

# Introduction

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The purpose of this book is to provide an effective means to protect the human rights of workers in international supply chains and to offer a robust way to protect the planet and its population. Although its goal is ambitious, the book is designed to be practical and realistic. It is made to be used. Otherwise, the book cannot achieve its goal, which is to see results. The supply chains that are the subject of the book make possible a good life for so many, and they hold together the great global economy. Those supply chains are themselves held together by contracts; indeed, most of the time, the supply chains consist of contracts. Contracts are the legal and operational tool that constructs the supply chains. Contracts are the critical, though certainly not the only, tool to help achieve supply chains that are successful, responsible, and sustainable.

The demand for responsible and sustainable supply chains has become urgent. Business, financial, legal, and moral reasons drive this demand, which business lawyers are hearing from clients of all varieties. Human rights scandals or toxic chemical releases result in shutdowns, sustained disruptions, and reputational damage. Investors and bank lenders are increasingly insistent about clean supply chains with well-managed risks. Human rights and environmental risks threaten the viability of an investment and undermine the collectability of a loan. When security forces commit violence against a community, a heavily funded project may never launch, or may close at tremendous cost. When pollution poisons the ground, there is an obvious adverse health impact, but the collateral value plummets as well, perhaps into negative value. Investors and lenders have little doubt of this, regardless of the larger questions about share price or political valence.

In addition to business and financial pressures, the legal and compliance requirements have become pressing. The reach of anti-trafficking laws in the United States is burgeoning. Enforcement is surging. Legislation with a global scope is already in place in some European countries, and more is coming from the European Union. International standards, previously confined to soft law documents, like the UN Guiding Principles on Business and Human Rights,<sup>1</sup> are hardening into binding laws enforced by the courts. And aside from all of this,

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1. Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/31 (June 11, 2011). Available at [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

the decisionmakers who lead the companies involved in supply chains hardly want to take part in human trafficking or environmental damage.

Contracts are a critical component of any strategy to establish and maintain responsible and sustainable supply chains. Contracts have not only legal force but a crucial operational function. This book focuses on the contractual strategy because it is best positioned to be both “legally effective and operationally likely.”<sup>2</sup> The book begins with model contract clauses (MCCs) that companies can use to implement sound, responsible, and sustainable corporate policies. The ensuing chapters provide legal analysis to inform counsel who will need to adapt and implement the model clauses. The volume also includes discussion of the issues from many, sometimes divergent, points of view. Authors hail from corporations and unions, law firms and NGOs, civil society and the academy. Their approaches are different, their views vary, and their politics span the spectrum from left to right. For this book, they have come together in an attempt to build an effective structure to improve human life and to protect the environment. This book recognizes the essential point that the companies involved are designed for profit, and their supply chains must be successful as a business matter. But few would endorse, in the name of profit, supply chains that are irresponsible or unsustainable. Such supply chains seem unlikely to be profitable for very long. What constitutes a responsible and sustainable supply chain, of course, is open to considerable debate, as is reflected in the following pages. But the ultimate goal can bring many businesses, organizations, institutions, and people together.

## **I. Part One**

Part One of the book contains model contract clauses that are meant to be used in actual supply contracts, after being adapted for particular clients and contexts. They are the product of a working group of the American Bar Association Business Law Section. There is no doubt of the demand for the clauses,<sup>3</sup> and the current version, called MCCs 2.0, takes pride of place as chapter 1. In that chapter, the clauses themselves are preceded by extensive introductory and explanatory material, and the clauses are annotated with further explanation and citation so counsel can make informed decisions. The clauses are designed to be modular, and careful choices will be necessary. Some clauses will be appropriate for some companies and contracts, others will not, and counsel must decide and draft accordingly.

The clauses themselves are followed in chapter 2 by Building Blocks for Schedule P (“P” for Policies), which offers guidance for companies who are

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2. MCCs 2.0 at 116; MCCs 1.0 at 1094.

3. When they were first published, we knew they were being used because we received emails asking for Word versions of the clauses. The current version is now available in easy-to-adapt Word format on the web. They can be found in the “Drafting Document” available at [https://www.americanbar.org/groups/human\\_rights/business-human-rights-initiative/contractual-clauses-project/](https://www.americanbar.org/groups/human_rights/business-human-rights-initiative/contractual-clauses-project/).

looking to develop responsible and sustainable policies. The policies cannot be stated specifically here: this book covers all industries, so policies appropriate in agriculture or apparel would often be inapposite in electronics or extractive industries. On the other hand, responsible purchasing practices can be articulated for general use, and they are included next in Schedule Q, which appears as chapter 3.

MCCs 2.0 and their schedules, which are focused on human rights, are followed in chapter 4 by model contract clauses addressing environmental issues. Toxics are the subject of the clauses offered here. The environmental project is proceeding in parallel with the human rights project, but it started afterwards and is not quite as far along. At the time of publication, further model clauses on carbon and on agriculture are not yet available, but they are anticipated soon. Together with the toxics clauses, and perhaps others, they might make up a Schedule E (for Environment).

Finally, MCCs 1.0 are included at the end of Part One in chapter 5. Although they reflect a more traditional way of contracting that many no longer see as the best approach, MCCs 1.0 are designed for those who prefer traditional methods. The differences between MCCs 1.0 and 2.0 are explained in chapter 1 in the introduction to MCCs 2.0, and there is further discussion in chapter 6.

## II. Part Two

The second part of the book contains legal analysis of the MCCs themselves and of the contexts in which they will be used. It begins with chapter 6, giving a general overview of the MCCs: their genesis and development, their strategies and choices, their legal underpinnings and drafting alternatives, and their current use and likely future. The next chapters widen the focus to corporate law more generally. In chapter 7, Professor Jonathan Lipson compares the diffuse and relatively ineffective tenets of “corporate social responsibility” with the more robust and promising contractual approach offered here. Chapter 8 discusses different rubrics of corporate liability, including the potential liability of directors and officers, under *Caremark*<sup>4</sup> and other doctrines. This chapter is written by Susan Maslow, a longtime business lawyer in private practice and one of the editors of this volume.

The orientation next shifts to the environmental perspective, where in chapter 9 Professor Michael Vandenberg and the working group of environmental lawyers discuss the importance of looking to environmental values in supply chain contracts. They explain their work on toxics, agriculture, and carbon and sustainability, as well as the environmental working group’s overarching strategies and the related legal issues that arise. The geographic lens widens in the next chapters. First, in chapter 10, Jenni Ramos writes about the model environmental clauses from the Chancery Lane Project, a prominent cooperative project in

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4. *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996).

England. Then, in chapter 11, Nikolai Badenhoop addresses the European taxonomy legislation that governs green investing. He is a German scholar whose work and experience span several European countries, and he relates how the European Union laws relate to supply chains and supply contracts.

The broad geographic and jurisdictional considerations continue in the following chapters. In chapter 12, Sydney Mintzer adds his voice and his extensive knowledge and experience in international trade law to my own more limited research-based understanding. The chapter considers not only the Uyghur Forced Labor Prevention Act<sup>5</sup> and the regulation and enforcement it has engendered but also the more general international trade laws that have sometimes been dangerously ignored as so much attention has been directed to China. The chapter covers these issues, therefore, not just with respect to China and the Xinjiang Uyghur Autonomous Region (XUAR), but also laws that apply to imports from all over the world. Next, in chapter 13, Martijn Scheltema—a leading practitioner and professor in business and human rights in the Netherlands—explains the many European Union laws that apply to supply chain and contract-based initiatives. The current proposal for a Corporate Sustainability Due Diligence Directive is fully treated, as is an array of other European legislation that requires careful attention. This chapter also gives a preview of the European Model Clauses that are currently being drafted by the European Working Group that he co-chairs (along with me).

In a similar vein, chapter 14 looks not only at European legislation generally, but in particular concentrates carefully on the new German law, which at the time of writing is the most recently enacted, and one of the most thorough, legislative acts on the subject. It gives the expert perspective of a multinational team, including Professor Sarah Dadush, a well-known international scholar in business and human rights and cofounder of the Responsible Contracting Project at Rutgers, in addition to Bettina Braun and Daniel Schönfelder, who are both learned in German law as well as business and human rights. Then, in chapter 15, Salli Swartz offers a transactional viewpoint from civil law countries, like France, where she has long been a leading business lawyer. France is of course of particular interest since it, like Germany, has recent and far-reaching legislation on these issues.

The legal analysis in Part Two concludes with considerations of a broader nature. John Sherman, one of the leaders of the project that led to the proposal and adoption of the UNGPs, explains how they—and particularly the cornerstone concept of “human rights due diligence”—can, and need to be, integrated into supply chain contracting. These matters are treated in chapter 16. Next, in chapter 17, Hill Wellford and Ryan Will analyze the antitrust implications of the strategies offered in this book. The antitrust and competition law issues are important, though often overlooked, and they can arise in a number of contexts. Counsel is urged to consult this chapter, which was written by two respected experts in the field. Last, chapter 18 reflects the litigation and arbitration issues

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5. Uyghur Forced Labor Prevention Act (UFLPA), Pub. L. 117-78 § 3(e), 135 Stat. 1525 (2021) (codified at 22 U.S.C. § 6901 note).

that always need to be taken into account when evaluating any contractual strategy. Claes Cronstedt, Martijn Scheltema, and Robert Thompson offer a full consideration informed by their long and careful work on the Hague Rules on Business and Human Rights Arbitration.<sup>6</sup> Dispute resolution issues in this context can be markedly different where whole communities, and worldwide media coverage, can come into play.

### III. Part Three

The experience of considering and crafting the MCCs has shown, sometimes markedly, that businesses, counsel, regulators, activists, and the many others involved in these issues approach them from different directions, and their vision is shaped by their different perspectives. MCCs 2.0 was designed to reflect these varying points of view and, for that reason, among others, the clauses and their annotations necessarily reflect and explain choices and compromises. In keeping with the practical orientation of this book, the perspectives need to be articulated and appreciated so users of the MCCs can understand the alternatives and, when desired, be informed by those who may share their goals—and also be warned by those who do not. Not all perspectives can be captured, of course, and to our regret, sometimes other commitments prevented some people from accepting the invitation to contribute to this book. But this volume offers a proud range of perspectives, and it should be useful for those using the book.

Part Three begins with chapter 19, by Vijaya Palaniswamy, a long-time partner at Linklaters and now general counsel of a sizeable corporation. He also served as pro bono counsel to the drafting project for MCCs 2.0, and thus occupied a crucial role in their consideration, development, and drafting. His chapter provides important insight into the consultation process that shaped MCCs 2.0, and although he is very much a supporter of the project, he raises important implementation challenges to consider. The next two chapters give the perspectives of lawyers at large international law firms, beginning with Linklaters (chapter 20) and followed by Goodwin (chapter 21). The Linklaters chapter discusses the many ways that large law firms are likely to employ the MCCs in educating, advising, and providing work product for their clients. As one of London's Magic Circle law firms, the Linklaters chapter offers an English, American, and global point of view. The Goodwin chapter illustrates how the MCCs can be adapted and employed in private equity investments in portfolio companies, and it includes discussion of the current thinking of the US Securities and Exchange Commission on environmental, social, and governance (ESG) issues. It is written by Danielle Reyes, a partner specializing not only in corporate law and financial transactions, but also the co-chair of the firm's ESG & impact practice.

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6. *The Hague Rules on Business and Human Rights Arbitration* (Dec. 2019), [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf).

Chapter 22 moves decidedly away from the high altitudes of international law firms. In “Can I Speak Now?! The Need For Marginalized Voices to Shape ESG Advising for Corporations in Global Supply Chains,” Professor Geeta Tewari draws attention to those who often lack a voice in these discussions. Her vision is shaped by humanistic disciplines and the narrative form, and her chapter provides a linchpin for understanding the issues. The editors of this book are keenly aware that women and people of color in the developing world feel the impact of supply chains in a way that many of us cannot conceive. We regret that the volume does not include more chapters addressing these and similar issues, particularly from the perspective of the Global South, despite considerable efforts to recruit more authors to help expose and explain these matters.

Nevertheless, the next set of chapters does continue in a similar vein. Shawn MacDonald heads Verité, a civil society organization that looks to identify, illuminate, and resolve labor rights violations. In chapter 23, he asks a central question: “Can contracts be genuinely reimagined and implemented to serve the goals of the emerging regulatory regime and of workers, or will most contracts remain secret and obscure mechanisms that largely favor buyers and perpetuate the failed compliance approaches of the past?”<sup>7</sup> His examination of the question is hopeful to a degree but also sobering. Similarly, Charity Ryerson from the Corporate Accountability Lab examines the MCCs from a simultaneously optimistic and cautious perspective in chapter 24. The view from organized labor is given next in chapter 25. It is written with characteristic care and energy by Jeff Vogt, a scholar affiliated with the AFL-CIO.

Part Three concludes with a true overview in chapter 26, analogizing this space to a “galaxy of norms.” There are so many issues, of sometimes staggering scale, with so many players pushing for a lead, so many voices clamoring for attention, and so many needs desperately asking to be met. Elise Groulx Diggs, Pam Ly, and Mitt Regan, with their long experience, consider and place the MCCs project in the larger sphere of business and human rights. It is a fitting conclusion, though Susan Maslow (the other editor of this volume) and I find ourselves humbled and pensive. We have spent our careers using and studying business law. For many years, one of us would have denied any interest, much less involvement, in human rights or the environment. But horizons widen as times change, and though our perspectives may not have shifted, we have attempted to lift our gaze high enough to encompass issues that cannot be ignored. We know that many others find themselves in similar places. This book is for everyone who faces these issues.

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7. MacDonald, chapter 23, at 407.