

BALANCING BUYER AND SUPPLIER RESPONSIBILITIES
Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0

by the

Working Group to Draft Model Contract Clauses to
Protect Human Rights in International Supply Chains
American Bar Association Section of Business Law

David V. Snyder, chair
Susan A. Maslow, vice chair

Principled Purchasing Project led by Sarah Dadush

The Model Contract Clauses (MCCs) are designed as a practical tool to help buyers and suppliers protect the human rights of workers in international supply chains. This second version (MCCs 2.0) marks a major shift in contract design to align better with current and contemplated legislation as well as initiatives such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Responsible Business Conduct.

MCCs 2.0 reflect both recent research and evolving thought about effective organizational strategies and legal developments, including growing US enforcement through Withhold Release Orders and the likely adoption of mandatory human rights due diligence law in the European Union. The MCCs provide missing operational guidance for mapping, identifying, and addressing human rights risks at every tier of the supply chain.

While the most prominent shift in MCCs 2.0 is that buyers share contractual responsibility for protecting human rights with their suppliers and sub-suppliers, other contract design changes are equally fundamental. Instead of a typical regime of representations and warranties, with concomitant strict contractual liability, these clauses provide for a regime of human rights due diligence, requiring the parties to take appropriate steps to identify and mitigate human rights risks and to address adverse human rights impacts. This regime is considerably more pragmatic. 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 “checkbox” approach). Human rights due diligence is a more realistic process that assumes parties will need to set priorities, addressing the most pressing issues first, without a fictional representation that everything is perfect.

In addition, MCCs 2.0 stress remediation of human rights harms over contractual remedies, and they introduce relational dispute resolution mechanisms. Finally, in an innovative provision engendered by the COVID-19 pandemic, buyers take on an obligation of “responsible exit,” both generally and particularly with respect to force majeure or similar events. As in MCCs 1.0, MCCs 2.0 continue to impose obligations through the supply chain (not merely to first tier suppliers); address the unique problems of mitigation and contract remedies when human rights are involved; and manage the risk and exposure of the buyers through disclaimers, although the disclaimers now reflect the shared responsibilities of both parties. With some adaptation, the MCCs can also be used to advance additional environmental, social, and governance (ESG) goals.

The clauses are intended to be fully modular; in-house and outside lawyers can pick and choose what clauses to adopt or adapt. Alternative text is often provided, with extensive footnotes providing counsel with information and resources that might be useful in making drafting decisions. MCCs 2.0 can assist companies of all sizes and industries to implement their own human rights policies and comply with the ever-expanding legislative initiatives to address forced and child labor and other human rights abuses.