



AMERICAN BAR ASSOCIATION

Model Contract Clauses To **Protect Workers** In International Supply Chains



Introduction

The American Bar Association (ABA) Business Law Section Working Group undertook an extensive project to help buyers and suppliers redesign their contracts to better protect human rights in supply chains, with a focus on a cooperative approach with shared responsibility.

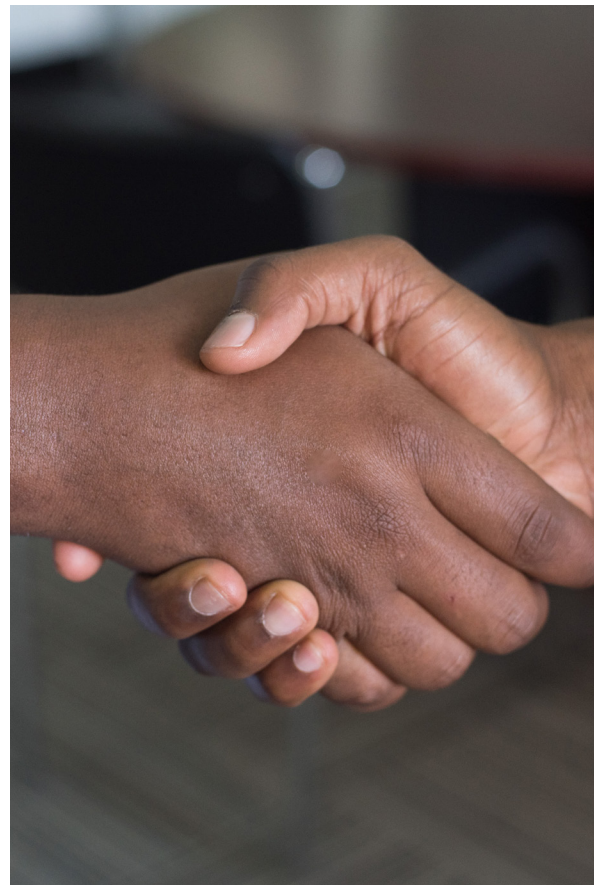
This toolkit provides an overview of the ABA Model Contract Clauses (Version 2.0) (MCCs). We are not seeking to reproduce the clauses or guidance notes here, but simply to guide Mekong Club members to the relevant sections of the MCCs and related materials and highlight some of the key provisions.

Background

As the ABA Working Group explain in their Executive Summary Executive Summary:

[Model Contract Clauses and the Responsible Buyer Code](#)

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



This issue is in other words ‘coming home’. The MCCs and related materials produced by the ABA Working Group are intended to assist companies of all sizes and industries to integrate human rights due diligence principles into every stage of the supply contract process and operationalize the shared responsibility between buyers and suppliers for the human rights performance of their contract.

Model Contract Clause Overview

The MCCs are designed to align with the UN Guiding Principles on Business and Human Rights (the “**UNGPs**”) and the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (the “**OECD Guidance**”). They seek to translate these principles into contractual obligations that require both buyer and supplier to cooperate in protecting human rights and remediating harm.

Instead of the traditional approach of representations and warranties with related strict contractual liability (which can lead to a “checkbox” approach), the MCCs seek to establish a more pragmatic regime of human rights due diligence, requiring the parties to take appropriate steps to identify and mitigate human rights risks and to address adverse human rights impacts (based on a prioritisation approach).



In addition, the MCCs stress remediation of human rights harms over typical contractual remedies (like termination / monetary damages) and seek to move away from remediation being solely the responsibility of the supplier (especially where the buyer may have contributed to the harm).

Finally, the MCCs focus on “responsible exit” obligations, engendered by issues arising from the COVID-19 pandemic.

We have summarized the key provisions from the MCCs in in the final section of this Toolkit, but if you would like to read the full report on the MMC initiative, including the background to the project and a detailed description of the clauses with accompanying explanatory notes [Full Report: The Model Contract Clauses](#)

Human Rights Policy

The MCCs envisage that there would be a schedule to the contract setting out the company's human rights policy or supplier code of conduct (referred to as "**Schedule P**"). The ABA Working Group does not take a prescriptive stance on what Schedule P should include but provides guidance that can be used as building blocks for those companies which do not have their own policy in place, or those that want to revamp their policy to better align with the principles of the MCCs.

The detailed guidance on **How to Create a Human Rights Policy – Schedule P Building Blocks** can be accessed [here](#):

Responsible Buyer Code

As mentioned above the MCCs embody a shift towards shared responsibility between buyer and supplier. The ABA Working Group therefore felt it was important to highlight the human rights standards that the buyer is expected to follow. This is in the form of a code of conduct (referred to as "**Schedule Q**"), which is designed to plug a gap in the supply chain governance area. Although many companies have committed to respect human rights in their general corporate policies, there are few (if any) examples of buyer specific codes.

References to the Responsible Buyer Code are built into the MCCs and the two are designed to work together, but it is of course open to companies to adopt the MCCs without adopting the Buyer Code, or to include their own form of Buyer Code and adapt the provisions accordingly.

The full text of the **Responsible Purchasing Code of Conduct (Version 1.0)** can be accessed [here](#)

Key Clauses Highlights

1. Mutual Obligations with Respect to Combatting Abusive Practices in Supply Chains

The clauses in this section establish the fundamental obligations with respect to human rights due diligence and reflect the overall objective that the MCCs embody a shared approach between Buyer and Supplier. They include the following:

- Both parties putting in place an appropriate due diligence process (having regard to size and circumstances), maintaining the same on an ongoing basis and disclosing relevant information to each other (1.1)
- Requirement to consider human rights impacts of any material modification requested by Buyer or Supplier (e.g. changes to specification, order quantities, timing) (1.3d)
- General obligations under Schedule P (Human Rights Policy) for Supplier (and its subcontractors), as well as commitments from Buyer to support Supplier by engaging in responsible purchasing practices (1.2 / 1.3)
- Excused non-performance arising from any reasonably unforeseeable industry wide or geographically specific event, which goes broader than force-majeure (1.3e)
- Responsible exit obligation whereby parties are required to consider potential adverse human rights impacts and employ commercially reasonable efforts to mitigate them (1.3f)

2. Remediating Adverse Human Rights Impacts linked to Contractual Activity

The clauses in this section set out in more detail the requirements regarding remediation, with a focus on measures to identify, stop and correct the harm, including:

- Prompt notification of any potential or actual human rights violation (breach of Schedule P) (2.1)
- Cooperative investigation of any such violation (2.2)
- Preparation of a remediation plan that is proportionate to the adverse impact and includes objective milestones (2.3)
- Right to cure, so as to avoid further human rights impact arising from termination for breach (2.4)



3. Rejection of Goods and Cancellation

This section clarifies that a human rights related breach under Schedule P may be sufficient to give the Buyer the right to reject the goods as 'non-conforming' even though the goods may otherwise conform to specification. Further rights to cancel or terminate may apply subject to the 'responsible exit' clause, unless the breach relates to a 'zero-tolerance' matter resulting in automatic termination.



4. Revocation of Acceptance

This section is only applicable to US law governed contracts under the Uniform Commercial Code.

5. Non-variation of Matters related to Schedule P

This clause reiterates the importance of Schedule P and that any course of dealing or other conduct relating to matters covered by Schedule P would not constitute a waiver or limit any compliance requirement.



6. Buyer Remedies

The clauses in this section highlight that remedies must be understood in conjunction with the commitment to human rights remediation, rather than defaulting to termination of the supply arrangement. They include the following:

- *Rights to cease trading with certain factories or subcontractors.*
- *Suspending certain payments until specific remediation action has been taken.*
- *Payment of damages, but only on the clear understanding that neither Buyer or Supplier should benefit from a human rights violation and damages should instead be put to toward supporting remediation .*
- *Return, destruction or donation (in some circumstances) of non-conforming goods.*



7. Disclaimers

This section includes disclaimers that effectively clarify that the Buyer takes on no contractual duties beyond those expressly stated – thereby seeking to manage the risk of Buyers who by virtue of the MCCs take on more responsibility in managing the supply chain.

8. Dispute Resolution Procedures

Alternative dispute resolution clauses have been provided which should be considered in light of relevant clauses in the master supply agreement (or equivalent) and the parties customary approach to resolution of disputes. For companies that prefer to litigate rather than arbitrate this remains an option, and various phases of escalation are included.



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