the postponement of the ceremonies.[28]

**Frustration: Meaning, Scope and applicability under Section 56 of the Contract Act 1872**

**Section 56 of the Contract Act stipulates:**

"An agreement to do an act impossible in itself is void. A contract to do an act, which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

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

In **Hamara Radio and General Industries Ltd Co. v State of Rajasthan[29], it was said that** the essential principles on which the doctrine of frustration is based is the impossibility, or, rather, the impracticability in lawor fact of the performance of a contract brought about by an unforeseen or unforeseeable sweeping change in the circumstances intervening after the contract was made. In other words, while the contract was properly entered into in the context of certain circumstances which existed at the time it fell to be made, the situation becomes so radically changed subsequently that the very foundation which subsisted underneath the contract as it were gets shaken, nay, the change of the circumstances is so fundamental that it strikes at the very root of the contract, then the principle of frustration steps in and the parties are excused from or relieved of the responsibility of performing the contract which otherwise lay upon them.

In Ram kumar v. P C Roy & Company[30] it was noticed that the doctrine 'frustration of contrac' is invented by the court in order to supplement the defects of the actual contract. The theory of the implied condition has never been acted on by the Court as aground of decision, but is merely stated as a theoretical explanation whereas in England in Taylor v Caldwell[31] the court took decision based on implied condition of the contract which was in contrast with the absolute contract concept argued and accepted in Paradine v. Jane.

The English Court observed Frustration as Lord Radcliff in Davis Contractors v Fareham Urban District Council[32]narrated ".....frustrationoccurs whenever the law

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[28] Ibid.

[29] AIR 1964 Raj205:1964 Raj LW 313 (DB).

[30] AIR 1952 Cal 335.

[31] Ibid.

[32] [1956] A.C. 696.

recognizes that without default of either party, a contractual obligation has become inapplicable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract"

He also added," .....It was not this that I promised to do. There is, however, no uncertainty as to the materials upon which the Court must proceed. The data for decision, on the one hand, the terms and conditions of the contract, read in the light of the then circumstances and, on the other hand, the events which have occurred. In the nature of thing there is often no need for any elaborate enquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessary attached to the occurrence of an unexpected event that, as it were, change the faceof the things. But even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play."

In the same judgment he added that "There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing than that contracted for"

In **Satyabrata Ghose v Mugneeram Bangur and Co**[33] the court explained section 56 of Contract Act and said the word impossible has not been used in the sense of physical or literal impossibility. The performance of act may not be literally impossible, but it may be impracticable and unless from the point of view of the object and which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the at which he promised to do.

**Commercial Impossibility**

Another point to remember is that the impossibility under section 56 does not include commercial impossibility. The loss or damage suffered by the promisor in the course of fulfilling the obligations cannot absolve him from liability in the least degree. The mere fact that the contract has been rendered more onerous does not of itself, give rise to frustration.[34] In this case, there was a firm price contract for supply of ghee to the Union of India. The price of ghee rose abnormally due to the Second World War. The Supplier's claim for a higher rate on the basis of equity was negatived by the Supreme Court. The Court found that the agent were fully aware of the altered circumstances and held that the mere fact that the circumstances in which the contract was made was altered, the contract was not frustrated. [35]

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[33] AIR 1954 SC 44.

[34] *Alopi Parshad and sons Ltd. V Union of India*, AIR 1960SC 588, *Easun Engineering Co Ltd V Fertilizers and chemicals Travancore Ltd*, AIR 1991 Mad 158.

[35] Ibid.

**Physical Impossibility**

An indefinite stoppage of work (Physical impossibility which couldn't be anticipated earlier) pursuant to a government order coupled with a compulsory sale of plant has been held to be sufficient to cause frustration.[36]

**No self- induced frustration**

A contracting party cannot be relieved from the performance of his part of the contract if the frustration of the contract is self generated or the disability is self induced. [37] So the essence of frustration is that it should not be due to the act or election of the party and it should be without any default of either party and, if it was party's own default which frustrated the adventure, he could not rely on his own default to excuse him from liability under the contract.[38]

**Frustration under English Law and Section 56 of Contract Act: A comparison**

The periphery of frustration is very broad under English Law, whereas the area of frustration under section 56 is limited in comparison to English law. Section 32 of Contract Act (Contingency of contract) and Section 22 (Mistake) also make performance impossible under contract Act after the contract is entered into.

The present situation for *force majeure* and frustration under Contract Act is as follows; International commercial contracts, e.g., contracts for procurement of seeds, fertilizers, chemicals etc. that Bangladesh's government agencies enter into foreign suppliers usually have a standard *force majeure* clause that excuses performance for the period during which any of the *force majeure* events specified therein exist.

Domestic contracts (where both the contracting parties are Bangladeshi), particularly the ones relating to building construction and the real estate development in Bangladesh offers an interesting extension of the concept of *force majeure* . *Force Majeure* in such contracts tend to make a little or no distinction between a *force majeure* event properly so called and a case of hardship. The definition of *force majeure* is broadening with the contracting parties making new entries in the list of events, the parties believe, are beyond their control. While the natural calamities defying human control rank as the historically recognized exemption from performance, new events, often, interestingly, non natural phenomena,( it is also been recognized in English law where we have seen terrorist act and hostilities are new entry in the list of *force majeure* clause)are qualifying, by agreement of the parties, as *force majeure*.

Hardship events, e.g., unusual escalation of price of building price ( a deviation from the Alopi Parshad Case), or sudden scarcity of such materials, though falls outside the classical definition of *force majeure*, could be seen to be excusing performance to the same extent to which natural calamities, e.g., earthquake or tsunami would do

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[36] *Metropolitan Water Board V Dick, Kerr,& Co.* [1918] A.C.119.

[37] *Ecom's Controls (India) Ltd V Bailey Controls Co* AIR 1998 Del 365; 1998(2) Arb LR 188 (Delhi).

[38] *G A Galia Kotwala and Co Ltd V K.R.L. Narsimhan* AIR 1954, Mad 119.

under the terms of a particular contract. In the same vein, political commotion, blockades and strikes, commonplaces in Bangladesh, for their massive disruptive effect on transportation across the country, is increasingly being considered as a strong candidate for recognition by the parties as a *force majeure* event.

When it comes to incorporation by the parties of the aforesaid new *force majeure* events in contracts, **the parties are seen to be shifting from the conventional risk avoidance or risk aversion trend to a calculated risk allocation or risk sharing arrangement.** While *force majeure* clauses are geared to relieving the affected party of its performance obligation, it could often be the case that such relief would benefit neither the party bound to perform nor the party entitled to performance. Delay consequent upon the occurrence of a *force majeure* event acts to the detriment of both the parties: on the one hand, the party entitled to performance would not getting the performance in due time; on the other hand, the party bound to perform would not be receiving his return, price, or consideration in time because of his inability to perform in time. This mutual detriment forces the parties to provide for certain contingencies in their contract. Construction and real estate development contracts in Bangladesh, for example, could provide that in the event price escalation of building materials up to a certain limit, the employer would compensate the contractor by making an additional payment, or granting an extra concession, or otherwise in such manner as the parties think appropriate. Right to stoppage of work would be granted to the contractor in extreme cases only, for example, when such arrangement would not be financially viable

**Conclusion**

Though the parties of the contract both under English law and Contract Act solemnly follow the doctrine ***pacta sunt servanda*** and try to fulfill their performance, for inevitable reasons those performance could not be completed for some unforeseen reasons, reasons could not be anticipated at the making of the contract. As a result, the contract is frustrated. But the area covered by frustration is very limited. To cure this, the parties today enclose in their contract *force majeure* or hardship clause or both to overcome such situations where they have to shoulder onerous obligations totally different from the obligations they have taken while entering into the contract.

Parties are becoming more reluctant to invoke frustration both here and abroad can be seen in the decision of Coulson J in Gold Group Properties v BDW trading,(and many other unreported real estate cases in Bangladesh) where it was held that a development agreement had not been frustrated as a result of advice given to the defendant developer that the properties were unlikely to meet their contractually agreed prices.[39] One of the reasons given by Coulson J for this conclusion was that the development agreement made express provision for what was to happen in the

[39] *Gold Group Properties Ltd v BDW Trading Ltd* (formerly known as Barratt Homes LTd) [2010] EWHC 323(TCC), [2010] BLR 235.

event that there was a need to reduce the minimum prices. The agreement permitted the parties to renegotiate the Schedule of Minimum Prices. Given that the contract contained a provision which dealt with the situation which has occurred. It could not be said that the contract had been frustrated.

In both countries the increasing width of these clauses is one reason for the restricted role of the doctrine of frustration or Contract Act. So it could be understood that the doctrine of frustration will be excluded where the contract contains a *force majeure* or a hardship clause which expressly provides for the event which occurred as Gold Group Properties.[40]

Insertion of these two clauses in modern contracts specially estate development and commodity or commercial contracts lessening the need for expansive doctrine of frustration, as the parties are free to include situation under these clauses which might have effect to frustrate the contract and handles the new situation in a more effective manner with or without making the contract void . Thus these clauses play an important role in modern commercial contract by permitting the parties to

a. Define for themselves the circumstances in which their *force majeure*or hardship clause is to operate.
b. The contracting parties if they wish include in the clause an event which would not be sufficient to frustrate the contract.
c. The contracting parties will have enough freedom in case of deciding the consequences which are to follow from the occurrence of theses clauses. This lessens the rigidity and protects the parties from the drastic consequences of a finding that the contract has been frustrated, which is against the wishes of the parties.

Like English law, *force majeure* clauses help parties to avoid or lessen their obligations in case of a supervening event which is beyond their control. If these clauses are not part of the contract, then the concept of frustration of contract the concept frustration under English law recognized by section 56 of the Contract Act would operate to help the parties from the liabilities they have not undertaken.

[40] Ibid.