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*

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INTRODUCTION

This project was born of challenge, frustration, and hope. There is little doubt that workers in international supply chains are being abused, in the most horrifying ways, even as they work to produce the staples of our everyday lives and indeed support much of our economy. Young children and enslaved people pick and process cocoa and coffee beans; they pick and process cotton; they sew clothes, weld steel, and assemble sporting goods; they mine rare minerals and extract valuable sources of energy. Many workers find themselves in

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* This report is the product of the Working Group and reflects the rough (and sometimes hotly debated) consensus of the Working Group. While produced under the auspices of the Uniform Commercial Code Committee of the American Bar Association Business Law Section, the report has not been approved or endorsed by the Committee, the Section, or the Association. Accordingly, the report should not be construed to be the action of either the American Bar Association or the Business Law Section. Nothing contained herein, including the clauses to be considered for adoption, is intended, nor should it be considered, as the rendering of legal advice for specific cases or particular situations, and readers are responsible for obtaining such advice from their own legal counsel. This report and the clauses and other materials herein are intended for educational and informational purposes only. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered.

** David Snyder as chair and Susan Maslow as vice chair served as principal drafters of this report, and particularly the introductory text and Version 1.0 of the MCCs, *see infra*, which served as the groundwork for this Version 2.0. Much of the drafting of the new contract clauses in Version 2.0 was undertaken *pro bono publico* by a team at Linklaters LLP, *see infra* note †, although the ultimate drafting was done (and ultimate drafting decisions made) by Snyder and Maslow with the support or at least acquiescence of the Working Group. David Snyder is Professor of Law and Director of the Business Law Program at American University Washington College of Law in Washington, D.C., and would like to acknowledge grant funding from the law school as well as travel funding from the American Bar Association. He would also like to thank Katherine Borchert, Philip Killeen, Sophie Lin, and Alexandra Finocchio for excellent research assistance. Susan Maslow is a semi-retired partner at Antheil Maslow & MacMinn, LLP in Bucks County, Pennsylvania. She is also chair of the Corporate Social Responsibility Subcommittee to Implement the ABA Model Principles on Labor Trafficking and Child Labor. Special thanks are due to Aditi Bagchi, Omri Ben-Shahar, Robert Hillman, Jonathan Lipson, Trang Nguyen, Kish Parella, and Salli Swartz.

† Sarah Dadush, Professor of Law at Rutgers Law School, led the Principled Purchasing Project to move the MCCs toward a more balanced allocation of responsibility for the human rights performance of supply contracts between buyers and suppliers. Specifically, the Project team produced MCCs that articulate the buyer's obligations to behave responsibly in relation to its supplier in order to better protect workers' human rights; the Project team also produced the Responsible Purchasing Code of Conduct, referred to as Schedule Q throughout the MCCs. The team is made up of Olivia Windham-Stewart, John F. Sherman III, and a team of lawyers acting *pro bono publico* from Linklaters LLP, and the Project benefited from a generous grant by the Laudes Foundation.

injurious and even deadly working conditions, with people hurt and killed by the hundreds.[1] Supply chains can be riddled with modern forms of slavery, particularly debt-bonded labor.[2] Much has been invested in ameliorating these conditions, but not enough. They continue,[3] and they are now sharpened and heightened by the enveloping crisis of the COVID-19 pandemic.

One of the crucial tools for addressing these problems is the contractual governance of supply chains. The Model Contract Clauses (MCCs) offered here seek to help companies implement healthy corporate policies in their supply chains in a way that is both legally effective and operationally likely. In general, the MCCs do not state the human rights performance standards themselves. The MCCs do not state what the working conditions must be like, how many fire exits are necessary, or what measures must safeguard against conflict minerals. The MCCs are designed for use across sectors, so the substantive standards will vary (clothing brands need no standards on conflict minerals, and electronics makers are not concerned with cotton sourcing). The human rights standards that the supplier must follow are assumed to be stated in what is here called "Schedule P" ("P" for "Policy") and the standards that the buyer must follow are assumed to be stated in "Schedule Q." Both Schedules P and Q are likely to take the form of codes of conduct, one for the supplier and one for the buyer. They are outside the scope of the MCCs themselves. This practice is typical. A purchase agreement consists largely if not entirely of legal obligations; the specifications for the goods themselves are often contained in separate schedules or in other documents. Although the Working Group cannot offer a model Schedule P because of the wide variation across industries, we do provide the "Building Blocks for Schedule P" for buyers that are starting to consider or revising their expectations of their contracting partners. Because it is less industry-specific, a standard Schedule Q is offered, enumerating and explaining the responsible purchasing practices that buyers may be expected to follow.

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[1] *See, e.g.*, Steve Henn, *Factory Audits and Safety Don't Always Go Hand in Hand*, NPR (May 1, 2013), http://www.npr.org/2013/05/01/180103898/foreignfactory-audits-profitable-but-flawed-business; Matt Stiles, *Documents: Wal-Mart Auditors Inspect Bangladesh Factory, Find Safety Flaws*, NPR (Apr. 30, 2013), http://www.npr.org/2013/04/30/180123158/documents-wal-mart-auditors-inspectbangladeshi-factory-find-safety-flaws.

[2] The International Labour Organisation estimates that around 50% of victims of forced labor in the private economy are affected by debt bondage – around eight million people worldwide. *See Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, ILO (2017), https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf* ; https://antislavery.org/slavery-today/bonded-labour/.

[3] *See, e.g.*, Annie Kelly, *Nestlé Admits Slavery in Thailand While Fighting Child Labour Lawsuit in Ivory Coast*, GUARDIAN (Feb. 1, 2016), https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast (presenting Nestle's instances of forced labor within its supply chains); Daniela Penha, *Slave Labor Found at Starbucks-Certified Brazil Coffee Plantation*, MONGABAY (Sept. 18, 2018), https://news.mongabay.com/2018/09/slave-labor-found-at-starbucks-certified-brazil-coffee-plantation/ (finding slave labor in a Starbucks coffee bean supplier); Michael Sainato, *Accidents at Amazon: Workers Left to Suffer After Warehouse Injuries*, GUARDIAN (July 18, 2018), https://www.theguardian.com/technology/2018/jul/30/accidents-at-amazon-workers-left-to-suffer-after-warehouse-injuries (revealing numerous instances of workplace injuries in Amazon's factories); Martje Theuws & Pauline Overeem, *Flawed Fabrics: The Abuse of Girls and Women Workers in the South Indian Textile Industry*, SOMO CTR. RES. MULTINATIONAL CORPS. 17–30 (2014), http://www.indianet.nl/pdf/FlawedFabrics.pdf (reporting on women's labor conditions in five spinning mills: Best Cotton Mills, Jeyavishnu Spintex, Premier Mills, Sulochana Cotton Spinning Mills, and Super Spinning Mills); Pauline Overeem & Martje Theuws, *Case Closed, Problems Persist: Grievance Mechanisms of ETI and SAI Fail to Benefit Young Women and Girls in the South Indian Textile Industry,* SOMO CTR RES. MULTINATIONAL CORPS. 21–23 (2018), http://www.indianet.nl/pdf/CaseClosedProblemsPersist.pdf (finding the grievance mechanisms for spinning mills did not provide remedy to affected workers and did not meet the requirements of the United Nations Guiding Principles).

The Model Contract Clauses offered below (MCCs 2.0) are designed as an improvement on and an alternative to those published two years ago (MCCs 1.0).[4] MCCs 1.0 were intended to harness supply contracts as one critical tool—among many—to put human rights policies into operation while managing company risk. Although many corporations have admirable human rights policies, mere policies can languish if they are not integrated into the operational and legal life of the company, and particularly into the company's supply chains. MCCs 1.0 were drafted to give counsel a model to follow in operationalizing their companies' human rights policies, easing the task for overburdened corporate counsel and giving the benefit of extensive research conducted by the Working Group.

MCCs 1.0 met with considerable interest and enthusiasm, and the Working Group received extensive feedback that was often supportive, sometimes critical, and sometimes both. The great interest in the project also led to the informal augmentation of the Working Group with many voices from outside the Business Law Section, which is the official location of the Working Group (under the auspices of the Uniform Commercial Code Committee). With that feedback, the Working Group embarked on a new version of the MCCs. Version 1.0 envisioned a business model where buyers were confronted with troublesome suppliers who would violate the human rights of workers; the buyers would need to manage this problem through contractual control of their suppliers, and the MCCs could help them do so. Additional research reveals, however, that human rights violations at the supplier level are often rooted in the buyers' own purchasing practices, particularly by timing demands, pricing pressures, and last-minute order modifications, as well as a lack of due diligence—turning a blind eye—to human rights issues. MCCs 2.0 accordingly assign contractual responsibility for human rights in the supply chain to the buyers as well as the suppliers. In these revised clauses, buyers commit to responsible purchasing practices while suppliers commit to responsible and ethical management of their workforce and their subsuppliers. Crucially, both buyers and suppliers are required to engage in "human rights due diligence." These responsibilities are enforceable, although the legal remedies are not facile. MCCs 2.0 now include extensive provisions on human rights remediation as well as more standard contract remedies.

To many lawyers the addition of buyer responsibilities is the most significant change from MCCs 1.0, but the shift from a regime of representations and warranties in MCCs 1.0 to a regime of human rights due diligence in MCCs 2.0 is at least as important. Several strong forces motivated this move. Large multinational enterprises (MNEs) will likely find themselves subject to mandatory human rights due diligence in any case. Human rights due diligence is already mandatory for companies meeting certain criteria under French law,[5] and

[4] David V. Snyder & Susan A. Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 BUS. LAW. 1093 (2018) [hereinafter MCCs 1.0].

[5] French Corporate Duty of Vigilance Law, Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, [Law 2017-399 of March 27, 2017 relating to the duty of care of parent companies and sponsoring undertakings], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Mar. 28, 2017, https://www.legifrance.gouv.fr/eli/jo/2017/3/28; *see also* Wet zorgplicht kinderarbeid [Dutch Child Labor Due Diligence Act], Wet van 24 oktober 2019, Stb., 2019, https://zoek.officielebekendmakingen.nl/stb-2019-401.html.

regulatory efforts in a similar direction are well under way in European Union law.[6] Small and medium enterprises (SMEs) will benefit from a more realistic regime of due diligence rather than the strict liability of representations and warranties that, as a practical matter, will often be untrue and therefore routinely breached. In other words, MCCs 2.0 move from a demand that supplier make a number of representations and warranties that both parties will perhaps know to be false, or doubtful, to a contractual expectation that all parties in the supply chain, from the buyer itself to its top-tier suppliers to the lowest level subcontractors, will all be duly diligent about human rights impacts. In some ways due diligence is familiar as it is a constant in corporate practice. Still, many lawyers will find it new in two ways. Obviously it is a move away from more traditional contract drafting that centers on standard "reps and warranties." More fundamentally, human rights due diligence is not simply about assessment of corporate risk and assuring legal compliance but instead requires a consideration of stakeholders' (including workers') interests that are not identical to those of the contracting parties.

More broadly, MCCs 2.0 seek to align much more closely with the 2011 UN Guiding Principles on Business and Human Rights (UNGPs)[7] and with the OECD Guidelines for Multinational Enterprises as well as the OECD Due Diligence Guidance for Responsible Business Conduct.[8] The UNGPs and OECD Guidelines and Guidance have enjoyed wide uptake by many businesses already, and the ABA itself has officially endorsed the UNGPs, as have numerous other bar organizations.[9] Aside from human rights due diligence, the UNGPs and the Guidelines drove several significant changes in MCCs 2.0. Human rights remediation is generally prioritized over typical contract remedies (like money damages), and issues like pricing, changes of circumstances (such as COVID-19), timing, and modifications are addressed expressly. In addition, the Working Group discovered that while many companies already have committed to respect human rights in their corporate codes of conduct, many are looking for help in doing so in their supply chains. Accordingly, we are offering guidance with respect to what buyers may require of their suppliers in the form of "Building Blocks for Schedule P" as well as guidance in the form of a "Schedule Q" that states the buyer's responsibilities. Schedule Q fills a gap in the supply chain governance arena because most codes of conduct

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[6] The announcement was made in April 2020 by EU Commissioner for Justice Didier Reynders that the European Commission will introduce legislation on mandatory human rights due diligence in the first quarter of 2021 as part of the European Green Deal and the COVID-19 recovery package. *See generally* Eur. Parl. Comm. on Legal Affairs, *Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability* (2020/2129(INL)) (Sept. 11, 2020); Eur. Parl. Subcomm. on Hum. Rts., *Briefings on Human Rights Due Diligence Legislation—Options for the EU* (PE 603.495) (June 2020). For a recent update on EU developments, see Jonathan Drimmer et al., *Pre-Draft of the EU Mandatory Corporate Due Diligence and Corporate Accountability Initiative: 10 Questions Businesses Need to Know*, PAUL HASTINGS (Oct. 5, 2020), *https://www.paulhastings.com/publications-items/details/?id=da731c70-2334-6428-811c-ff00004cbded.*

[7] *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework,* , Human Rights Council, annex, U.N. Doc. A/HRC/RES/17/31 (Mar. 21, 2011) (accessible at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [hereinafter UNGPs].

[8] *See* OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), available at http://www.oecd.org/daf/inv/mne/48004323.pdf; OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), available at http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

[9] The ABA House of Delegates endorsed the UNGPs in 2011 and has since been followed by the International Bar Association, the Law Society for England and Wales, the Japan Federation of Bar Associations, and the European Bars Federation [Fédération des Barreaux d'Europe (FBE)]. For a concise history of the background, content, and uptake of the UNGPs, see John F Sherman, III, *Beyond CSR: The Story of the UN Guiding Principles on Business and Human Rights*, *in* CORPORATE SOCIAL RESPONSIBILITY—SUSTAINABLE BUSINESS: ENVIRONMENTAL, SOCIAL AND GOVERNANCE FRAMEWORKS FOR THE 21ST CENTURY (Rae Lindsay and Roger Martella eds. 2020) ch. 20, § 20.04, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561206 (last visited Nov. 26, 2020).

apply to suppliers, not buyers. As there are few if any examples of buyer codes, Schedule Q is specific and detailed.

Some of these changes are path-breaking but necessary. As detailed below, the legislative move to mandatory human rights due diligence has already started. France led the way, other countries are considering similar legislation, and the European Union has announced that it will be moving in this direction in 2021. Large MNEs may already be subject to such rules because of their business in France or the Netherlands, and others may soon find themselves in a like position. That said, many companies find themselves very differently situated, and this project has always been intended for a broad range of companies, including SMEs. Further, different companies are in different places with respect to the commitments they want to make and the responsibilities they can undertake. For these reasons, the MCCs 2.0 *retain a fully modular approach so that companies can choose the commitments that best reflect their positions, their goals, and their sector of activity.* This is not a certification document; it is not a prix fixe menu. Companies are fully free to order their contractual provisions à la carte, choosing the clauses and the commitments that are right for them.

VERSION 1.0, THE CHIEF ISSUES ADDRESSED, AND THE RESOLUTIONS RETAINED IN VERSION 2.0

This project was originally conceived as an effort in legal problem-solving, careful drafting, and research in order to move corporate commitments from mere policy statements to the legal and operational side of companies. It was instigated by a previous ABA project: after much effort and negotiation, the ABA adopted model principles against labor trafficking and child labor.[10] The Business Law Section had achieved some success in convincing companies to adopt these principles, but there was considerable concern that they were ineffective as mere policy statements. The Working Group was formed to operationalize them, in corporate parlance. The Working Group saw its mission as making corporate human rights policies legally effective and operationally likely. These twin goals remain our mantra.

The main challenge at the initial stage of the work was to solve the mismatch between commercial law rules and human rights law and standards. The problem is that goods made in unacceptable conditions might fully conform to product specifications. As we said then, "The background law does not deal easily with the problem of soccer balls that are perfectly stitched but that were sewn by child slaves."[11] The problem manifests itself primarily with respect to conformity and remedies, and MCCs 1.0 took on the task of resolving those issues. The first version of the MCCs was geared to solve a commercial law problem and to assure that the

[10] There are both ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor ("ABA Model Principles") and ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor ("Model Policies"). The ABA Model Principles are the high level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083 (2015). For more information on the Model Principles Task Force, see the *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*, http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.html.

[11] MCCs 1.0, *supra* note 4, at 1095. *See generally* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 526 (2004).

clauses would be likely to work with typical purchasing documents. They were designed as a helpful resource for companies' counsel.

The chief issues were making supplier obligations flow through the entire supply chain; allowing for traditional contract remedies along with human rights remediation even if suppliers' defaults did not lead to defective goods (e.g., perfect shirts that were made in extremely dangerous conditions); conceiving of mitigation as something other than resale at market prices (because the goods may be "perfect" but nevertheless tainted by their reprehensible provenance); allowing a full range of remedies in a less than promising international transaction; and structuring the relationship through the use of disclaimers to limit the liability of buyers. MCCs 1.0 offered solutions to these issues, and for the most part they remain in MCCs 2.0, although no solution is ideal. They were (and are) as follows.

- All responsibilities flow through the entire supply chain under broad definitions of subcontractors, employees, and representatives, and duties are imposed on all of them. See MCCs 2.0 ¶ 1.2.
- In MCCs 1.0, goods are nonconforming and the buyer has a right of rejection and cancellation or avoidance if the supplier has violated Schedule P. See MCCs 1.0 ¶ 2. This right remains in MCCs 2.0 unless the buyer failed to engage in responsible purchasing practices. See MCCs 2.0 ¶ 3. If the buyer did contribute to the problem, the situation is more complex. See MCCs 2.0 ¶¶ 2.3(e), 6.2(f), 6.5(b).
- Mitigation is reconceived (as is "acceptance" under U.C.C. § 2-606) in recognition of the possibility that reselling tainted goods might actually increase damages (e.g., through reputational harm and other consequential damage). Alternative mitigation could include donating the tainted goods to charity, for instance, unless other action is required by law, as when the US trafficking statutes are implicated. See MCCs 2.0 ¶ 6.4.
- Remedies are still specified in detail, taking into account the particular problems of tainted but otherwise conforming goods, reputational harm, informational issues, and so on. See MCCs 2.0 ¶ 6. Nevertheless, the MCCs 2.0 make clear that neither party should profit from breaches of ethical practice. See MCCs 2.0 ¶ 6.3(a). Further, remedies in MCCs 2.0 must be understood in conjunction with the commitment to human rights remediation of the problem, see ¶ 2, rather than termination of the relationship. This shift is discussed further *infra*.
- Although some who have worked on the project have pushed hard to remove them, the disclaimers have been retained in modified form. Compare MCCs 1.0 ¶ 5.7 with MCCs 2.0 ¶ 7.

The treatment of disclaimers deserves further consideration. The problem is that a variety of legal doctrines may perversely discourage buyers from taking affirmative steps to identify and address human rights abuse in their supply chains. Typically, buyers have no enforceable duties to workers who are legally separated from the buyers, and in most international supply chains, the workers are legally remote from the ultimate buyers (although buyers are prohibited under US law from importing goods made with forced labor). If the buyer takes affirmative steps, however, it may become liable to workers for failing to use reasonable care in an undertaking that it willingly undertook. Further, some types of control by buyers over suppliers may sacrifice the suppliers' independent contractor status, which can

be so important in shielding buyers from liability.[12] For these reasons, the disclaimers in MCCs 1.0 sought to maintain the legal independence of the suppliers, even though the buyer was imposing duties on its suppliers to keep the supply chain clean. For example, while a buyer might monitor its suppliers, MCCs 1.0 provide that the buyer assumes no *duty* to do so.[13]

Some buyers, of course, may have non-contractual legal duties to monitor, to disclose information, and so on; for instance, buyers who are federal contractors and therefore bound by the Federal Acquisition Regulation must "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities."[14] And all buyers may have a duty to disclose the discovery of forced labor in their supply chains under some circumstances.[15] Further, buyers who commit to abide by the UNGPs or other norms may be under their own corporate duty to do just that, which will involve considerable involvement in keeping their supply chains clean.[16] Such buyers will monitor their suppliers on an ongoing basis to determine whether they are in compliance with Schedule P, and they must map their supply chains to determine whether their products are produced with human rights abuse at more remote links in the chain, below those suppliers with whom they have a direct contractual relationship. Such monitoring and mapping are fundamental to human rights due diligence under the UNGPs. None of this, however, means that contractual disclaimers are inappropriate. That buyers may have a regulatory or statutory duty, enforceable by the government, or their own corporate commitments to the UNGPs or other norms, does not mean that buyers will also want to incur parallel contractual (or tort) liability, enforceable by their contracting counterparties or other private plaintiffs, except as stated explicitly in the contract.

Buyer reluctance to take on additional liability to private plaintiffs should come as no surprise; millions of dollars are spent in litigation over implied private rights of action. The disclaimers simply say that the buyer takes on no contractual duties beyond those explicitly stated; the buyer may or may not owe duties for some other reason, but the disclaimer expressly rejects private contractual enforcement of such duties. The disclaimers thus do important work in protecting buyers who choose to become more involved in managing their supply chains rather than burying their heads in the sand. In short, they help companies manage their risk while they comply with their duties, being clear that some companies may wish to limit who can sue under the contract for alleged breaches of those duties. And to be clear, as just noted, the buyer in MCCs 2.0 does take on some explicitly stated contractual

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[12] Consider the case law reviewed in Ramona Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. U. L. REV. 1707 (2019); David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 AM. U. L. REV. 1869, 1902-03 (2019). Note the "trenchant observation of Judge Johnston that current tort doctrine encourages Western buyers to divorce themselves from the supply chain as much as possible and to 'ignore[] workplace safety' as a means to 'escape liability.'" *Rahaman v. J.C. Penney Corp*., No. N15C-07-174 MMJ, 2016 WL 2616375, at *9 n.68 (Del. Super. Ct. May 4, 2016). The complaint was originally filed in the United States District Court for the District of Columbia, naming Bangladesh as a defendant (No. 15-CV-00619-KBJ (D.D.C. filed Apr. 23, 2015)).

[13] MCCs 1.0, *supra* note 4, ¶ 5.7.a.

[14] FAR, 48 C.F.R. §§ 52.222–56, 22.1703(c)(1)(ii)(A).

[15] *See, e.g*., 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b). Foreign laws may also impose similar legal duties on U.S. companies doing business in or with their countries. *See supra* note 5.

[16] *See generally* John Gerard Ruggie & John F. Sherman, III, *Adding Human Rights Punch to the New Lex Mercatoria: The Impact of the UN Guiding Principles on Business and Human Rights on Commercial Legal Practice,* 6 J. INT'L DISPUTE SETTLEMENT 455–461 (2015), https://scholar.harvard.edu/files/john-ruggie/files/adding_human_rights_punch_to_the_new_lex_mercatoria.pdf.

duties, as discussed in the next section. The disclaimers as drafted in MCCs 1.0 are flat, but in version 2.0 the disclaimers are necessarily qualified: it would not be true to say that the buyer is taking on no obligation to monitor its supply chain, for instance. The buyer is taking on that and other responsibilities as part of its human rights due diligence in Article 1. Thus the disclaimers remain in MCCs 2.0, but with exceptions for the obligations that the buyer takes on elsewhere in the agreement.[17]

THE MOVE TO BUYERS SHARING RESPONSIBILITY WITH SUPPLIERS

A number of reasons have motivated the addition of buyer responsibilities, but two are compelling: protection for workers cannot happen successfully without buyer responsibility, and many buyers are now or will soon be legally required to take on this responsibility. These twin reasons are all the stronger because they are intertwined.

Buyers' purchasing practices can play a key role both in protecting and in harming workers. Version 1.0 of the MCCs was conceived on the notion that problems in the supply chain are caused by irresponsible suppliers, not by the ultimate buyer. This is in tension with the UNGPs, the research that supports them, and more recent research in conjunction with the drafting of MCCs 2.0.[18] In short, if the MCCs are to be successful, buyers need to follow responsible purchasing practices.

Extensive research has shed light on the realities of international supply chain contracting and the role of buyers' purchasing practices. The leaders of the Principled Purchasing Project, which is part of the Working Group, put together an extraordinary set of consultations during the summer of 2020. It is not necessarily the kind of rigorous empirical research from which findings may be generalized, but we did hear from many people in many sectors. Consultations were held with representatives of large Western buyers (including three companies that are certainly household names), with a third party who is often involved in remediation, with nongovernmental organizations and others from civil society, with investors committed to ESG values,[19] with representatives of multilateral international organizations, with standard setters and auditors, with union and labor advocates, with industry associations, and with suppliers from several countries in East and South Asia.[20] After these consultations and other research, the Working Group has no doubt that buyer demands, typically related to production times, price requirements, or change orders, can often cause or contribute to human rights violations. It has become clear that improving buyers' purchasing practices is central to protecting workers from human rights abuses. To be effective, the MCCs must provide mechanisms for buyers to share responsibility with suppliers.

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[17] MCCs 2.0 ¶ 7.1(a)-(b) ("Buyer does not assume a duty under this Agreement . . . except as stated in Article 1 and 2").

[18] Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U.L. REV. 1519, 1537-40 (2019) (citing Vijay Padmanabhan et al., *The Hidden Price of Low Cost: Subcontracting in Bangladesh's Garment Industry*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2659202 (2015)); John F. Sherman, III, *The Contractual Balance Between 'Can I?' and 'Should I?' Mapping the ABA's Model Supply Chain Contract Clauses to the UN Guiding Principles on Business and Human Rights*, Corporate Social Responsibility Initiative, Harvard Kennedy School, April 2020, Working Paper No. 73, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574811.

[19] That is, environmental, social, and governance values.

[20] The consultations were held under Chatham House rules so identifying information cannot be disclosed here. In all, over 50 people were consulted representing roughly 40 to 50 organizations.

To the business-minded lawyer, effectiveness must always be the ultimate goal, but any lawyer's mind is trained to home in on legal risks; developing legal requirements on human rights due diligence and increased legal enforcement of existing regulations heighten the need for buyers to focus on their responsibility. It is still true that policing supply chains carries risks,[21] and candid lawyers must acknowledge as much to their clients.[22] But the countervailing risks have been heavy for some time, and they are becoming even weightier now. When MCCs 1.0 were published, companies were already concerned with a variety of compliance obligations, particularly around federal trafficking, forced labor, and child labor statutes, as well as disclosure obligations under some state and foreign laws.[23] Many of these may have seemed like paper obligations, and companies seldom if ever felt the brunt of any enforcement. That has changed, and US Customs and Border Protection has now seized numerous cargoes under Withhold Release Orders issued pursuant to anti-trafficking laws.[24] Corporate boards and officers can no longer afford attractive but ineffective corporate policies. Few current risk assessments will be able to justify turning a blind eye to the problems.

If US Customs enforcement were not enough, new legislation has already begun to require companies to be responsible for their supply chains, and not just around child labor, forced labor, and conflict minerals, but also for working conditions and workers' health and safety. For many years, admittedly, companies had few seriously enforced legal incentives to clean their supply chains. That landscape changed when France passed its duty of vigilance law in 2017, with the Netherlands passing a similar Child Labor Diligence Act in 2019.[25] The EU is now showing every sign of following suit.[26] These changes are discussed in the next section, but the point for now is that both operational effectiveness and legal obligation, in practice as well as on paper, require buyers to take responsibility for their supply chains. MCCs 2.0 help them to do that.

THE MOVE FROM REPRESENTATIONS AND WARRANTIES TO HUMAN RIGHTS DUE DILIGENCE

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[21] *See supra* note 12 and accompanying text.

[22] *See* MODEL RULE OF PROFESSIONAL CONDUCT 2.1 (duty to provide candid advice to clients).

[23] MCCs 1.0, *supra* note 4, at 1095 (citing Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7114 (2018); 18 U.S.C. §§ 1589–1592 (2018) (criminal sanctions for forced labor, trafficking, and peonage); Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013)); Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016); CAL. CIV. CODE ANN. § 1714.43; Federal Acquisition Regulation, 48 C.F.R. §§ 52.222–50 to 52.223-7; UK Modern Slavery Act 2015, c. 30; French Corporate Duty of Vigilance Law, *supra* note 5; Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1); *see also* Australian Modern Slavery Act 2018 (Cth) No.153 part 2; Dutch Child Labor Due Diligence Act, *supra* note 5.

[24] *See, e.g.*, US Customs & Border Protection, *CBP Issues Detention Order on Palm Oil Produced with Forced Labor in Malaysia* (Sept. 30, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-palm-oil-produced-forced-labor-malaysia. After a long period when enforcement was rare, US CBP has issued roughly 18 "withhold release orders" (WROs) in the last twelve months (as of Oct. 11, 2020). Some link this surge in enforcement to multimillion dollar settlements by buyers. *See* Andy Hall, *Statement on Top Glove's Estimated US$40m Reimbursement of Migrant Worker Recruitment Related Fees and Costs*, FACEBOOK, (Oct. 5, 2020), https://m.facebook.com/story.php?story_fbid=10157620591885677&id=675065676.

[25] *See supra* note 5.

[26] *See supra* note 6.

The same two reasons—operational effectiveness and enforced legal requirements—that compel the addition of buyer responsibilities within MCCs 2.0 also require the move from representations and warranties to human rights due diligence. For many MNEs there is not much of a risk calculus on this score; simply put, human rights due diligence is currently required by French law and Dutch law and will likely be required very soon by EU law.[27] Even for MNEs who are not subject to French and Dutch law and who will not be subject to EU law, and for SMEs in similar circumstances, the move still makes sense. The regime of representations and warranties, with their accompanying strict liability—if they are not true, there is breach—is unrealistic and ineffective, and often so much so as to be downright fictitious. Frequently this regime is thought to lead to what is called a "tickbox" or "checkbox" approach to supply chain management in which buyers require a laundry list of representations of compliance from their suppliers. Suppliers mechanistically provide them by checking the boxes, and everyone goes home happy (although they may be more than a little resentful of time wasted with form-filling). Little is achieved.[28]

The move from representation-and-warranty to due diligence is eminently practical, then, and should be reassuring to the parties. The participants in the supply chain are no longer being asked, unrealistically and fictitiously, to literally guarantee perfect compliance with the human rights and safety standards in Schedule P and the principled purchasing practices in Schedule Q. Instead, they are being required to be duly diligent, on an ongoing basis, about achieving those goals. This is not mere aspiration; the parties are contractually obligated to use reasonable means to achieve the goal. But there is no longer strict liability for failure of perfect compliance. And there is no longer the knowledge, certain to both parties, that the human rights obligations of the contract are breached the moment it is signed.

Although warranty rather than due diligence is the usual style of contract drafting in common law countries, diligence obligations are no stranger to the common law. Notions of good faith efforts or best efforts are standard in many contracts for sales of goods,[29] and due diligence accords well with the *obligation de moyens*, sometimes even called an *obligation de diligence*, in the civil law.[30] To some the switch may seem surprising; after all, if human rights are so crucial, should the parties not be expected to be strictly liable rather than merely to use appropriate efforts? Yet given the size and complexity of many supply chains, the varying capabilities of different companies, from the largest MNEs to the most modest SMEs, due diligence is the better regime. These inescapable facts are recognized in the UNGPs. Under Guiding Principle 24, businesses are entitled to prioritize and focus their attention on the most severe human rights harms or on harms that would become irremediable if there is a delayed response. Not everything can be made perfect, ever, much less all at once. Perfection is not

[27] *See supra* notes 5-6 and accompanying text. Although it is narrower because it is limited to child labor, the Dutch statute of 2019 similarly imposes a due diligence regime. *See supra* note 5.

[28] D.A. Baden et al., *The Effect of Buyer Pressure on Suppliers in SMEs to Demonstrate CSR Practices: An Added Incentive or Counter Productive?*, 27 EUR. MGMT. J. 429, 435 (2009); *see also* James Harrison, *Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment*, 31, 2 IMPACT ASSESSMENT & PROJECT APPRAISAL 107, 111, 115 (2013), https://www.tandfonline.com/doi/full/10.1080/146155 (explaining that due diligence "could degenerate into a 'tick-box' exercise designed for public relations purposes rather than a serious integral part of corporate decision-making."); *see also* Ruggie & Sherman, *supra* note 16, at 460.

[29] *See, e.g.*, U.C.C. § 2-306.

[30] For basic explanations of the *obligation de moyens* or *de diligence* and its relation to other kinds of obligations with stricter liability, such as the *obligation de résultat* or the *obligation déterminée*, *see* MARTIN DAVIES & DAVID V. SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS: GLOBAL SALES IN COMPARATIVE CONTEXT 437-41 (OXFORD UNIV. PRESS 2014).

and cannot be the standard. Priorities are necessary, and this is reflected in MCCs 2.0, particularly sections 2.3(c) and 2.5.

Human rights due diligence is a prospective, retrospective, and ongoing risk management process that enables businesses to respect human rights by identifying, preventing, mitigating, and accounting for how they address the impacts of their activities on human rights.[31] To be effective, it requires understanding the perspective of potentially affected individuals or "stakeholders," and engagement with stakeholders pervades each stage of the process. It is understood within the context of the UNGPs and the subsequent OECD Guidelines and Guidance.[32] The OECD Due Diligence Guidance provides enterprises with the flexibility to adapt due diligence to their circumstances, recognizing that the nature and extent of diligence will be affected by the size of the enterprise, the context of its operations, and other factors. Specific guidance for SMEs seeking to implement effective human rights due diligence processes can also be found in the Guidance.[33] In addition, the OECD has produced sector-specific due diligence guidance for the minerals, extractives, agriculture, garment and footwear, and financial sectors, as well as guidance that applies across sectors. Like the Guiding Principles, a key aspect of the OECD Due Diligence Guidance is to carry out and improve the diligence process on an ongoing basis. Although the language is not well suited for contract clauses, the following list gives a good, though not exhaustive, understanding of the concept. Human rights due diligence includes:

(i) embedding responsible business conduct into the culture of the company through leadership, incentives, policies, and management systems;
(ii) identifying and assessing actual and potential adverse human rights impacts, throughout the supply chain, that the contract-related activities may cause or contribute to, or that may be directly linked to the operations, products or services contemplated by the contract;
(iii) ceasing, preventing, and mitigating such adverse impacts;
(iv) tracking and monitoring, in consultation and collaboration with internal and external stakeholders, the success of mitigation or prevention;
(v) communicating how adverse impacts are addressed, mitigated or avoided; and
(vi) providing for or cooperating in remediation where appropriate.[34]

As can be appreciated from this list, while due diligence is familiar to corporations and their counsel, human rights due diligence is not coterminous with the kind of due diligence undertaken for a merger or a public offering. Human rights due diligence goes beyond technical legal compliance and includes the need to look at risks through the perspective of the stakeholder, as learned through engagement with the stakeholder; the prioritization of responsive action by severity of impact on the stakeholder; the need to search on an ongoing basis for human rights risks throughout the entire supply chain, and not just the first few tiers; the development of leverage to influence contractual parties to refrain from, mitigate, or remediate harm to human rights; and the need to go beyond the limits of local law. In other words, human rights due diligence is a necessary part of ongoing supply chain management; it is proactive, forward and backward looking, responsive to actual or potential impacts, and

[31] See the UNGPs, *supra* note 7, especially Principles 11, 17 through 22, 29, and 31.

[32] OECD Due Diligence Guidance*, supra* note 8.

[33] *See* OECD Due Diligence Guidance, *supra* note 8, at 9, 18, Annex Questions 6, 7, and Table 4.

[34] See the introduction to Section II of the OECD Due Diligence Guidance, *supra* note 8.

requires meaningful and regular engagement with stakeholders. Under the law now, to some degree, and under the law as it is developing, those impacts are part of the inescapable responsibility of the contracting parties, and that is why they are the focus of the first obligation stated in MCCs 2.0.

EXPRESS TREATMENT OF HUMAN RIGHTS REMEDIATION

Human rights remediation receives extensive treatment in MCCs 2.0. In contrast, MCCs 1.0 provide for termination on breach but assume the parties would not actually move to termination except in the rarest and most egregious circumstances. Instead, the parties would work to remediate the problem by taking measures to stop and correct the harm and to address any grievances. Termination, generally speaking, is in no one's interest. The buyer does not want to suffer the disruption and incur the delay or switching costs to transfer its business to new suppliers. The supplier certainly does not want to lose business. And except in the most extreme circumstances, the workers do not want to lose their jobs and their livelihood, such as it is. MCCs 1.0 give the buyer a termination right, which would increase the buyer's leverage, as contemplated by the UNGPs and OECD Guidelines,[35] to require human rights remediation by the supplier. In this way MCCs 1.0 are similar to many loan documents that allow a lender to call a loan upon default, accelerating all amounts due and requiring immediate payment, even though in most circumstances everyone expects the loan to be sent to "workouts" where efforts can be made to salvage the loan. Of course not all loan documentation works this way, and similarly, MCCs 1.0 provide an alternative for notice and cure if the parties wanted to provide contractually for human rights remediation.[36]

Because everyone should contemplate remediation in almost all circumstances, MCCs 2.0 flip the position of MCCs 1.0 and provide for remediation expressly and extensively.[37] In addition, remediation is not solely the responsibility of the supplier; the buyer must participate if it has caused or contributed to the problem.[38] These provisions are not only in keeping with the shared responsibility of buyers and suppliers but also seem especially appropriate in cases where the buyer has caused or contributed to the harm. On the other hand, and perhaps just as obviously, cases may arise where the conduct is so egregious that immediate termination is

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[35] *See* UNGPs, *supra* note 7, Commentary to Principle 19; OECD Guidelines, *supra* note 8, § II, art. 3.2.

[36] *See* MCCs 1.0, *supra* note 4, ¶¶ 2.3 (cancellation and avoidance), 2.5 (no right to cure), at 1099-1100 & n.30 (suggesting in a footnote an alternative clause for notice and cure to allow remediation).

[37] MCCs 2.0 ¶ 2 (remediation); *see also id.* ¶ 2.4 (right to cure). It is an interesting question of contract design to decide whether a contractual termination right, like that in ¶ 2.3 of MCCs 1.0, *supra* note 4, should be included in transactions that do not contemplate its use but instead contemplate remediation (or in commercial practice, a workout). A termination right that will seldom be used might be conceived as a supracompensatory remedy that in a competitive market will be undesirable. *See generally* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369 (1990). For that reason the switch to the scheme in MCCs 2.0 is perhaps desirable. The relevant market may not be competitive, however, and for that reason a buyer with bargaining power may prefer the termination right. The greater buyer leverage might arguably increase the chance of forcing remediation as well, but this will depend on the particular facts of the market and the parties' place in it, and even if so, overweening buyer power to terminate may undermine valuable cooperation and be counterproductive for that reason. These issues arise from holdup problems in supply chain contracting generally, and the Working Group fully admits that it has not solved those problems (and further believes that whoever does solve those problems will probably get a Nobel Prize in economics to show for it).

[38] MCCs 2.0 ¶ 2.3(e).

required, with no opportunity for remediation, and MCCs 2.0 provide expressly for this as well.[39] These cases involve what are often called zero-tolerance activities.

FORCE MAJEURE, RESPONSIBLE EXIT, COVID-19, AND OTHER DISRUPTIONS

The radical disruptions of COVID have caused new problems in supply chains and exacerbated old ones. MCCs 2.0 address these problems with two innovative provisions.[40] MCCs 2.0 acknowledge that the intervention of an event like COVID, or a particularly vicious monsoon, or political unrest, or countless other events, could upset the supply chain in a way that the goods could only be produced in violation of the commitments in Schedule P. Often these violations occur because of unauthorized subcontracting. In the case of COVID, lack of personal protective equipment could make production unsafe. These events may or may not constitute a force majeure, and the outcomes of judicial decisions on this issue are notoriously unpredictable under the U.C.C. and international sales law.[41] Judicial resolution of disputes in international supply chains is often impractical anyway. For these reasons, the clauses themselves provide guidance.

Notably, they apply to any "reasonably unforeseeable, industry-wide or geographically specific, material change" regardless of whether the change constitutes a force majeure. A supplier may exit the relationship without default if staying in the relationship would force it to breach Schedule P. When it comes to buyers wanting to exit the relationship, for whatever reason, including a force majeure event or something similar, the clauses impose on the buyer a duty to "consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them," regardless of the reason for exit. In light of claims that many buyers abandoned their suppliers when the COVID-19 lockdowns set in without compensating them—even for completely manufactured goods, and, in some cases, even for goods that had already been shipped[42]—MCCs 2.0 add that "Termination of this Agreement shall be without prejudice to any rights or obligations accrued prior to the date of termination, including, without limitation, payment that is due for goods."

These clauses hardly solve all the problems of force majeure, COVID, and similar events. Nothing can. But they bring human rights into the equation and may help the parties reach resolutions that take into account a broad view of the interests involved.

THE ADDITION OF DISPUTE RESOLUTION IN MCCS 2.0

Because the MCCs are drafted as an addition to a primary sales agreement, Version 1.0 contains no provision for dispute resolution. Presumably choice of law, choice of forum, arbitration, or the like would be treated in the main agreement. After publication of MCCs 1.0,

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[39] *Id.* ¶ 2.4.

[40] MCCs 2.0 ¶¶ 1.3(e)-1.3(f).

[41] *See* U.C.C. §§ 2-613, 2-615; CISG art. 79. *See generally* DAVIES & SNYDER, *supra* note 30, at 326-27.

[42] *See* Jeffrey Vogt et al., *Farce majeure: How global apparel brands are using the COVID-19 pandemic to stiff suppliers and abandon workers*, available at https://www.ecchr.eu/en/publication/die-ausrede-der-hoeheren-gewalt/.

the Working Group learned more about the special context of dispute resolution that involves human rights, and for that reason MCCs 2.0 add two relevant provisions.

Most prominently, clauses on nonjudicial dispute resolution have been added. For companies who prefer to litigate rather than arbitrate, litigation remains an option. (Alternative drafting is offered in MCCs 2.0 ¶ 8.6, so companies can choose arbitration or litigation.) Still, even companies who want judicial resolution of ultimate disputes may benefit from pre-litigation efforts at amicable resolution, and these mechanisms are set up in this new version. This kind of collaborative resolution is consonant with the more cooperative approach now taken in much cutting-edge supply chain management. Many companies will find the "up the line" scheme to be consonant with their management practices in many other business contexts.[43]

In addition, as MCCs 2.0 align more closely with the UNGPs, an "operational level grievance mechanism" is set up to address problems as they arise.[44] This mechanism is informal, but it is nevertheless required, and it must be fully functional. Again, its purpose—to be "legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue with affected stakeholders, including workers"—will align with many companies' efforts toward collaborative supply chain management. Further, it is required for consistency with the UNGPs.[45]

CONCLUSION: COMPANIES CAN CHOOSE THE COMMITMENTS THAT SUIT THEIR NEEDS AND GOALS

A modular approach is the central drafting strategy of the MCCs in both versions. The Working Group fully recognizes that not all companies are in the same place. Not only do they possess differing capabilities and face varying contexts, they are simply in different

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[43] *See* Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM L. REV. 1377, 1404 (2010); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 442 (2009); Susan Helper, John Paul MacDuffie & Charles F. Sabel, *Pragmatic Collaborations: Advancing Knowledge while Controlling Opportunism* 9 INDUS. & CORP. CHANGE 443, 449 (2000). In addition, governments adhering to the OECD Guidelines set up a National Contact Point (NCP) to further the effectiveness of the OECD Guidelines by, among other activities, helping to resolve dispute. The NCP in the United States provides a non-judicial grievance mechanism with a mediation and conciliation platform.

[44] MCCs 2.0 ¶ 1.4.

[45] UNGP 29, *supra* note 7. MCCs 2.0 have been very much influenced by the groundbreaking work in the HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION (2019). At the same time, it should be noted that many are skeptical of arbitration in the context of human rights, particularly because of experiences in investment arbitration. Arbitration can be seen as favoring corporate interests over human rights, with biased arbitrators and confidentiality provisions that protect wrongdoers and hamstring balanced advocacy. For some of the leading discussion, see generally Kyle D. Dickson-Smith & Bryan Mercurio, *Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?*, 40 SYDNEY L. REV. 213, 219-20 (2018); Duy Vu, *Reasons Not to Exit? A Survey of the Effectiveness and Spillover Effects of International Investment Arbitration*, 47 EUR. J. L. & ECON. 291, 307 (2019); Alessandra Arcuri & Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties*, 59 B.C. L. REV. 2791, 2792 (2018); LUKE E. PETERSON & KEVIN R. GRAY, INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 12-13, 27 (2003). Much of the criticism, however, is based on investor-state dispute resolution, and there are significant distinctions between investor-state disputes and supply chain disputes. The former generally involve states and investors; the latter are generally disputes between two sets of businesses. The numerous international arbitrations between business entities should speak favorably about the positive aspects of arbitration. Article 8 of MCCs 2.0 gives parties both arbitration and litigation options and the annotations provide further discussion of the issues involved.

positions in their approach to human rights. Some companies—often those who have been involved in the worst problems—have advanced far in taking responsibility for the effects of their business on human rights. Other companies have taken only a few steps, and many have not yet started on the path. The MCCs are drafted for all of these companies and designed so that counsel, with a minimum of effort, can adapt them to the particular circumstances of each company.

The Working Group has faced calls to require buyers to agree to all of the clauses, to prohibit "cherry-picking," to mandate a particular allocation of responsibility. And the Working Group has faced criticism for failing to do so, or for rejecting goals that can only be aspirational. These calls and criticisms misconceive the place of the Working Group. We cannot impose duties or mandate compliance. Nor have we chosen an aspirational mission. We are a creature of the Uniform Commercial Code Committee of the ABA Business Law Section, and we see ourselves as practical lawyers. The original and ongoing goal to draft clauses that are "legally effective and operationally likely" can only be achieved if companies adopt the clauses. Otherwise the MCCs will be relegated to even greater irrelevance than the corporate policies that languish, unused, in the minute books of board meetings. Accordingly, the MCCs are drafted so companies can eliminate clauses that do not fit their goals; they can use MCCs 1.0 if MCCs 2.0 are too much; they can adapt everything[46] to meet their needs. For many companies, the most critical step is the first one—to start taking measures to improve their contracts. If the Working Group can make it easier to take that first step, we will have accomplished one of our most important objectives. That is not our only objective, however. We hope to provide guidance for companies that would like to move into a leadership position. We have tried to achieve balance while understanding that different companies walk on different tightropes in different tents.

We began with the confession that challenge, frustration, and hope were the catalysts for this project, and their powerful combustion continues to move the project forward. After publication of MCCs 1.0, it became clear that an ambitious effort toward revision would be needed to meet the goals of the project, which at its center is focused on improving the human rights of workers and other stakeholders, practically and immediately, through contracts—one of the most potent tools available. At the same time, we know that more needs to be learned, that new methods of supply chain management are coming into use, that new laws are in the offing, and that more work will need to be done. For now, we believe MCCs 2.0 offer a practical tool for companies who want to commit to protecting workers and other stakeholders in their international supply chains. It is not an easy task. The problem is spread across the world and results from countless factors, including basic economic realities. It will not be fixed soon, and it will not be fixed by supply chain reform alone, or by contract clauses standing by themselves. This is the challenge. And it is sometimes frustrating that the problem can seem intractable, particularly since so many people, with different missions, different incentives, and different perspectives, contend for so many different solutions. Still, we hold the belief that each effort can help, and that practical solutions offered for even the most complex problems can result in real improvements in the lives of real people. That is our ultimate objective.

[46] We have not tried in this introduction to catalog all of the changes, or even all of the significant changes, from MCCs 1.0 to 2.0, but we are confident that counsel will readily identify problematic clauses in any case.

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CLAUSES TO BE INSERTED INTO SUPPLY CONTRACTS, PURCHASE ORDERS, OR SIMILAR DOCUMENTS FOR THE SALE OF GOODS

The text proposed assumes that buyers are located in the United States and that the applicable law is either (a) US state law that implements the Uniform Commercial Code without material nonuniform amendment or (b) the United Nations Convention on Contracts for the International Sale of Goods (the "CISG," a treaty to which the United States is a party and which applies to many international sales of goods under CISG article 1(1)(a)).

For the most part, substantive human rights standards and ethical purchasing practices are not contained in these clauses and are instead assumed to be specified in "Schedule P" and "Schedule Q" respectively. For companies that do not already have substantive human rights requirements for their suppliers, "Building Blocks for Schedule P" is included separately to provide guidance. A pro forma Schedule Q is also provided separately. In the clauses below, please refer to the footnotes for explanations of risks, statutory and case law, and human rights guidance from the UN Guiding Principles on Business and Human Rights (the "Guiding Principles" or "UNGPs") and the 2011 OECD Guidelines for Multinational Enterprises (the "OECD Guidelines") as well as the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (the "OECD Due Diligence Guidance")).

1 ***Mutual Obligations with Respect to Combatting Abusive Practices in Supply Chains***. As of the Effective Date[47] of this Agreement, Buyer and Supplier each agree:

1.1 *Human Rights Due Diligence.*[48]

(a) Buyer and Supplier each covenants to establish and maintain a human rights due diligence process appropriate to its size and circumstances to identify, prevent, mitigate and account for how each of Buyer and Supplier addresses the impacts of its activities on the human rights of individuals directly or indirectly affected by their supply chains, consistent with the 2011 United Nations Guiding Principles on Business and Human Rights.[49] Such human rights due diligence shall be consistent with guidance from the Organisation for Economic Co-operation and Development for the applicable party's sector (or, if no such sector-specific guidance exists, shall be consistent with the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (the "OECD Due Diligence Guidance").[50]

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[47] An effective date may not be necessary, but the parties may prefer an "Effective Date" to be either the date of this Agreement or the date when all conditions precedent are satisfied. Alternatively, parties may want to set a period during which certain, but not all, obligations under this Agreement are effective. Presumably a certain level of human rights due diligence [hereinafter HRDD] will have been done by Buyer before engaging in extensive negotiations with prospective suppliers. Note that the HRDD contemplated in the following clauses goes beyond the customary know-your-customer, anti-money laundering and other due diligences that companies may otherwise employ, as explained more fully in the introduction. *See supra* notes 27 to 34 and accompanying text. Note further that the Effective Date is referenced in Section 1.1(d) to include pre-signing remediation plans.

[48] *See supra* notes 27 to 34 and accompanying text. (on HRDD under the UNGPs and OECD).

[49] *See* UNGPs 15-19, *supra* note 7.

[50] *See supra* note 8.

(b) [Buyer and Supplier each] [Supplier] shall and shall cause each of its [shareholders/partners, officers, directors, employees,] agents and all subcontractors, consultants and any other person providing staffing for Goods[51] or services required by this Agreement (collectively, such party's "Representatives") to disclose information on all matters relevant to the human rights due diligence process in a timely and accurate fashion to [the other party] [Buyer].

(c) For the avoidance of doubt, each party is independently responsible for upholding its obligations under this Section 1.1, and a breach by one party of its obligations under this Section 1.1 shall not relieve the other party of its obligations under this Agreement.

(d) Human rights due diligence hereunder may include implementation and monitoring of a remediation plan to address issues identified by due diligence that was conducted before the Effective Date.

1.2 *Schedule P Compliance Throughout the Supply Chain.*[52] Supplier shall ensure that each of its Representatives acting in connection with this Agreement shall engage with Supplier and any other Representative in due diligence in accordance with Section 1.1 to ensure compliance with Schedule P. Such relationships shall be formalized in written contracts that secure from the parties terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P.[53] Supplier shall keep records of such written contracts to demonstrate compliance with its obligations under this Agreement and shall deliver such records to Buyer as reasonably requested.[54]

1.3 *Buyer's Commitment to Support Supplier Compliance with Schedule P*.[55]

(a) *Commitment to Responsible Purchasing Practices*. Buyer commits to support Supplier's compliance with Schedule P by engaging in responsible purchasing practices [in accordance with Schedule Q].

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[51] "Goods" is assumed to be defined earlier in the Agreement (and not defined in Schedule P). *See also infra* Section 3.2 (on the definition of "Nonconforming Goods").

[52] Guiding Principle 13 requires that businesses avoid causing or contributing to human rights harms through their own activities, address such impacts where they occur, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships. Accordingly, this clause seeks to embed obligations to comply with human rights through the entire supply chain. In keeping with the modular approach of these clauses, businesses may want to circumscribe their responsibility in line with the degree to which they are connected to the activities of the business.

[53] The content of Schedule P is beyond the scope of this document. Note, however, that some suggest the best practice is to avoid reference to specific laws in favor of a general reference because legislative initiatives in some countries are broader than in others. In the event that the drafter nevertheless wishes to require that Supplier specifically represent compliance with anti-trafficking and similar legislation, consider avoiding the term "applicable," which will limit required adherence by companies that do not meet the size or revenue requirements of certain legislation. This might present a problem where the law applies to Buyer, because of its size, but not Supplier, because of its (relatively small) size.

[54] UNGP 21, *supra* note 7, requires businesses to communicate externally, particularly where concerns are raised by affected stakeholders, and sets out standards for the form, frequency, adequacy and confidentiality of such human rights reporting. *See also* UK Modern Slavery Act, *supra* note 23, § 54.

[55] *See supra* note 49 on UNGPs 15-19.

(b) *Reasonable Assistance*. If Buyer's due diligence determines Supplier requires assistance to comply with Schedule P, Buyer, if it elects not to terminate this Agreement under Section 2.5, shall employ commercially reasonable efforts to provide such assistance[,[56] which may include Supplier training, upgrading facilities, and strengthening management systems.[57]] Buyer's assistance shall not be deemed a waiver by Buyer of any of its rights, claims or defenses under this Agreement or under applicable law.

(c) [*Pricing*. Buyer shall collaborate with Supplier to agree on a contract price that accommodates costs associated with upholding responsible business conduct, [including, for the avoidance of doubt, minimum wage and health and safety costs, at a standard at least as high as required by applicable law [and International Labour Organisation norms]].[58]]

(d) *Modifications*. For any material modification (including, but not limited to, change orders, quantity increases or decreases, or changes to design specifications) requested by Buyer or Supplier, Buyer and Supplier shall consider the potential human rights impacts of such modification and take action to avoid or mitigate any adverse impacts, including by amending the modification [consistent with Schedule Q]. If Buyer and Supplier fail to agree upon modifications and/or amendments that would avoid a Schedule P breach, then either party may initiate dispute resolution in accordance with Article 8.

(e) *Excused Non-Performance*. If (i) Supplier provides notice and reasonably satisfactory evidence to Buyer that a Schedule P breach is reasonably likely to occur because of a requested modification or because of a reasonably unforeseeable, industry-wide or geographically specific, material change to a condition affecting Supplier;[59] (ii) the

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[56] As market standards are unlikely to provide adequate measures for what constitutes "reasonable assistance," Buyer's obligations are articulated in Schedule Q.

[57] Parties may consider deeming the cost of reasonable assistance to be a setup or mobilization expense associated with Supplier's preparing to provide goods to Buyer. For example, if Schedule P obligations effectively require that Supplier make capital improvements to meet Schedule P targets that may go beyond the minimum requirements of applicable law, Supplier's costs for such compliance may qualify for reasonable assistance from Buyer. Depending on the circumstances, Buyer and Supplier may determine that such assistance should be provided as a single payment at the beginning of the term of the Agreement or the parties may decide to spread assistance over time, over units delivered, or otherwise. Where assistance is provided over time, the parties should clearly state when such assistance might be suspended or whether such assistance would be accelerated on early termination.

[58] In cases where the parties want to support a "living wage" under the Agreement, they are encouraged to review their costing using established methodologies, such as Fair Wear's labor-minute costing tools, and living wage estimates found at https://www.fairwear.org/programmes/lw-tools-and-benchmarks and to consult definitions such as that provided by the Global Living Wage Coalition, which defines a living wage as "[t]he remuneration received for a standard workweek by a worker in a particular place sufficient to afford a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transportation, clothing, and other essential needs including provision for unexpected events," and the ACT-endorsed definition, which is, "The minimum income necessary for a worker to meet the basic needs of himself/herself and his/her family, including some discretionary income." This should be earned during legal working hour limits (i.e. without overtime). *What is a Living Wage?*, GLOB. LIVING WAGE COAL., https://www.globallivingwage.org/about/what-is-a-living-wage/ (last visited Jan. 30, 2021); *How Does ACT Define a Living Wage?*, ACT, https://actonlivingwages.com/living-wages/ (last visited Jan. 30, 2021).

[59] For example, if a supplier lacks sufficient personal protective equipment (PPE) to protect its workers in a pandemic to allow for normal operations, it should not be found in breach.

parties cannot agree on a solution that avoids breach of Schedule P; and (iii) Supplier elects not to perform in order to avoid breaching Schedule P, then the parties hereby agree that this Agreement or a specific purchase order hereunder may be terminated in whole or in part by Supplier and that Supplier shall not be in default of its obligations under this Agreement as a result of such non-performance.[60]

(f) *Responsible Exit*. In any termination of this Agreement by Buyer, whether due to a failure by Supplier to comply with this Agreement or for any other reason (including the occurrence of a Force Majeure event or any other event that lies beyond the control of the parties),[61] Buyer shall (i) consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them; and (ii) provide reasonable notice to Supplier of its intent to terminate this Agreement. Termination of this Agreement shall be without prejudice to any rights or obligations accrued prior to the date of termination, including, without limitation, payment that is due for acceptable goods produced by Supplier pursuant to Buyer's purchase orders before termination.[62]

1.4 *Operational-Level Grievance Mechanism*.[63] During the term of this Agreement, Supplier shall maintain an adequately funded and governed non-judicial Operational Level Grievance Mechanism ("OLGM") in order to effectively address, prevent, and remedy any adverse human rights impacts that may occur in connection with this Agreement. Supplier shall ensure that the OLGM is legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue with affected stakeholders, including workers. Supplier shall maintain open channels of communication with those individuals or groups of stakeholders that are likely to be adversely impacted by potential or actual human rights violations so that the occurrence or likelihood of adverse impacts may be reported without fear of retaliation. Supplier shall demonstrate that the OLGM is functioning by providing [monthly] [quarterly] [semi-annual] written reports to Buyer on the OLGM's activities, describing, at a minimum, the number of grievances received and processed over the reporting period, documentary evidence of consultations with affected stakeholders, and all actions taken to address such grievances.

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[60] This provision is intended to address not only change orders but *force majeure*-like events that go beyond a simple change in conditions affecting a single supplier.

[61] This phrasing should be adapted to the phrasing of any Force Majeure clause in the main supply contract to be sure the provision can harmonize with the parties' agreed approach to and definition of a Force Majeure event.

[62] It is not uncommon for buyers to exert their leverage—such as threats of termination—to require discounts or other benefits from suppliers. However, this type of behavior is unlikely to be upheld in courts, and this provision is meant to allow Supplier to enforce its rights despite any superior leverage that Buyer may have. Buyer is required to satisfy all obligations accrued prior to termination including payment in full for goods produced without violation of Schedule P.

[63] Guiding Principle 29 provides that all businesses must have in place an OLGM to resolve human rights disputes early and directly through engagement and dialogue with stakeholders. It is part of the businesses' ongoing HRDD responsibility. Guiding Principle 22 expects that businesses should cooperate with or participate in legitimate remedial processes when the businesses recognize that they have caused or contributed to an adverse impact. Legitimate processes can include state judicial and nonjudicial dispute resolution mechanisms, as well as non-state nonjudicial mechanisms. Under Guiding Principle 31, all nonjudicial dispute resolution mechanisms, state and non-state, should meet the effectiveness criteria enumerated in the text of the clause. *See* UNGPs, *supra* note 7.

2 ***Remediating Adverse Human Rights Impacts Linked to Contractual Activity***.

2.1 *Notice of Potential or Actual Violations.*

(a) Within _____days of (i) Supplier having reason to believe there is any potential or actual violation of Schedule P (a "Schedule P Breach"), or (ii) receipt of any oral or written notice of any potential or actual Schedule P Breach, Supplier shall provide to Buyer a detailed summary of (1) the factual circumstances surrounding such violation; (2) the specific provisions of Schedule P implicated; (3) the investigation and remediation that has been conducted and/or that is planned as informed by implementation of the OLGM process set forth in Section 1.4; and (4) support for Supplier's determination that the investigation and remediation has been or will be effective, adequate, and proportionate to the violation.

(b) If Supplier reasonably believes that Buyer's breach of Buyer's obligations under Section 1.3 caused or contributed to the Schedule P Breach and that remediation of the Schedule P Breach requires Buyer's participation under Section 2.3(e), Supplier shall notify Buyer and provide details supporting its claim. If Buyer rejects Supplier's allegation, Buyer shall provide Supplier with its written explanation rejecting Supplier's position. In such case, the Dispute shall be resolved under Article 8.

(c) Supplier hereby designates (name) (title) at (email address) and Buyer designates (name) (title) at (email address) to send/receive all notices provided under this Section 2.1 [and in addition notices shall be given as specified in Section ____ for general notices under this Agreement].

2.2 *Investigation.*

(a) Upon receipt of a notice under Section 2.1, Buyer and Supplier shall fully cooperate with any investigation by the other party or their representatives. Without limitation, such cooperation shall include, upon request of a party, working with governmental authorities to enable both Supplier and Buyer or their agents to enter the country, to be issued appropriate visas, and to investigate fully.

(b) Each party shall provide the other with a report on the results of any investigation carried out under this Section; provided that any such cooperation in the investigation does not require Buyer or Supplier to waive attorney-client privilege, nor does it limit the defenses Supplier or Buyer may raise.

2.3 *Remediation Plan*.[64]

(a) If Buyer becomes aware of a Schedule P Breach[65] that has not been effectively remediated, Buyer shall, in collaboration with Supplier's other buyers where legally appropriate,[66] require Supplier to prepare a remediation plan (a "Remediation Plan").

(b) The purpose of the Remediation Plan shall be to restore, to the extent commercially practical, the affected persons to the situation they would have been in had the adverse human rights impacts not occurred. [The Remediation Plan shall enable remediation that is proportionate to the adverse impact and may include apologies, restitution, rehabilitation, financial and non-financial compensation, as well as prevention of additional adverse impacts resulting from future Schedule P violations.][67]

(c) The Remediation Plan shall include a timeline and objective milestones for remediation, including objective standards for determining when such remediation is completed and the breach cured.[68] Supplier shall demonstrate to Buyer that affected stakeholders and/or their representatives [and/or a third party acting on behalf of such stakeholders][69] have

[64] Remediation is both retrospective and prospective. It is retrospective because it attempts to make people whole for the harm they have suffered. It is prospective because it seeks to prevent recurrence. In this way remediation is embedded within HRDD. The forms of remediation in the clause are based on the commentary to UNGP 25, *supra* note 7.

[65] Under UNGP 24, *supra* note 7, businesses are entitled to prioritize and focus their attention on the most severe human rights harms or harms that become irremediable if there is a delayed response. A "severe harm" is characterized by its gravity, the number of people affected, and the ability to make people whole. *See id.* UNGP 14 (defining in commentary what contributes to the severity of harm).

[66] Research suggests that cooperation among buyers who all purchase from the same troubled supplier can be especially effective, but buyers should keep in mind any applicable antitrust or competition laws. Counsel should consider, for example, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); Letter from A. Douglas Melamed, Acting Ass't Att'y Gen., U.S. Dep't of Just., to Kenneth A. Letzler, Arnold & Porter (Oct. 31, 1996) (Business Review Letter on Apparel Industry Partnership development of standards for manufacturing under humane conditions). The context of these authorities is different, however, and buyers should consider concerted effort with the benefit of research and advice of counsel. Note that ethical and safety concerns do not necessarily allow activities otherwise proscribed by the antitrust laws. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679 (1978) (association's refusal to bid on price due to concerns about safety was a per se unlawful boycott). In response to the COVID-19 pandemic, the DOJ Antitrust Division issued a number of expedited Business Review Letters to provide requested guidance on permissible cooperation among competitors. At the time of writing, it is not known whether similar Business Review Letters may be available to facilitate human rights remediation if the parties implement appropriate safeguards to mitigate the risks of anticompetitive behavior.

[67] The bracketed language comes from the commentary to UNGP 25, *supra* note 7; companies committed to the UNGPs will likely want to retain the language for that reason.

[68] "Cured" may have different meanings in other contexts. In this case, a "completed" remediation or "cured" breach may include an ongoing activity (e.g., periodic monthly reports on compliance).

[69] Ideally, all adversely impacted stakeholders would be granted enforcement rights under this Agreement, but there are significant commercial and practical obstacles to granting such third-party beneficiary rights. For that reason Section 7.2 disclaims third party rights under the contract. If parties wish to include such rights, however, they may consider the language proposed in Corporate Accountability Lab, *Towards Operationalizing Human Rights and Environmental Protection in Supply Chains: Worker-Enforceable Codes of Conduct* (Feb. 2021), https://static1.squarespace.com/static/5810dda3e3df28ce37b58357/t/6026fd326aa9cd4f88697a20/1613167923256/Towards+Operationalizing+Human+Rights+and+Environmental+Protection+in+Supply+Chains.pdf (accessed Feb. 23, 2021):

participated in the development of the Remediation Plan.[70] [The Remediation Plan may contemplate recourse to the dispute resolution mechanisms set forth in Article 8, as appropriate.]

(d) Supplier shall provide [reasonably satisfactory] evidence to Buyer of the implementation of the Remediation Plan and shall demonstrate that participating affected stakeholders and/or their representatives are being regularly consulted. Before the Remediation Plan can be deemed fully implemented, evidence shall be provided to show that affected stakeholders and/or their representatives have participated in determining that the Remediation Plan has met the standards developed under this Section.

(e) If Buyer's breach of Section 1.3 has caused or contributed[71] to the Schedule P Breach or the resulting adverse human rights impact, Buyer shall participate in the preparation and implementation of the Remediation Plan, including by providing assistance [which may include in-kind contributions, capacity-building[72] and technical or financial assistance]

1.1. The Parties to this [Purchase Order/Agreement] acknowledge and agree that the terms of [Schedule P/Schedule Q] are intended to benefit and protect not only the Parties but also persons directly impacted by (1) Supplier's activities performed under this [Purchase Order/Agreement] and (2) activities by subsuppliers that the Supplier contracts with to perform under this [Purchase Order/Agreement]. Such persons include but are not limited to workers, land owners, property owners, those residing, working, and/or recreating in proximity to supply chain activities who are injured or suffer damages due to breach of [Schedule P/Schedule Q], including survivors of those killed or disabled. Such persons are intended third-party beneficiaries to [Schedule P/Schedule Q].

1.2. All intended third-party beneficiaries of [Schedule P/Schedule Q] have the right to enforce [Schedule P/Schedule Q] against Parties in any court or tribunal that has jurisdiction over the [Buyer/Supplier or Purchase Order/Agreement].

1.3. Third-party beneficiaries may assign their rights to a labor union, nongovernmental organization or other organizations providing legal assistance they select.

Parties adopting this language will need to consider its relation to other dispute resolution mechanisms and should note in particular the clause (¶ 1.2) on jurisdiction.

[70] The OECD Due Diligence Guidance recommends remediation be risk based, prioritizing the most severe risks for corrective action. OECD Due Diligence Guidance, *supra* note 8, at 34-35, Annex Questions 41-45 and 48-54. The appropriate remediation will depend on the nature and extent of the harm and the prioritization of risk. For example, many buyers choose to rate forced labor and child labor as high risk or Zero Tolerance, *see* Section 2.5. Buyer may refuse Goods originating from a factory where such Zero Tolerance breaches have taken place and may require rigorous comprehensive remediation of that factory while maintaining the contract with other factories operated by Supplier when appropriate.

[71] The OECD Guidelines (as well as the UNGPs) concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.11 and A.12 of the OECD Guidelines. *See* OECD Guidelines, *supra* note 8, at 20. The OECD Guidelines further provide that an enterprise "contributes to" an adverse impact or harm if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or encourage by incentives another entity to cause a harm and is not limited to minor or trivial contributions. *Id.* at 23. As stated there, "The term 'business relationship' includes relationships with business partners," including franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants," advisers, entities in the supply chain, and "other non-State or State entities directly linked to its business operations, products or services." *Id.* at 10, 23. The OECD Guidelines further provide that where a harm is directly linked to the operations, products, or services of a business, the business must use its leverage to influence the entity causing the harm to prevent or mitigate it. *See id.* at 24. Under UNGP 22, *supra* note 7, businesses are responsible for providing remediation where they caused human rights harm directly through their own operations and where they contributed to harm caused by others. Where Buyer fails to take reasonable action to address a Schedule P Breach promptly after becoming aware of it, Buyer may be deemed to have contributed to any ongoing harm.

[72] The term "capacity building" is found in the OECD glossary of statistical terms as: "[m]eans by which skills, experience, technical and management capacity are developed within an organizational structure (contractors, consultants or contracting agencies)—often through the provision of technical assistance, short or long term training, and specialist inputs (e.g., computer systems). The process may involve the development of human, material and financial resources." *Glossary of Statistical Terms: Capacity Building, OECD (Aug. 22, 2002),* https://stats.oecd.org/glossary/detail.asp?id=5103.

that is proportionate to Buyer's contribution to the Schedule P Breach and the resulting adverse impact.

(f) A Remediation Plan under this Article 2 or under Section 1.1(d) shall be a fully binding part of this Agreement.

2.4 *Right to Cure.*[73]

(a) In the event of a breach by Supplier of its obligations under Schedule P, Buyer shall give notice under Section 2.1(a), which shall trigger a [commercially reasonable] cure period [as set forth under this Agreement] [as agreed by the mutual written agreement of the parties (each acting in good faith and in a commercially reasonable manner)].[74] Such breach shall be considered cured when Supplier has met the standards set out in Sections 1.4 and 2.3.

(b) If such breach is not cured within the period designated under Section 2.4(a), or is incapable of being cured, Buyer may [cancel] [avoid][75] this Agreement under 6.2(e) and, with or without such [cancellation] [avoidance], may exercise any of its remedies under Article 6 or applicable law.

2.5 *Right to Immediate Termination*. Notwithstanding any other provision of this Agreement, this Agreement may be immediately [cancelled] [avoided] by Buyer under 6.2(e), without providing a cure period, if Supplier has engaged in a Zero Tolerance Activity. A "Zero Tolerance Activity" shall be any of the following activities if they were not disclosed promptly by Supplier to Buyer during due diligence under Section 1.1: (a) activities that would cause Buyer to be the subject of prosecution or sanction under civil or commercial laws whether national, regional or international; (b) activities that would expose Buyer to criminal liability; (c) activities prohibited by the Foreign Corrupt Practices Act of 1977 (as amended); (d) instances where it becomes apparent that Supplier cannot, in the absence of assistance from Buyer under Section 1.3(b), perform this Agreement without material or repeated violation of Schedule P; and (e) others specified in Schedule P.[76] Such termination shall be effectuated in compliance with Section 1.3(f) on responsible exit.

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[73] A right to cure is essential to the ability of Supplier to avoid the human rights harms to workers and others that may result from the termination by Buyer of the Agreement.

[74] Section 2.4 has been drafted broadly to provide Buyer and Supplier flexibility in crafting an appropriate industry-specific protocol for addressing Schedule P breaches by Supplier.

[75] "Cancel" for contracts governed by the U.C.C., "avoid" for those governed by the CISG. Both terms imply that the Agreement is being ended because of a breach. The agreement may be "terminated" even without a breach. *See* U.C.C. § 2-106(3). The drafting here follows the U.C.C. loosely in this regard, but not strictly; the U.C.C. distinguishes between cancellation for breach of the agreement and termination "otherwise than for its breach." In the drafting of this Agreement, "termination" may be for breach of the Agreement or not.

[76] *See supra* note 70 (discussing risk prioritization). This clause attempts to balance the fact that there are certain violations of human rights that are ultimately better addressed through the Remediation Plan process set forth above as compared to other violations that cannot be tolerated even for an instant, the Zero Tolerance Activities. This is a difficult line to draw at times and there is some divergence in practice and across legislation as to what may be tolerated and what is absolutely prohibited. Where these lines are drawn and what may or may not be permissible is an issue for each Buyer and Supplier to address based on applicable laws and policies. Note also the Supplier's right to immediate termination without default under Section 1.3(e) *supra*.

3 ***Rejection of Goods and [Cancellation] [Avoidance] of Agreement.***

3.1 *[Strict Compliance.* It is a material term of this Agreement that Buyer, Supplier, and Representatives shall engage in due diligence in accordance with Sections 1.1 and 1.2 so as to ensure compliance with Schedule P.]

3.2 *Rejection of Nonconforming Goods.* In the event of a Schedule P Breach by Supplier that renders the Goods Nonconforming Goods, Buyer shall have the right to reject them[77] unless Buyer's breach of its obligations under Section 1.3 [and/or Schedule Q] materially caused or contributed to the Schedule P Breach. Goods are Nonconforming Goods if the Buyer cannot resell them in the ordinary course of business or if the goods cannot pass without objection in trade or if the Goods are associated with a Zero Tolerance Activity.[78]

3.3 *[Cancellation.] [Avoidance.]* The following shall be deemed to [substantially impair the value of this Agreement to Buyer][79] [constitute a fundamental breach of the entire Agreement][80] and Buyer may [cancel] [avoid][81] this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies: (a) a breach by Supplier of Schedule P that relates to a Zero Tolerance Activity, or (b) Supplier's failure to timely complete its obligations under a Remediation Plan. Buyer shall have no liability to Supplier for such [cancellation] [avoidance] but shall employ commercially reasonable efforts to comply with Section 1.3(f).

3.4 *Timely Notice.* Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] [articles 38 to

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[77] See U.C.C. §§ 2-601, 2-602.

[78] Nonconforming Goods are presumably defined elsewhere in the Agreement, e.g., with respect to conformity to product specifications. This Section clarifies that goods that conform to product specifications may nevertheless be rejected in the circumstances specified in the text. The U.S. Customs and Border Protection (CBP) has the authority to detain merchandise at a port of entry if information reasonably, even if not conclusively, indicates that it is mined, manufactured or produced, wholly or in part, by forced labor, including convict labor, forced child labor or indentured labor under WROs issued under 19 U.S.C. § 1307. If CBP issues a WRO against a Supplier or Representative, as it has done eighteen times between September 2019 and October 2020, importers of detained shipments are provided an opportunity to export their shipments or submit proof to CBP that the merchandise was not produced by forced labor. If the goods cannot be released into U.S. markets because of a WRO or otherwise sold where and when Buyer intended, Buyer must have the right to reject the Goods as Nonconforming Goods. Similarly, if Buyer cannot sell the goods in the ordinary course of business, it should have the right to reject the Goods unless Buyer's own actions caused or contributed to the problem in a material way.

[79] Because the perfect tender rule of U.C.C. § 2-601 does not apply to installment contracts, installment contracts governed by the U.C.C. should include the phrase within the first bracket.

[80] The phrase within the second bracket is applicable for agreements to which the CISG applies, whether for a single delivery or an installment contract, under article 49.

[81] "Cancellation" occurs when a "party puts an end to the contract for breach by the other" under U.C.C. § 2-106(4). "Avoidance" is the appropriate term under CISG article 49.

40 of the CISG] [and U.C.C. §§ 2-607 and 2-608]),[82] Buyer's rejection of any Goods[83] as a result of noncompliance with Schedule P shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

4 **[*Revocation of Acceptance*.[84]**

4.1 *Notice of Buyer's Discovery.* Buyer may revoke its acceptance, in whole or in part, upon notice sent [in accordance with Section ___] of Buyer's discovery that the Goods are Nonconforming Goods unless Buyer's breach of its obligations under Section 1.3 materially caused or contributed to the Schedule P Breach. Such notice shall specify the nonconformity or nonconformities that Buyer has discovered at that point, without prejudice to Buyer's right to specify nonconformities that it discovers later.

4.2 *Same Rights and Duties as Rejection.* [Upon revocation of acceptance, Buyer shall have the same rights and duties as if it had rejected the Goods before acceptance.]

4.3 *Timeliness.* Notwithstanding any provision of this Agreement (including without limitation [the Inspection Period in Section ____ of this Agreement and] U.C.C. § 2-608), Buyer's revocation of acceptance of any Goods under this Article 4 shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.]

5 ***Nonvariation of Matters Related to Schedule P.***

5.1 *Course of Performance, Established Practices, and Customs.* Course of performance and course of dealing (including, without limitation, any failure by Buyer to effectively exercise any audit rights) shall *not* be construed as a waiver and shall *not* be a factor in Buyer's right to reject Nonconforming Goods, [cancel] [avoid][85] this Agreement, or exercise any other remedy. Supplier acknowledges that with respect to the matters in Schedule P, any reliance by Supplier on course of performance, course of dealing, or similar conduct would be unreasonable. Supplier acknowledges the fundamental importance to Buyer of the matters in Schedule P and understands that no usage or practice established between the parties should be understood otherwise, and any apparent conduct or statement to the contrary should not be relied upon.[86]

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[82] Articles 38 to 40 of the CISG require that Buyer examine the goods or cause them to be examined within as short a period as is practicable. Buyer loses the right to rely on a lack of conformity if Buyer does not give Supplier notice within a reasonable time after Buyer discovers or ought to have discovered a defect and, at the latest, within two years of the date of delivery (or other contractual period) unless Supplier knew or could not have been unaware of the defect. Because U.C.C. § 2-607(3)(a) provides a similar argument that Buyer's failure to notify Supplier of a breach within a reasonable time bars any remedy, this contractual text is included to limit disputes about what constitutes a reasonable time. If the U.C.C. is referenced in the text, the applicable state version should be cited.

[83] "Nonconforming Goods" and "Inspection Period" are assumed to be defined earlier in the Agreement. Nevertheless, Nonconforming Goods are defined specifically for purposes related to human rights policies in Section 3.2.

[84] The clauses on revocation of acceptance are designed for use in contracts governed by the U.C.C. and are drafted with U.C.C. § 2-608 in mind. They should be omitted in contracts governed by the CISG. For this reason, Article 4 is bracketed.

[85] "Cancel" for agreements under the U.C.C., "avoid" for the CISG. *See supra* note 81.

[86] The first phrase uses the terminology of U.C.C. section 1-303 and the second phrase uses the terminology of CISG article 9(1).

5.2 *No Waiver of Remedy.* Buyer's acceptance of any Goods in whole or in part will not be deemed a waiver of any right or remedy[87] nor will it otherwise limit Supplier's obligations, including, without limitation, those obligations with respect to indemnification.

6 ***Buyer Remedies.***

6.1 *Breach and Notice of Breach.* Upon breach by Supplier, Buyer may exercise remedies to the extent provided in this Article 6. Prior to the exercise of any remedies pursuant to Section 6.2, Buyer shall notify Supplier in accordance with Section 2.1. Such notice, if with respect to an actual violation, constitutes notice of default under this Agreement.[88]

6.2 *Exercise of Remedies*. Remedies shall be cumulative. Remedies shall not be exclusive of, and shall be without prejudice to, any other remedies provided hereunder or at law or in equity. Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement. Buyer's remedies include, without limitation:[89]

(a) Demanding adequate assurances from Supplier of due performance in conformity with Schedule P [after Buyer makes similar assurances to Supplier of its due performance under Section 1.3 [and/or Schedule Q]].

(b) Obtaining an injunction with respect to Supplier's noncompliance with Schedule P (in which case, the parties represent to each other and agree that noncompliance with Schedule P causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief).

(c) Requiring Supplier to terminate an agreement or affiliation with a specific factory, terminate a subcontract or remove an employee or employees and/or other Representatives.[90]

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[87] U.C.C. § 2-601.

[88] U.C.C. § 2-607(3)(a) requires notice of a breach within a reasonable time after constructive discovery of the breach. A buyer who fails to give such notice will find its claims barred, with many courts holding that pre-suit notice is required.

[89] This section reflects the remedies provided in the FAR, 48 C.F.R. § 52.222.50 relative to combating trafficking in persons. Additionally, the clause adds an insecurity provision under U.C.C. § 2-609. The clause also clarifies that injunctive relief may be necessary. In addition, while Buyer may want to work with a Supplier toward full compliance, Buyer should be prepared to face waiver arguments. The timing of the exercise of remedies is sensitive and the exercise of remedies and any requests for damages may themselves have adverse impacts on human rights. This provision expressly recognizes that such careful consideration of the exercise of remedies by Buyer does not constitute a waiver. Note also that the remedies provisions here do not mention setoff, see 11 U.S.C. §§ 506(a)(1), 553 (2018) (setoff is a secured claim in bankruptcy), recoupment, claw back, or similar remedies; if those remedies are not already provided elsewhere in the Agreement, counsel may wish to consider making such rights explicit in this clause.

[90] Buyer's ability to direct its supplier's operations or require the removal of an employee or employees can give rise to claims of undertaking liability or liability under the peculiar risk doctrine. *See Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016). There is also concern about becoming a joint employer and thereby opening exposure or liability. Counsel should consider very carefully whether it is better to have the power to make such demands (e.g., require that Supplier fire employees, or other Representatives, or terminate or suspend a relationship with a particular factory) or whether it is more important to forego this power in an effort to maintain independent status and concomitant lower risk of liability.

(d) Suspending payments, whether under this Agreement or other agreements, until Buyer determines, in Buyer's reasonable discretion, that Supplier has taken appropriate remedial action following the expiration of the cure period indicated in Section 2.4(a).[91]

(e) [Avoiding] [Cancelling] this Agreement if permitted by Sections 2.4(b), 2.5, or 3.3.

(f) Obtaining damages, including all direct and consequential damages caused by the breach; *provided, however,* that damages shall be reduced proportionately to the degree that Buyer's breach of Section 1.3 [and/or Schedule Q] caused or contributed to Supplier's breach of Schedule P.

6.3 *Damages*. Buyer and Supplier acknowledge:

(a) Neither Buyer nor Supplier should benefit from a Schedule P violation or any human rights violation occurring in relation to this Agreement. If damages are owed that would result in a benefit to Buyer or Supplier, such amounts should go toward supporting the remediation processes set out in Section 1.4 and Article 2. A "benefit" is here understood to mean being put in a better position than if this Agreement had been performed without a Schedule P Breach. Nothing herein limits the right of a party to be put in the position it would have been in had this Agreement been performed without a Schedule P Breach.

(b) [If there are insufficient funds to pay damages and complete the remediation processes set out in Section 1.4 and Article 2, remediation shall take priority.]

(c) [It may be difficult for the parties to fix damages for injury to business, prospects, and reputation with respect to Nonconforming Goods produced in violation of Schedule P, and in such case, liquidated damages must be paid by Supplier to Buyer as follows: [insert amount or formula for calculation.]] [92]

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[91] Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." See U.C.C. § 5-109(b). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is United City Merchs. (Invs.) Ltd. v. Royal Bank of Can., [1983] AC 168, 183 (HL) (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); *see also* Inflatable Toy Co Pty Ltd v. State Bank of NSW Ltd, [1994] 34 NSWLR 243 (Austl.) (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. § 5-109(b)(2) and comment 7, or by the civil procedure laws or rules of certain jurisdictions requiring posting of a bond, or by collateralization or bonding provisions in the reimbursement agreement itself. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain become firm and cannot be enjoined. See U.C.C. § 5-109.

[92] U.C.C. § 2-718(1) on liquidated damages prohibits penalties, providing that "unreasonably large liquidated damages [are] void as a penalty." The ultimate enforceability of these provisions will turn on whether the exercise of the remedy in the contractual clause was reasonable. Particular care should be exercised if Buyer demands liquidated damages in addition to

6.4 *Return, Destruction or Donation[93] of Goods; Nonacceptance of Goods*.

(a) Buyer may, in its sole discretion, store the rejected Nonconforming Goods for Supplier's account, ship them back to Supplier or export them or, if permitted under applicable law, destroy or donate the Nonconforming Goods, all at Supplier's sole cost, expense, and risk, except to the extent that Buyer has caused or contributed to the nonconformity by breach of Section 1.3 [and/or Schedule Q].

(b) Buyer is under no duty to resell any Nonconforming Goods produced by or associated with Supplier or its Representative who Buyer has reasonable grounds to believe has not complied with Schedule P, whether or not such noncompliance was involved in the production of the specific Nonconforming Goods. Buyer is entitled to discard, destroy, export or donate any such Nonconforming Goods. Notwithstanding anything contained herein to the contrary or instructions otherwise provided by Supplier, destruction or donation of Nonconforming Goods rejected [or as to which acceptance was revoked],[94] and any conduct by Buyer required by law that would otherwise constitute acceptance, shall not be deemed acceptance and will not trigger a duty to pay for such Nonconforming Goods.[95] Buyer and Supplier represent and agree that this Section and any related Sections are an effort to mitigate damages, as selling, profiting from, and being associated with tainted goods or Nonconforming Goods is likely to be damaging to Buyer, including to Buyer's reputation.

6.5 *Indemnification; comparative fault calculation*.

(a) Supplier shall indemnify, defend and hold harmless Buyer and its officers, directors, employees, agents, affiliates, successors and assigns (collectively, "Indemnified Party") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, export or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees that would not have been incurred but for Supplier's Schedule P Breach, and the costs of enforcing any right under this Agreement or applicable law, in each case, that arise out of the violation of Schedule P by Supplier

other damages. These provisions are bracketed so counsel can consider the most appropriate damages provisions in the relationship.

[93] Donation of goods manufactured or otherwise delivered with the use of forced labor may not be permitted by the U.S. Customs and Border Protection, Cargo Security, Carriers and Restricted Merchandise Branch, Office of Trade. Buyer's only option as an importer may be to return or export the goods. Other countries may have similar restrictions on the possession and ownership of merchandise mined, produced, or manufactured in any part with the use of a prohibited class of labor and such laws, which are beyond the scope of this document, must be examined before donations are made.

[94] See *supra* note 84 (on revocation of acceptance).

[95] This section is drafted to address concerns that might be raised with respect to the U.C.C. § 1-305 mandate to place the aggrieved party in the position of its expectation, without award of consequential or penal damages unless specifically allowed, particularly with respect to minimizing damages. See also U.C.C. § 2-715 (consequential damages cannot be recovered if they could have been prevented). An attempt by Buyer to avoid mitigation might be seen as a lack of good faith. Nevertheless, reselling goods that are produced in violation of a human rights policy may be understood as increasing Buyer's damages, rather than reducing them. Accordingly, Buyer should be entitled to discard, destroy, export or donate to a charity any goods produced in violation of a human rights policy as an attempt toward mitigation, rather than against it.

or any of its Representatives. This Section shall apply, without limitation, regardless of whether claimants are contractual counterparties, investors, or any other person, entity, or governmental unit whatsoever.

(b) Notwithstanding Section 6.5(a), Supplier's obligation to indemnify Buyer shall be reduced proportionately to the degree that Buyer's breach of Section 1.3 [and/or Schedule Q] caused or contributed to Supplier's breach of Schedule P; in other words, for the avoidance of doubt, damages shall be borne by Buyer directly to the extent Buyer has materially caused or contributed to the breach of Schedule P.[96]

7 ***Disclaimers.***

7.1 *Negation of Buyer's Contractual Duties Except as Stated.* Notwithstanding any other provision of this Agreement:

(a) Buyer does not assume a duty under this Agreement to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like, except as stated in Articles 1 and 2.[97]

(b) Buyer does not assume a duty under this Agreement to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives, except as stated in Articles 1 and 2.[98]

(c) Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by Supplier or its Representatives, (ii) implementation of safety measures by Supplier or its Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by Supplier or its Representatives. The efforts contemplated by this Agreement do not constitute any authority or obligation of control. They are efforts at cooperation that leave Buyer and Supplier each responsible for its own policies, decisions, and operations. Buyer and Supplier and Representatives remain independent and are independent contractors. Nor are they joint employers, and they should not be considered as such.[99]

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[96] For example, if Supplier agrees to a change order requested by Buyer and the parties should know that Supplier will be unable to perform without violating Schedule P, indemnification to Buyer must be reduced to the extent, pro rata, that Buyer caused or contributed to the harm. This clause sets up a mechanism akin to a comparative fault regime.

[97] Federal contractors should note the FAR, 48 C.F.R. §§52.222-56, 22.1703(c), which requires contractors, within threshold limits, to "monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities." This disclaimer does not negate a duty arising under FAR or any other regulation or law; it simply disclaims any such *contractual* duty by Buyer. As discussed in the introduction, buyers may have duties under applicable laws, regulations, and their own corporate commitments; the purpose of these disclaimers is to negate liability based on this Agreement, except as stated in Articles 1 and 2.

[98] Again, note the FAR, *see* 48 C.F.R. §§52.222.56, 22.1703(c), and again, note that buyers may be subject to duties that do not arise by contract, as explained *supra* note 97.

[99] *Note the possible conflict here with Buyer's remedies under Section 6.2(c). See also supra* note 90. This disclaimer is included to help negate claims of undertaking liability or liability under the peculiar risk doctrine. It could conflict, however, with some legislative efforts currently being considered and debated in the European Union.

(d) Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law, except to the extent Buyer must disclose information to Supplier as expressly provided in this Agreement.[100]

7.2 *Third Party Beneficiaries.* [All buyers and suppliers in the supply chain have the right to enforce the relevant provisions relating to the human rights protections set forth herein and in Schedule P [and Schedule Q] and privity of contract is hereby waived as a defense by Buyer and Supplier provided, however, that there are otherwise no third-party beneficiaries to this Agreement. Individuals or entities, including but not limited to associations, workers, land owners, property owners, those residing, working and/or recreating in proximity to supply chain activities and any individual who is injured or suffers damages due to a violation of human rights have no rights, claims, causes of action or entitlements against Buyer or Supplier arising out of or relating to this Agreement, Schedule P, [Schedule Q] or any provision hereunder.] [There are no third-party beneficiaries to this Agreement].[101]

8 ***Dispute Resolution.***[102]

8.1 *Dispute Resolution Procedures.* The parties agree that the procedures set forth in this Article shall be the sole and exclusive remedy in connection with any dispute arising in whole or in part from or relating to Articles 1 through 7 or Schedule P [or Schedule Q], whether such dispute

[100] This provision emphasizes that Buyer is assuming a limited contractual duty to disclose although Buyer may have duties to disclose under other standards (legal or non-legal). For example, Buyer must determine if it provided false or misleading information to Customs and Border Protection and other officials in the event that goods are initially accepted and removed from the dock but are later determined to be tainted by forced or child labor. If the original information provided to CBP is false, a duty to amend may arise. *See, e.g.* 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b). As another example, under FAR, contractors and subcontractors must disclose to the government contracting officer and agency inspector general "information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct." 48 C.F.R. § 22.1703(d).

[101] Third-party beneficiaries are a controversial issue. Two alternatives are given here. *See also supra* note 69 for a third alternative affirmatively granting third-party beneficiary status to stakeholders. The ultimate decision may be affected by the outcome of discussions with respect to a possible mandatory treaty on business and human rights. See *the Second Revised Draft of a Treaty on Business and Human Rights* by the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights (OEIGWG), established by U.N. Human Rights Council Resolution 26/9 (Aug. 6, 2020). It could also be affected by legislative developments in the European Union.

[102] These dispute resolution options should be considered in light of the dispute resolution clauses in the sales contract. Article 8 may or may not be suitable for all applications and should be considered in the context of Buyer's existing internal policies and Buyer's customary contractual terms regarding the resolution of disputes and claims, including Buyer's standard form and template procurement agreements; the standard terms and conditions of Buyer's purchase orders; and the Buyer's supplier codes of conduct (Schedule P) or analogous documents that include, *inter alia,* administrative, operational, remedial and/or corrective action procedures, processes, sanctions and penalties. Dialogue, settlement and remediation of any controversy arising from a human rights abuse offer victims the most favorable and expeditious resolution, but it is also possible that both human rights abuse and other contractual breaches could be involved. The corporate culture of a company will likely determine whether arbitration or litigation is the preferred route to follow for breaches unrelated to Schedule P [or Schedule Q] provided that under no likely circumstance would a party agree to bifurcate its chosen resolution of such multiple disputes. A mediation-during-the pendency-of litigation clause is therefore included here.

involves Buyer, Supplier, or a Representative[103] (a "Dispute"). Buyer and Supplier irrevocably waive any right to commence any action in or before any court or governmental authority, except as expressly provided in this Article 8. Notwithstanding anything contained herein to the contrary, however, at any point in the proceedings under this Article 8, the parties may agree to engage the services of a neutral facilitator to assist in resolving any Dispute.

8.2 [*Confidentiality.*[104] All documents and information concerning the Dispute, including all submissions of the parties, all evidence submitted in connection with any proceedings, all transcripts or other recordings of hearings, all orders, decisions and awards of the arbitral tribunal and any documents produced as a result of any informal resolution of a dispute, shall be confidential, except with the consent of both parties or where, and to the extent, disclosure is required of a party (a) by legal duty, (b) to protect or pursue a legal right, or (c) in relation to legal proceedings before a court or other competent authority.]

8.3 *Joinder of Multiple Parties.* If one or more other disputes arise between or among parties to other contracts that are sufficiently related to the same or similar actual or threatened human rights violations, the parties shall use their best efforts to consolidate any such related disputes for resolution under this Article 8.

8.4 *Informal Good Faith Negotiations Up the Line.* The parties shall try to settle their Dispute amicably between themselves by good faith negotiations, initially in the normal course of business at the operational level. If a Dispute is not resolved at the operational level, the parties shall attempt in good faith to resolve the Dispute by negotiation between executives who hold, at a minimum, the office(s) of [TITLE(S)]. Either party may initiate the executive negotiation process at any time and from time to time by providing notice [in accordance with Section 2.1(c)]

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[103] This Agreement explicitly provides that every supplier and buyer in the chain is bound to Schedule P [and Schedule Q] and the Agreement provisions relating to human rights protections. Involvement of Representatives is therefore contemplated in this clause. *See generally* International Chamber of Commerce Rules of Arbitration, art. 7 (2017) ("Joinder of Additional Parties"); *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645-45, 1648 (2020) (finding that in certain circumstances, nonsignatories may compel arbitration of international disputes and equitable estoppel may apply).

[104] Confidentiality is usually perceived as among the advantages of arbitration, including international commercial arbitration, over litigation and public filings. Confidentiality comes with drawbacks, however, particularly where the proceeding affects the public interest, as is likely true when a dispute relates to human rights. This provision is bracketed, and the parties should carefully negotiate and omit or adapt the text to reflect the form of confidentiality or transparency that best suits their efforts to mediate or arbitrate. Note that the UNGPs do not require full transparency. UNGP 31(e), *supra* note 7, expects that nonjudicial grievance mechanisms will keep parties informed and "provid[e] sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake." The commentary states, "Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary." *Id.* (quoting commentary). The Hague Rules on Business and Human Rights Arbitration, *supra* note 45, call for total transparency of all proceedings. The Hague BHR Rules aim to fill the judicial remedy gap in the UNGPs and should be considered by those companies committed to the UNGPs. In any case, those who are not legally required to disclose discovered human rights abuses and who hope to protect any Dispute from public dissemination, especially before cure or remediation is in place, must verify the applicable chosen rules regarding confidentiality or should include express provisions in the arbitration provisions that deal with confidentiality. This section requires total confidentiality unless otherwise required. The bracketed portion of Section 8.8 below, however, allows for an agreed upon release of redacted final orders and awards.

(the "Dispute Notice"). Within no more than five (5) days[105] after the Dispute Notice has been given, the receiving party shall submit to the other a written response (the "Response"). The Dispute Notice and the Response shall include (a) a statement of the Dispute, together with a recital of the alleged underlying facts, and of the respective parties' positions and (b) the name and title of the executive who will represent that party and of any other person who will accompany the executive. The parties agree that such executives shall have full and complete authority to resolve the Dispute. All reasonable requests for information made by one party to the other will be honored. If such executives do not resolve such dispute within [twenty (20)] days of receipt of the Dispute Notice for any reason, the parties shall have an additional [ten (10)] days thereafter to reach agreement as to whether to seek to resolve the Dispute through mediation under Section 8.5.[106]

8.5 *Mediation.* If the parties do not resolve any Dispute within the periods specified in Section 8.4, either party may, by notice given in accordance with Section 2.1(c) (the "Mediation Notice"), invite the other to resolve the Dispute under the [insert name of rules] as in effect on the date of this Agreement (the "Mediation Rules"). The language to be used in the mediation shall be [language]. If such invitation is accepted, a single mediator shall be chosen by the Parties. If, within [_____] days following the delivery of the Mediation Notice, the invitation to mediate is not accepted, the parties shall resolve the Dispute through [arbitration][litigation] under Section 8.6] [If the parties are unable to agree upon the appointment of a mediator, then one shall be appointed by the [insert title of official at the named institution]].

8.6 *[In this clause companies choose between arbitration (Alternative A) and litigation (Alternative B):] [Arbitration] [Litigation].* If and only if the parties (a) have chosen not to make use of Mediation under Section 8.5 to resolve the Dispute, or (b) have not, within [____] days following the delivery of the Dispute Notice, resolved the Dispute using such Mediation, then the Dispute shall be settled

[Alternative A for arbitration:] [by arbitration in accordance with the [name of rules of the arbitration institution] (the "Arbitration Rules") in effect on the date of this Agreement.[107] The number of arbitrators shall be [one] [three]. The seat of arbitration shall be [seat] and the place shall be [place]. The language of the proceedings shall be [language]. [The provisions for expedited procedures contained in [section or article] of the Arbitration Rules shall apply

[105] The number of days appropriate for good faith negotiations may vary based on the severity or breadth of the Schedule P Breach as well as Buyer's ability to find another source for the products at issue.

[106] A commitment to enter into mediation need not be complex and these Model Clauses use the short and simple clauses recommended by such institutions as the PCA and UNCITRAL. Other institutions that provide mediation services may not accept clauses such as these and the drafter should consult with such other institutions to determine what text to employ. Reference should be made to Model Arbitration Clauses for the Resolution of Disputes under Enforceable Brand Agreements at https://laborrights.org/sites/default/files/publications/%20Model%20Arbitration%20Clauses%20for%20the%20Resolution%20of%20Disputes%20under%20Enforceable%20Brand%20Agreements.pdf. *See also* Clean Clothes Campaign et al., *Model Arbitration Clauses for the Resolution of Disputes Under Enforceable Brand Agreements*, Int'l Lab. Rts. F. (June 24, 2020), https://laborrights.org/publications/model-arbitration-clauses-resolution-disputes-under-enforceable-brand-agreements.

[107] In selecting the applicable Arbitration Rules, the parties must be sure the scope of discovery and the cost allocation is acceptable and can add text deviating from what is provided within such provisions if not.

irrespective of the amount in dispute. The parties further agree that following the commencement of arbitration, they will continue to attempt in good faith to reach a negotiated resolution of the Dispute.[108]]

[Alternative B for litigation:] [in accordance with ____ [here refer to the choice of forum and related clauses of the main supply contract].[109] Notwithstanding the commencement of litigation, if the parties are subsequently able to resolve the Dispute through negotiations or mediation, any resultant resolution may be made a consent judgment on agreed terms.]

8.7 [Only for use with Alternative A for arbitration:] *[Emergency Measures.* Notwithstanding any provision of this Agreement or any applicable institutional rules, any party may obtain emergency measures at any time to address a Zero Tolerance Activity or any other imminent threat to health, safety, or physical liberty (including without limitation the holding of workers in locked barracks or the unavailability of accessible and unlocked emergency exits). In addition, a party may make an application for emergency relief to the [name of institution] (the "Arbitration Institution"] for emergency measures under the arbitration rules of the Arbitration Institution as in effect on the date of this Agreement.[110] If and only if the arbitral tribunal does not have the power to grant effective emergency measures or other specific relief may a party apply for relief to a court of competent jurisdiction that possesses the power to grant effective emergency measures.]

8.8 [Only for use with Alternative A for arbitration:] [*Arbitration Award.* The arbitrator(s) may grant any remedy or relief set forth in Article 6 or elsewhere in this Agreement and that a court of competent jurisdiction could grant, except that the arbitrators may not grant any relief or remedy greater than that sought by the parties, nor any punitive damages. The award shall include compliance with a Remediation Plan as contemplated by Article 2 above. [The arbitration tribunal shall send a copy of each final order, decision and award to [title of official and name of institution] so that the public may have access to such documents, provided that, prior to sending any such document to such repository, such arbitration tribunal, in consultation with each of the parties, shall redact any information from such document that would (a) would reveal the identity of any party that wishes to remain anonymous; or (b) disclose any other information

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[108] *The Singapore Arb-Med-Arb Clause*, SING. INT'L ARB. CTR., siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause (last visited Feb. 15, 2021): "Arb-Med-Arb is a process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings."

[109] If the parties do not wish to include mediation and/or arbitration provisions, the Model Clauses assume somewhere in the underlying master agreement they have included standard text addressing litigation issues such as the choice of law and choice of forum, consent to jurisdiction and service of process, and any desired waivers (e.g., of objection, of defense, of jury trial); these litigation provisions are not included in these Model Clauses.

[110] Several standard arbitration systems contemplate a financial harm ceiling for the application of expedited procedures which will not be applicable in the context of the discovery of human rights abuse where the harm is not necessarily or primarily a financial harm to be suffered by one of the parties. The following alternate wording could be added: The provisions for expedited procedures contained in the Arbitration Rules shall apply, provided the discovered harm is ongoing and steps to immediately address and cure are possible but not being voluntarily implemented.

(including without limitation the amount of any award, any proprietary information or any trade secrets) that a party wishes to remain confidential.]]