

# Foreword

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The book you are about to read concerns a host of issues surrounding and triggered by the complex, hot-button issues relating to human trafficking, other human rights and environmental abuses in corporate supply chains. Labor trafficking, forced labor, and child labor alone exploit almost 200 million men, women, and children around the world. Such large numbers make it likely that everyone is indirectly capitalizing on this exploitative labor—the supply chain fueling our clients' business profits, and the lower costs of our consumer goods based on abused workers in those supply chains as they 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. Meanwhile, the effects of climate change, toxic discharges, and other environmental harms are immediate—sometimes apparent from a glance through the window, and certainly no further than a daily newspaper.

This book approaches these issues from the perspective of what I consider to be the most powerful and concrete tool to do so—the American Bar Association (ABA) Business Law Section Working Group's Model Contract Clauses (MCCs). The MCCs were the brainchild of Professor David Snyder of American University's Washington College of Law and a member of the ABA Business Law Section's Uniform Commercial Code (UCC) Committee. David, along with Susan Maslow, founder of a Philadelphia area law firm, now chair of the Section's Corporate Social Responsibility Law Committee, have shepherded this project from conception to reality with the assistance of an international Working Group.

My conclusion on the strength of the MCCs is partially based on my experience at General Motors where, before I became the General Counsel of GM North America (GMNA), I was a procurement lawyer and later GMNA's chief commercial lawyer. I led, among others, all GMNA's other procurement lawyers. In those roles, I understood the power of the purchase order and related supply contracts. They influence all issues surrounding the procurement process that fuels GM's massive global operations. This conclusion also springs from my role as the chief drafter of the 2014 ABA Model Principles on Labor Trafficking and Child Labor (ABA Model Principles) which, together with the UN

Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises, comprise policy frameworks to address the issues of human rights and environmental abuses in supply chains.

The MCCs convert those policy frameworks to practices by weaving the widely used legal provisions of the UCC and the United Nations Convention on the International Sale of Goods (CISG) together with those Principles, Guidelines and other policy frameworks. The MCCs are thus able to create a set of contract terms that incorporate human rights protections into purchase orders and supply contracts that are usually limited to commercial law matters.

Such an undertaking requires far more than a simple incorporation clause in the master supply agreement or purchase order. When the MCCs are implemented, downstream suppliers (who become buyers of lower tier suppliers) in any supply chain are going to pay far more attention to human rights protections reflected in the purchase order than those in an unenforceable corporate policy. Moreover, using the MCCs allows buyers and suppliers to utilize modifications to commercial law to address the sustainability of their supply chains. The process set forth in the MCCs facilitate compliance with the growing hard law in this area like the Uyghur Forced Labor Prevention Act, the German Supply Chain Act, and Bill S-211 out of Canada. The authors of the chapters of this book all understand that supply contracts are an expression of the parties' expectations. How supply contracts are negotiated, the terms they contain, and their performance—how buyer and supplier play out their contractual relationship— affects how well the human rights of workers and often whole communities are protected.

Why should you care? I can only tell you about my journey and why I care. Toward the end of the last century, while I was GMNA'S chief commercial lawyer, GM encountered its first supply chain slavery case. The response was to insert a clause in the purchase order that I signed off on which was the common way to address these issues at that time. Unfortunately, this didn't stop the modern slavery or adverse human rights impacts. Other cases arose, some involving not only issues of human rights impacts but also environmental contamination that could taint products placed on GM vehicles. In some cases, those issues rose to the top levels of GM management during my tenure as GC of GMNA. Here again I witnessed the power of the person at the top of GM's supply chain, Bo Andersson during my tenure as GC, take charge and end the practice of using these kinds of tainted products in GM vehicles.

These and similar examples were data points in my experience at GM on the issue of human rights issues arising in the Company's supply chain. Now, as mentioned above, these issues have justifiably become a routine focus of concern in supply chains operations globally. Governments from around the world have significantly increased legislative efforts to address these issues. Litigation surrounding them, along with reputational risks sharpened by investor and customer objections, have also grown.

After retiring from GM and becoming a law professor at Western Michigan University Cooley Law School, I went on a life-changing mission trip to India and was confronted with the enormity of human trafficking. I returned to discover

it was present in the US including in corporate supply chains, and I realized that those data points from my GM days were the seeds that gave root to my passion to fight trafficking in supply chains. My main vehicle for doing so was serving as the reporter and chief drafter of the ABA Model Principles. I, and the other members of the ABA Model Principles Working Group—including its chairs Bill Johnston, Denise Kraft, Brad Newman and over 50 other lawyers, judges, and other business professionals from the Business Law Section and across the ABA, were involved. We were joined by individuals from the government and from civil society organizations, and we were all guided by the leadership of (then) ABA President Laurel Bellows, who had made confronting the issue of human trafficking one of her presidential initiatives. Despite spirited discussions among the broad spectrum of interests within the ABA, the ABA Model Principles were adopted without objection by the ABA House of Delegates at the 2014 ABA Mid-year Meeting. Like my GM experiences, the ABA Model Principles became the seeds of the MCCs when David Snyder joined one of ABA Model Principles implementation meetings. The rest, as they say, is history, but in this case it's also foresight. David, Sue, and the Working Group to Draft Human Rights Protections in International Supply Contracts, formed in 2016, created MCCs Version 1.0 and now Version 2.0, a marvelous tool to guide businesses through the many difficulties in confronting human rights abuses in supply chains.

For human rights abuses to be avoided, it's not just about the party at the top of the supply chain forcing provisions on the supply base. Quite the contrary, aggressive contracting, characterized by unfairly one-sided or oppressive terms, tends to promote oppositional rather than cooperative buyer-supplier relationships. On the one hand, such practices can generate undue commercial pressure on suppliers, exacerbate human rights risks, and undermine the buyer's ability to meet its own human rights commitments. On the other hand, better contracts are ones that emphasize a cooperative relationship between buyers and suppliers and incorporate contractual practices consistent with that philosophy to generate better human rights outcomes.

Consequently, the most prominent shift in MCCs 2.0 is that buyers share contractual responsibility for protecting human rights with their suppliers and sub-suppliers in a regime where human rights due diligence replaces the typical regime of representations and warranties. This newer regime is considerably more pragmatic since, in the real world, such adverse human rights impacts are going to be discovered if the parties have the courage to look. Representations and warranties are of questionable use in these contexts, encouraging the parties to turn a blind eye to reality while taking on theoretically strict liability (the problematic "checkbox" or "checkbox" approach). Required, ongoing human rights due diligence is a more realistic process that presumes parties will need to set priorities, addressing the most pressing issues first, without a fictional representation that everything is perfect.

The MCCs are intended to be fully modular; in-house and outside lawyers can pick and choose what clauses to adopt or adapt. Alternative text is often provided, with extensive footnotes providing counsel with information and resources that might be useful in making drafting decisions. MCCs 2.0 can assist

companies of all sizes and industries to implement their own human rights policies and comply with the ever-expanding legislative initiatives to address forced and child labor and other human rights abuses.

The unique aspect of this book, however, is that it is much more than an explanation of another set of model contract clauses for use by purchasing lawyers. Rather, it is a tool that will help companies navigate the maze of hard and soft law that permeates the area of supply chain sustainability as indicated by the breadth of subjects covered.

Virtually every lawyer in a law firm or in-house counsel environment can find something in this book that applies not only to their own practice but also to those complementary practices applicable to supply chains. And recall we are speaking of supply chain labor practices that exploit almost 200 million men, women, and children globally, often in ruthless and abusive ways.

From my perspective as former general counsel, this book would be required reading for my entire staff, with an obvious emphasis on certain chapters for certain lawyers. This wide applicability goes beyond a policy perspective, concentrating on practical application of the MCCs. Procurement and ongoing operations under the MCCs follow a pragmatic approach where buyers share contractual responsibility for protecting human rights with their suppliers and sub-suppliers. This is accomplished with a regime of precontract and ongoing human rights due diligence, to identify and mitigate human rights and environmental risks and to address adverse impacts when they are discovered. Doing so in such a matter is far preferable to the legislative and litigation approaches mentioned above.

And that leads me to close with the fact that a guiding principle of the MCCs as stated by Professor Snyder is to make supply chain control, including worker and environmental protection, both “legally effective and operationally likely.” In fulfilling that principle, the MCCs are driven by lawyers, businesses, human rights and environmental advocates, and others, together with members of civil society. They all had a prominent role in developing the MCCs, and all have contributed to this book: an essential tool for all business, environmental, and human rights lawyers, and for others interested in understanding and achieving supply chain sustainability.