

# **Model Contract Clauses Version 2.0 and the Responsible Buyer Code**

## **Executive Summary**

### **Model Contract Clauses Aligned for Human Rights Due Diligence**

The human rights performance of global supply chains is quickly becoming a hot button issue for anyone concerned with corporate governance and corporate accountability. Mandatory human rights due diligence legislation is on the near-term horizon in the E.U. Consumers and investors worldwide are increasingly concerned about buying from and investing in companies whose supply chains are tainted by forced or child labor or other human rights abuses. Government bodies such as U.S. Customs and Border Protection are increasingly taking measures to stop tainted goods from entering the U.S. market. And supply chain litigation, whether led by human rights victims or Western consumers, is on the rise. There can therefore be little doubt that the face of global corporate accountability for human rights abuses within supply chains is changing. The issue is “coming home,” in other words.

### **Why do contracts matter?**

Contracts are an expression of the parties’ expectations. How supply contracts are negotiated, the terms they contain, and their performance—how buyer and supplier play out their contractual relationship—affects how well the human rights of workers and often whole communities are protected. Aggressive contracting, characterized by unfairly one-sided or oppressive terms, tends to promote oppositional rather than cooperative buyer-supplier relationships. This can generate undue commercial pressure on suppliers, exacerbate human rights risks, and undermine the buyer’s ability to meet its own human rights commitments. On the other hand, better contracts and better contractual practices can generate better human rights outcomes.

### **What does a “good” or human rights due diligence-aligned contract look like?**

To align with international business and human rights norms and expectations, set out in the UN Guiding Principles on Business and Human Rights (the UNGPs) and the OECD Due Diligence Guidance for Responsible Business Conduct, contracts must be revised to reflect the parties’ own human rights commitments and standards and provide a clear process for upholding them. Such revised contracts would better protect the parties and other stakeholders, including workers, who, although not party to the contract, are at risk of being adversely impacted by it. Revised contracts would also begin to satisfy the growing body of legislation requiring human rights due diligence and public disclosure relating to human rights abuses.

In 2021, a working group formed under the auspices of the American Bar Association Business Law Section published a set of model contract clauses, the MCCs 2.0, to help buyers and suppliers redesign their contracts to better protect human rights in their supply chains. MCCs 2.0 are the first model contract clauses that attempt to integrate the principles contained in the UNGPs and the OECD Due Diligence Guidance into international supply contracts. The MCCs translate these principles into contractual obligations that require buyer and supplier to cooperate in protecting human rights and make both parties responsible for the contract’s human rights performance.

**Some of the key MCCs 2.0 obligations include:**

- (1) **Human Rights Due Diligence:** buyer and supplier must each conduct human rights due diligence before and during the term of the contract. This requires both parties to take appropriate steps to identify and mitigate human rights risks and to address adverse human rights impacts in their supply chains.
- (2) **Buyer Responsibilities:** buyer and supplier must each engage in responsible sourcing and purchasing practices (including practices with respect to order changes and responsible exits). A fuller description of responsible purchasing practices is contained in the Responsible Buyer Code of Conduct (**Buyer Code**), also developed and published by the Working Group.
- (3) **Remediation:** buyer and supplier must each prioritize stakeholder-centered remediation for human rights harms before or in conjunction with conventional contract remedies and damage assessments. Buyer must also participate in remediation if it caused or contributed to the adverse impact.

**Conventional contracts compared to contracts that incorporate MCC 2.0**

Conventional Contracts	Human Rights Due Diligence Aligned Contracts (adopting MCCs 2.0)
<p><b>Representations and Warranties</b></p> <ul style="list-style-type: none"> <li>● Traditional contracts typically employ a regime of representations and warranties, with concomitant strict contractual liability, whereby the supplier warrants that it, along with all its representatives, are in compliance with the buyer’s human rights policies.</li> <li>● Many representations and warranties are questionable in these contexts, encouraging the parties to turn a blind eye to reality while taking on theoretical strict liability (the problematic “checkbox” or “tickbox” approach).</li> </ul>	<p><b>Human Rights Due Diligence</b></p> <ul style="list-style-type: none"> <li>● MCCs 2.0 provide for a regime of human rights due diligence, requiring the parties to take appropriate steps to identify and address adverse human rights impacts after mapping human rights abuse risks at every tier.</li> <li>● The human rights due diligence approach ensures that both buyer and supplier are responsible for carrying out human rights due diligence in accordance with international norms and for cascading this commitment through the supply chain.</li> </ul>
<p><b>Supplier Obligations</b></p> <ul style="list-style-type: none"> <li>● Traditional supply contracts place responsibility for upholding human rights in supply chains on the supplier, with few obligations on the buyer to ensure the human rights performance of the contract.</li> </ul>	<p><b>Supplier and Buyer Responsibilities</b></p> <ul style="list-style-type: none"> <li>● MCCs 2.0 include commitments by both the supplier and the buyer. The buyer is to engage in responsible purchasing practices. The buyer is to provide reasonable assistance to the supplier in meeting buyer’s own human rights standards; collaborate with the supplier to agree to contract modifications that mitigate adverse human rights impacts;</li> </ul>

	and exit the contract responsibly, by considering the human rights impacts of termination, providing reasonable notice, and paying for any goods produced by supplier prior to termination.
<p><b>Damages</b></p> <ul style="list-style-type: none"> <li>● Traditional contracts do not define tainted goods as “Nonconforming Goods”. If a breach of a representation or warranty with respect to human rights is discovered and buyer wants to reject the goods or terminate the contract, the focus is on contractual remedies, for example, the provision of money damages to the buyer in the event of a contract breach (including a human rights violation). They fail to attend to the provision of remediation for the victim of the harm.</li> </ul>	<p><b>Remediation</b></p> <ul style="list-style-type: none"> <li>● MCCs 2.0 identify tainted goods as “Nonconforming Goods” and include the production, distribution or delivery of “Nonconforming Goods” as a contract breach but prioritize the remediation of human rights harms (addressing adverse conditions to benefit the victims and to avoid further abuses) over contractual remedies (although they are still allowed when appropriate). MCCs 2.0 also include obligations for the buyer to provide for or cooperate in remediation if the buyer caused or contributed to the harm.</li> </ul>

**How to use MCCs 2.0 and the Buyer Code?**

MCCs 2.0 are designed to be used by buyers and suppliers operating in any industry. They are also modular, meaning that a company can select and adapt the MCCs it wishes to include in the contract. Alternative text is often provided, with extensive footnotes providing counsel with research and resources that might be useful in making drafting decisions.

A company interested in adopting the MCCs would, as a first step, take its human rights policy (usually, an anti-trafficking policy or a supplier code of conduct) and include it in the contract as an additional, binding, schedule. The MCCs refer to this as “Schedule P” (P for policy). The Working Group does not take a position on what Schedule P should or should not contain, however it has prepared a document outlining the “Building Blocks for Schedule P” for companies that have not yet developed their own human rights policies.

The parties may also wish to include the Buyer Code as an additional schedule to the contract. The Buyer Code 1.0 has been drafted by the Working Group and is referred to in the MCCs as “Schedule Q.” Reference to the Buyer Code is already built into the MCCs, and the two are therefore designed to work together. However, a party can adopt the MCCs without adopting the Buyer Code. Conversely, the Buyer Code can be adopted independently from the MCCs.

The parties would then incorporate the MCCs in their master contract or purchase order materials after adapting them to their industry, human rights risk exposure, and other factors relevant to their circumstances.

Beyond the contracting parties, MCCs 2.0, Schedule P, and the Buyer Code are also relevant to a range of other stakeholders interested in promoting human rights in supply chains (e.g., government agencies, procurement bodies, industry associations, investors, civil society organizations, international development organizations, and consumer groups).

If you are interested in finding out more about how you or your organization can use or work with MCCs 2.0, please contact one of the leaders of the Working Group:

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