

Responsible Contracting Project

Supplier Model Clauses (SMCs) 1.0 Framing Memo



Linklaters



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Disclaimer

The SMCs are the product of the Responsible Contracting Project. 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. The SMCs are intended for educational and informational purposes only, and ultimately the contractual parties are to decide whether and which of the contractual clauses they use in their supply relationships. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered.

I. Background to the Supplier Model Contract Clauses (SMCs)

In 2022, the Sustainable Terms of Trade White Paper published by the Sustainable Terms of Trade Initiative ("STTI") identified unfair contracting practices as one of the key issues negatively affecting human rights in the garment sector. The paper called for a collaborative effort to draft model contract clauses that would better protect suppliers by sharing responsibility with buyers (and their representatives) for addressing human rights risks, including by sharing in the costs associated with addressing such risks and co-operating to establish fairer practices that can support improved human rights outcomes in the parties' supply chains.

The Supplier Model Contract Clauses ("SMCs") set out here were drafted by the Responsible Contracting Project ("RCP"), in collaboration with suppliers and manufacturing associations participating in the Sustainable Terms of Trade Initiative. The SMCs are supported by the Initiative for Global Solidarity (IGS) which promotes the implementation of human rights and environmental due diligence (HREDD) in global supply chains and FABRIC (Promotion of a Sustainable Textile and Clothing Industry in Asia) which brings together people from Asian industry, the public sector, NGOs and international buyers and promotes knowledge transfer and cooperation. IGS and FABRIC are working on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ) and are implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

RCP was founded in 2022 as a spin-off from the American Bar Association ("ABA") Business Law Section Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains. The SMCs draw on many of the principles contained within the ABA Working Group's Model Contract Clauses 2.0 ("MCCs 2.0"), published in 2021. Indeed, both the MCCs 2.0 and the SMCs are informed by a human rights due diligence ("HRDD") framework, discussed further below.

It is important to note, however, two primary distinctions between the MCCs 2.0 and the SMCs:

- 1) The MCCs 2.0 were drafted to be used across sectors, whereas the SMCs were drafted specifically for the apparel sector.
- 2) The MCCs 2.0 were drafted to balance obligations between buyers and suppliers, whereas the SMCs were drafted specifically with apparel suppliers in mind.

As the SMCs were drafted for apparel suppliers, they contain a number of buyer obligations. If readers are interested in clauses that contain more detailed supplier obligations, we recommend they look at the MCCs 2.0, which can be found on the RCP website, under Toolkit, here:

<https://www.responsiblecontracting.org/toolkit>.

II. The Human Rights Due Diligence Framework

HRDD is a dynamic, ongoing process whereby companies must identify, prevent, mitigate, account for and, where appropriate, remediate any potential or actual adverse human rights impacts (“Adverse Impacts”) in their supply chain.

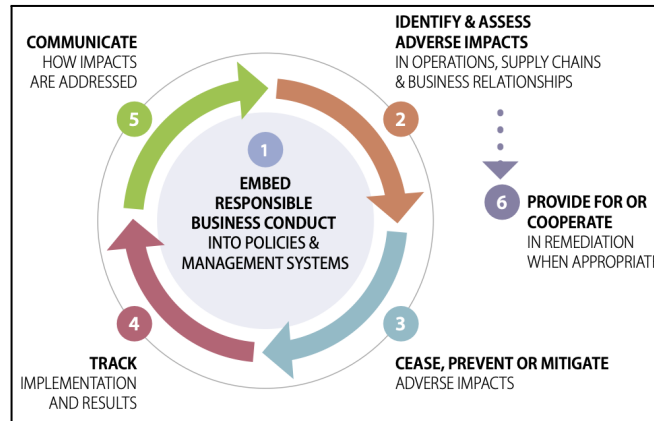


Fig. 1 The Due Diligence Process and Supporting Measures, OECD Due Diligence Guidance for Responsible Business Conduct. Pg. 21

The concept of HRDD is enshrined in the 2011 [United Nations Guiding Principles for Business and Human Rights](#) (“UNGPs”), later expanded upon in the Organisation for Economic Co-operation and Development’s (“OECD”) [Due Diligence Guidance for Responsible Business Conduct](#) and the sector-specific OECD [Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector](#). For more information on the due diligence process and supporting measures, please consult these instruments.

1. How is HRDD relevant to contracting?

Contracts are a mechanism for allocating risks, rights and obligations between the parties -- the buyer (and/or its representatives) and the supplier. When contracts are used to govern and address human rights risks, they tend to be drafted in such a way that places all of the responsibility and risk for Adverse Impacts on the supplier, while most of the contractual rights belong to the buyer.

Integrating an HRDD approach into supply contracts produces an alternative framework to the traditional model, whereby buyers and suppliers share the risks and responsibilities associated with upholding human rights. Indeed, a core principle of the UNGPs is that all companies have a responsibility to respect human rights (“R2R”) and that responsibility cannot simply be transferred to other actors in the supply chain. As such, the R2R is both inalienable and shared -- all companies have it, all the time. Traditional contracts that place sole responsibility for

human rights on the supplier are therefore fundamentally out of sync with the UNGPs and HRDD.

Many suppliers will be familiar with buyers' contractual requirement that suppliers guarantee, promise, or "represent and warrant" that there are no, and never will be any, human rights violations in their supply chain. Such guarantees are not only unrealistic, given that there is no such thing as a perfect supply chain, but they are also fundamentally inconsistent with the UNGPs and the OECD.

HRDD is designed not to outlaw imperfection, but rather to proactively address imperfection. **HRDD expects continuous improvement, not perfection** -- certainly not on day one. Regimes that rely on unrealistic promises of perfection that often place the supplier in breach of contract on day one are therefore out of sync with the HRDD approach.

Furthermore, HRDD recognises that a buyer's own behaviour, including its purchasing practices, can significantly contribute to Adverse Impacts. However, traditional contracting overlooks the buyer's responsibility to manage its own actions and behaviours in such a way that supports, rather than undermines, positive human rights outcomes. This is another way in which traditional contracting is at odds with HRDD.

Finally, where an actual Adverse Impact occurs in relation to the contract, HRDD would require that the parties (buyer and supplier) provide for, or co-operate in providing, remediation to the adversely impacted stakeholders. Traditional contracting regimes do not typically contain such provisions. Instead of prioritising remediation for the victim(s), traditional contracts prioritise traditional contract remedies, such as suspension of performance or payments, rejection of goods, immediate termination, and money damages.

In sum, with HRDD, the enquiry does not stop at the question, "Are there any human rights risks in your supply chain?" because there almost always are such risks. Rather, HRDD goes on to ask: "What are the companies involved doing, in an ongoing and dynamic fashion, to mitigate identified risks to prevent them from graduating into harm?" And, if prevention is unsuccessful and/or something bad happens, HRDD asks: "What are the companies involved doing to remedy the situation to ensure the adverse impact stops and that the victim(s) are restored to the position they were in prior to the impact?"

Thus, unlike traditional contracts, HRDD places co-operation, prevention and remediation far ahead of retaliation and termination. Since, as discussed below, HRDD is now becoming a legal requirement for many companies through the enactment of mandatory due diligence legislation, the inconsistency between contracts-as-usual and due diligence-aligned contracts matters.

HRDD is a useful lens to illuminate the weaknesses of traditional contracting when it comes to managing human rights risks in supply chains. The short version of the contracting-as-usual

problem is that **risk shifting is not the same thing as risk management**. For human rights, effective risk management requires risk sharing and co-operation between the parties, including on matters related to the commercial terms and practices.

By adopting a due diligence-aligned, shared-responsibility approach to contracting, suppliers can push back on traditional contracting practices that place all the responsibility for human rights on their shoulders while doing little to support positive human rights outcomes. The shared-responsibility approach supports more balanced buyer-supplier relations and more effective implementation of human rights policies and risk-management processes.

2. Why is HRDD-alignment so important? The turn toward mandatory HRDD legislation.

HRDD, as set out in the UNGPs and OECD Guidance, is the foremost standard for managing Adverse Impacts in supply chains. Although these international instruments remain “soft law” in most jurisdictions, an increasing number of national and supranational laws are either in force or coming into existence requiring in-scope companies to conduct human rights and environmental due diligence in their own operations and supply chains in line with the UNGPs and OECD Guidance.

Examples of mandatory human rights and environmental due diligence laws already enacted include:

- The German Supply Chain Due Diligence Act (“LkSG”), in force since January 2023
- The Norwegian Supply Chain Transparency Act, in force since July 2022
- The French Duty of Vigilance Law, in force since March 2017

The EU is also in the process of negotiating the final text of the Corporate Sustainability Due Diligence Directive (“CS3D”). Under the CS3D, companies that generate above a certain threshold of turnover within the EU -- regardless of whether they are EU companies -- will be required to conduct human rights and environmental due diligence within their own operations and supply chains.

It is unlikely that companies will be able to comply with legal requirements simply by contractually shifting their human rights and environmental due diligence responsibilities onto their suppliers and supply chain partners. The guidance published by the German agency responsible for enforcing the LkSG strongly suggests the same (see [here](#) for an English-language opinion on this). As such, rather than pursuing the traditional, risk-shifting contracting approach, in-scope companies may be better off proactively aligning their contracts with due diligence principles, as exemplified in the SMCs and the MCCs 2.0. The SMCs were drafted to align with both best practice and existing and emerging legislation.

III. Updates to the Clauses

RCP circulated a first draft of the SMCs in Spring 2023. The team held several consultations with suppliers and manufacturing associations and received a notable amount of written feedback prior to completing this final draft. Suppliers were, in the main, enthusiastic about providing feedback. It is important to note, however, that while many of the dynamics that affect the industry are relevant across the board, the supplier ecosystem contains suppliers and manufacturing associations of many different sizes, all working in different contexts and countries, often with different clients. Capturing consistent and uniform “supplier feedback” amongst these very different experiences is therefore not always a straightforward task. Synthesising these comments can be equally difficult.

While it is therefore likely that some suppliers will see their feedback and comments reflected in the final draft, it is also possible (even likely) that some suppliers will see changes that reflect a different opinion. It is important to note that the SMCs are model contract clauses. We recommend they be used as a basis -- “a jumping off point” -- that can be revised and adapted to each supplier’s particular circumstances and needs.

While the full list of changes is too long to include in detail, it is important to highlight a few key updates:

1. Simple and Plain Language Versions

The initial draft set of clauses contained three versions of each clause: simple, plain language, and a formal legal language version. Although some suppliers appreciated the three versions, the majority felt that it was unnecessary to have so many permutations and that it would be easier to just use the formal legal language version in the final product.

The vast majority of suppliers did express a need to receive additional support and training to understand the full implications of each clause, as well as the surrounding topics, such as HRDD. Our understanding is that GIZ and STTI will be taking steps to make such support and training available in the coming year.

2. Specificity

RCP received several comments requesting that the clauses be revised to include more specific terms. Although companies would be expected to include more specific terms appropriate for their contexts and business relationships, the SMCs cannot be more specific. Specific terms vary across companies and contexts, so no one specific term would be appropriate in a model clause. In addition, there would be a heightened risk of legal issues relating to the model clauses from a competition law perspective the more they contain specific

competitively-sensitive information, as this could lead to anti-competitive effects. For these reasons, the SMCs are written in general terms.

As mentioned above, the model clauses are intended as a basis point only. Suppliers themselves can amend and adapt these clauses so that they contain more specific information and requirements. To facilitate such adaptation, some of the clauses include different drafting options, indicated by square brackets (“[]”).

3. Codes of Conduct (“CoC”)

The initial draft set of clauses contained multiple references to Schedule P and Schedule Q. Schedule P referred to the buyer’s human rights policy or supplier code of conduct, while Schedule Q referred to the responsible purchasing code of conduct or buyer code. For simplicity, the terms “Schedule P” and “Schedule Q” have been removed and replaced with direct reference to the Supplier Code of Conduct and the Responsible Purchasing Code of Conduct.

It is important to note that while most companies have a Supplier Code of Conduct in place, Responsible Purchasing codes of conduct (or policies) are less common. As it is likely that the shift towards mandatory HRDD will place more emphasis on responsible purchasing in the future, such buyer codes are likely to become more common. This is why we have included bracketed options in the SMCs to reference a buyer code in the contract.

The frameworks and tools available for guiding companies on responsible purchasing are expanding. For examples of existing buyer codes and responsible purchasing standards, please see:

- The ABA working group Responsible Purchasing Code of Conduct:
<https://www.responsiblecontracting.org/buyer-code>
- Social Accountability International’s Buyer-Supplier Mutual Code of Conduct:
<https://sa-intl.org/resources/mutual-code-of-conduct/>
- The Common Framework for Responsible Purchasing Practices:
[The Common Framework — The Common Framework \(cfrpp.org\)](https://www.cfrpp.org/)

4. Environment

References to the environment have been included in the SMCs because laws, regulations, and the UNGPs and OECD Guidance often address adverse environmental impacts as a human rights issue. However, the SMCs are focused on human rights, rather than the environment per se. While concepts used in the SMCs may be relevant to certain aspects of environmental due diligence, due to the wide-ranging and highly technical aspects of environmental impacts, these are not covered in full in the SMCs. Further guidance on managing environmental risks and impacts may be found in other environment-specific projects, such as the model clauses developed by [The Chancery Lane Project](#).

5. Using the SMCs

A point of clarification on using the SMCs: the clauses are designed to be used in conjunction with a “master agreement” or “framework agreement” under which individual purchase orders are issued. The master or framework agreement is assumed to include all commercial terms, including remedies, while the SMCs are devoted to HRDD-related obligations and remedies.

The CoCs -- the supplier code and the buyer code -- can be added as schedules or appendices to the master agreement. When added to the master agreement, the CoCs become binding on the parties.

As indicated above, the SMCs are model clauses that can be edited to suit the user’s needs. Rather than copying and pasting the SMCs into the contract, users should (1) select the SMCs they want to include in the contract and (2) edit and adapt them to suit their needs and specific circumstances.

While users can choose which SMCs to include in their contracts, RCP strongly recommends including SMC 2 on Shared Responsibility to Carry Out Human Rights and Environmental Due Diligence as that clause centres HRDD and ties in with many of the other SMCs. In other words, although each SMC can be adopted and adapted separately, SMC 2 sets the HRDD stage and weaves a common HRDD thread across the clauses. Users can of course include cross-references between the clauses to make the HRDD connection more explicit, if they wish -- we opted not to so that each SMC can stand alone.

A last point regarding the finality of the SMCs: We refer to “SMCs 1.0” to acknowledge that these clauses are an iterative product that is neither perfect nor complete as is. It is possible that, based on future feedback, a version 2.0 could be developed. For updates, please visit the [RCP Toolkit](#).