

# USING CONTRACTS TO UPHOLD HUMAN RIGHTS, ADVANCE ESG OBJECTIVES, AND IMPROVE COMPLIANCE

The Model Contract Clauses from the  
Working Group of the  
American Bar Association Business Law Section



**USING  
CONTRACTS  
TO ACHIEVE  
BETTER  
SOCIAL  
OUTCOMES**

- What are the Model Contract Clauses (MCCs)?
- Why did we develop MCCs 2.0?



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Contracting-as-usual doesn't work

- Product v. production process conformity
- Ineffective supplier-only representations
- Social breaches are treated as commercial breaches, with insufficient consideration of *human* impact of breach



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- Effectiveness requires *shared responsibility* for human rights
- MCC-aligned contracts are tools for effectively managing risk
  - Human *and* legal risk
  - Operational and business risk
- “Legally effective and operationally likely”




**WHAT DO SHARED- RESPONSIBILITY  
CONTRACTS LOOK LIKE?**

The UNGPs give us some important clues...

**ALL** BUSINESSES HAVE A RESPONSIBILITY TO RESPECT HUMAN RIGHTS, WHICH MEANS THEY MUST AVOID **CAUSING OR CONTRIBUTING** TO ADVERSE HUMAN RIGHTS IMPACTS, INCLUDING THROUGH THEIR **PURCHASING PRACTICES**

→ **SHARED-RESPONSIBILITY** IS A KEY FOR UNGP AND OECD ALIGNMENT

Conventional Contracts	HRDD-Aligned Contracts (MCCs)
<ul style="list-style-type: none"> <li>• <b>UNILATERAL Representations &amp; Warranties by Supplier</b></li> <li>• <b>UNILATERAL responsibility for upholding human rights standards on supplier</b></li> <li> <ul style="list-style-type: none"> <li>• <b>only Supplier can be in social breach</b></li> <li>• <b>Buyer can terminate immediately</b></li> <li>• <b>Supplier has no right to cure</b></li> </ul> </li> <li>• <b>Remedies for social breach flow from Supplier to Buyer + neither party has obligation to provide remediation to victims</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>SHARED Human Rights Due Diligence (HRDD) obligation</b></li> <li>• <b>SHARED responsibility for human rights</b></li> <li>• <b>Buyer undertakes to support Supplier's social performance by engaging in <i>responsible purchasing practices</i>:</b> <ul style="list-style-type: none"> <li>• <b>Responsible pricing</b></li> <li>• <b>Provide reasonable assistance to supplier</b></li> <li>• <b>Responsible change orders &amp; modifications</b></li> <li>• <b>Responsible exit (COVID)</b></li> </ul> </li> <li>• <b>Human rights remediation <i>before</i> other contract remedies (provided <i>jointly, if buyer contributed</i>)</b></li> </ul>



USING THE  
MCCS  
AND  
ENLISTING  
YOUR  
CONTRACTS  
AS ALLIES

- 33 Model Contract Clauses -- Pan industry and modular
- **Step 1:** Take your company's human rights policy and attach as Schedule P ("P" for policy) to your contract
- **Step 2:** Decide if you want to include a commitment to responsible purchasing as Schedule Q to your contract
- **Step 3:** Select and edit the MCCs that best operationalize your policies throughout the contract



SCHEDULE Q – THE  
BUYER CODE

Complements typical supplier codes of conduct

Promotes the shared-responsibility approach of UNGPs and OECD Guidance

Includes: institutional commitments to responsible purchasing, supplier selection, negotiation, performance, renewal, human rights remediation, and responsible exit

Can be adopted with the MCCs – as Schedule Q (binding) – or independently as voluntary policy

Can be adopted in whole or adapted to suit firm's purposes

# I.1a Human Rights Due Diligence

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. 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).

# 1.2 Compliance throughout the supply chain

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. 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.

## I.4 OPERATIONAL LEVEL GRIEVANCE MECHANISM

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 grievance.

## 2.3 REMEDIATION

2.3 (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. Supplier shall demonstrate to Buyer that **affected stakeholders and/or their representatives [and/or a third party acting on behalf of such stakeholders]** have participated in the development of the Remediation Plan. [The Remediation Plan may contemplate recourse to the dispute resolution mechanisms set forth in Article 8, as appropriate.]

2.3 (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.

## I.3(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), 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.

## 8.4 TO 8.6 STEPPED DISPUTE RESOLUTION

8.4 **Informal Good Faith Negotiations Up the Line:** the parties should attempt to resolve the dispute at the operational level; and thereafter, as between executives;

8.5 **Mediation:** the parties may next choose to present their dispute to a neutral mediator;

8.6 **Arbitration/Litigation:** if the above steps are unsuccessful, the parties may choose to initiate adversarial proceedings.



PRESENTERS  
AND ABA  
WORKING  
GROUP  
LEADERS

- David V. Snyder ([dsnyder@wcl.american.edu](mailto:dsnyder@wcl.american.edu))
  - ABA Working Group Chair
  - Professor of Law and Director, Business Law Program  
American University, Washington, DC
- Sue Maslow ([smaslow@ammlaw.com](mailto:smaslow@ammlaw.com))
  - ABA Working Group Vice Chair
  - Retired Partner, Antheil Maslow & MacMinn, Doylestown, PA
- Sarah Dadush ([s.dadush@law.rutgers.edu](mailto:s.dadush@law.rutgers.edu))
  - Lead, Principled Purchasing Project, ABA Working Group
  - Professor of Law, Rutgers University, Newark, NJ
- Olivia Windham Stewart ([olivia@oliviawindhamstewart.org](mailto:olivia@oliviawindhamstewart.org))
  - Co-Lead, Principled Purchasing Project, ABA Working Group
  - Independent Human Rights and Supply Chain Consultant
- Patrick Miller ([patrick.miller@pmillerlegal.com](mailto:patrick.miller@pmillerlegal.com))
  - Founding Attorney, P Miller Legal Services