

# Contracting for Human Rights and Corporate Due Diligence: Using the ABA Working Group's Model Contract Clauses 2.0

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Transcript of the intervention of Sarah Dadush in the webinar on Corporate Due Diligence in Contract and Company Law organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese Presidency of the Council of the European Union in partnership with the British Institute of International and Comparative Law, the Portuguese Ombudsman (Provedor de Justiça), the Teaching Business and Human Rights Forum, and NOVA 4 The Globe on the 25th of March 2021.

***Question 1. What was the original concept behind the Working Group's model contract clauses (MCCs) and what are some of the key elements of the MCCs, in particular with respect to implementing the UNGPs and corporate human rights due diligence?***

At its inception, the model contract clauses (MCCs) project was about finding ways to operationalize firms' human rights policies contractually, so that these policies could do more work to protect workers' human rights. A great many firms, especially consumer-facing firms, have made public commitments to upholding human rights (e.g., supplier codes of conduct, anti-trafficking and forced labor and anti-child labor policies, subscribing to initiatives like the UN Global Compact), often posted on their websites. As common as they are, however, these policies often do little more than communicate the company's good intentions to protect human rights. Companies are rarely compelled to take measures to ensure that their own policies are in fact implemented.

The MCCs seek to address this gap by offering language and drafting guidance for implementing companies' human rights policies *contractually*. They aim to embed concern for the human rights performance of the supply chain into the legal and operational life of

the company(ies), in the hope that this will yield better outcomes for workers and their communities.

A key contribution of the MCCs, which have now been published in two versions, 1.0 and 2.0, is to place production *process* conformity on contractual par with *product* conformity. In other words, the MCCs treat a failure to respect workers' human rights in the production process as a contractual breach, much as typical contracts for the sale of goods would treat a failure to deliver the goods on time or in accordance with the design specs as a breach. This is a major innovation because expanding the contractual focus to include the production process brings workers' human rights into the contract's—binding and enforceable—sphere.

With respect to MCCs 2.0, published in March 2021—see [here](#) for the entire MCC 2.0 toolkit—a few key elements deserve mention. Version 1.0 was drafted to be very “buyer-friendly,” meaning that it made the supplier solely contractually responsible for meeting the buyer's human rights standards and created no obligations for the buyer to ensure that their contracts are negotiated or performed in a way that upholds their own human rights standards.

This approach was problematic because it overlooked the reality that the buyer's purchasing practices can generate intense commercial pressure on suppliers, which in turn can lead to the degradation of working conditions and violations of workers' human rights. Indeed, poor purchasing practices such as aggressive (below cost of production) pricing, imposing unreasonably short and non-negotiable timelines, making last minute order changes, and engaging in irresponsible exits (a practice that has been particularly prevalent and harmful during the pandemic) are often a root cause of human rights harms in global supply chains.

Otherwise put, unfair commercial practices by buyer firms can lead to the unfair treatment of workers. In the language of the UN Guiding Principles on Business and Human Rights (UNGPs), unfair commercial practices and unfair contracts can “cause or contribute” to adverse human rights impacts.

**MCCs 2.0** address the buyer piece of the human-rights-in-supply-chains problem, offering new model clauses that, if incorporated into the supply contract, would obligate the buyer to engage in responsible purchasing practices. The MCCs 2.0 are supplemented by a Responsible Purchasing Code of Conduct, aka, the **Buyer Code**, which contains a set of principles and standards for responsible purchasing practices.

The MCCs 2.0 toolkit thus shifts toward a **shared responsibility model** that holds *both* supplier and buyer responsible for the human rights performance of their contract.

The shift toward shared responsibility flows from another, even more fundamental shift in MCCs 2.0, which is to move away from a “compliance” approach (with “one and done” representations and warranties) toward a process-based, human rights due diligence approach to contractual performance. Indeed, the MCCs 2.0 are the first model contract clauses to integrate human rights due diligence principles into every stage of the buyer-supplier relationship. They seek to translate the principles contained in the UNGPs and the Organization for Economic Co-operation and Development (OECD) Due Diligence Guidance into contractual obligations that require both buyer and supplier to cooperate in upholding human rights.

The translation is not perfect, but our hope is that it will at least offer a helpful foundation for conversations about what it could and should look like to bring HRDD principles into contractual arrangements and indeed to draft HRDD-aligned contracts. That conversation is particularly relevant today, given the forthcoming EU legislation on mandatory human rights due diligence, which would require all companies doing business in the EU (whether or not they are domiciled or incorporated in the EU) to engage in HRDD.

There are other noteworthy elements of the MCCs 2.0 toolkit, but for purposes of this writing, the above should suffice.

***Question 2. When drafting model contract clauses, how does one introduce flexibility to avoid a one-size-fits-all approach that could lead to box-ticking?***

The MCCs are designed to be used by companies operating in any number of sectors (e.g., apparel, electronics, automotive, agriculture). A company wanting to adopt the MCCs need not adopt them all or in a wholesale way. Companies can select the MCCs that are the best fit for their industry-specific needs, human rights exposure, and institutional commitments to advancing human rights. The MCCs can be adapted and edited to suit the adopter's needs. They are also modular, meaning that they include bracketed language with alternative formulations. The **Report** includes drafting guidance to assist adopters in selecting and adapting the MCCs.

Beyond adoption, our hope is that companies will use the MCCs 2.0 toolkit to support a rich internal conversation about improving their contracts and commercial practices, in order to improve the human rights performance of their supply chains. The more the MCCs and the Buyer Code are used as part of an institutional rethinking process, the less likely it is that they will be reduced to just another "tick box" exercise.

Like the MCCs, the Buyer Code can be incorporated into the contract (as "Schedule Q"), but it can also be adopted independently, as a standalone commitment to responsible purchasing. The Buyer Code is drafted to be a "gold standard" for responsible purchasing practices and can be adopted wholesale or adapted to suit the needs of the particular user.

***Question 3. How do the MCCs address the issue of providing remedy for victims, given that victims are unlikely to be parties to the contract?***

Remediation was a crucial issue for the Working Group. The problem we faced was that typical contract remedies for breach tend to (a) be financial and (b) flow only between the parties to the contract (buyer and supplier), from the breaching to the non-breaching party. This structure does not work well for breaches related to human rights or the production process as such breaches involve a third party: the victims of the breach, usually the workers.

Absent a third-party beneficiary clause (a model third-party beneficiary clause granting broad rights to workers and others is offered in footnote 69 of the **Report**), workers have no rights under the contract. And even if workers did have rights under the contract, typical contract remedies may not be appropriate or adequate for addressing the harms suffered.

To address these challenges the Working Group developed a set of MCCs dealing specifically with human rights remediation (e.g., restitution and financial compensation, apologies, ceasing the harm and taking measures to prevent the harm from re-occurring). The main objective of these MCCs is to place human rights remediation ahead of typical contract remedies, so that remediation becomes the first "contractual response" to a human rights-related breach.

At the outset, the supplier is required to have a robust operational level grievance mechanism (OLGM) in place to address workers' human rights-related grievances. In the event that a human rights-related breach occurs and is not sufficiently addressed by the OLGM, the supplier must, in consultation with affected stakeholders, prepare and implement a remediation plan. Victims must also be consulted in assessing the completion of the remediation plan.

Importantly, if the buyer's purchasing practices somehow caused or contributed to the adverse impact, then the buyer must participate in providing remediation, by contributing financially and non-financially, in proportion to its responsibility for the adverse impact.

Placing human rights remediation ahead of typical contract remedies is also intended to discourage buyers from engaging in “cut and run” responses to human rights issues in their supply chain. If something bad happens in connection with the contract, the buyer should not terminate without first supporting the remediation process. Buyer firms should come to termination as a last resort, in other words, only when it becomes evident that they are dealing with a “bad” supplier or a supplier who has no intention and/or no capacity to remediate.

The shift in the MCCs 2.0 toward HRDD matters here, too, since the UNGPs and the OECD Guidance require the involvement of stakeholders at every stage of the due diligence process—identifying, assessing, mitigating, and remedying human rights risks. Thus, HRDD-aligned contracts, such as those adopting the MCCs, would bring workers into the contract, even if they are not given third-party beneficiary enforcement rights. In line with this, another place workers/victims are given some “voice” in the contract is the dispute settlement section in Article VIII of the MCCs.

In short, regardless of whether workers are identified as third-party beneficiaries to the contract—many companies will hesitate to give broad rights to workers—the MCCs require the buyer and the supplier to engage with affected and potentially affected stakeholders at every opportunity.

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