Soccer Balls Stitched by Tiny Fingers

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David V. Snyder, Susan Maslow, and Sarah Dadush, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, 77 **Bus. Law. (ABA)** ___ (Winter 2021-2022), available at SSRN.

More than 40 million people in the world today are held in some form of slavery. Slavery today takes many forms, ranging from the abhorrently obvious open slave markets in Libya reported in 2017 to bonded labor, prison labor, sex trafficking, child soldiers, debt slavery, and many other permutations of one of the oldest human institutions. Slavery is so endemic and difficult to police that the continuing human tragedy seems intractable, especially when viewed from the limited toolset available to governments seeking to prevent the practice.

The Model Contract Clauses 2.0 (MCCs 2.0) presented in this report represent a movement away from traditional command and control legislative and regulatory enforcement efforts to provide private commercial actors with a set of modular, scalable, flexible, and implementable mechanisms for addressing slavery in international supply chains. As Snyder, Maslow, and Dadush note: “This project was born of challenge, frustration, and hope. There is little doubt that workers in international supply chains are being abused, in the most horrifying ways, even as they work to produce the staples of our everyday lives and indeed support much of our economy.” (P. 2.)

While private efforts to combat slavery in international supply chains have largely been limited to corporate codes of conduct purporting to prohibit individual firms from supporting directly or indirectly human trafficking, slavery, or slave-made goods in their supply chains, there is little evidence that such internal codes actually impact slavery within these firms’ supply chains on a systematic scale. In contrast, the MCCs (both version 1.0 and 2.0) confront this problem by providing a well-crafted and coherent set of contract terms that every actor in a supply chain—whether buyer or seller—can incorporate into their supply chain contracts thus situating private contract as a supplement to legislative and efforts. Although it is not possible in this review to engage with the actual contract clauses, the strategic thinking behind the MCCs 2.0 is both artful and a powerful demonstration of how private contracts may be drafted to mobilize international supply chains more effectively in the fight against slavery worldwide.

First, the MCCs 2.0 begin with the recognition that both buyers and suppliers bear responsibility for slavery within their supply chains. While the first version of the MCCs (MCC 1.0) focused on irresponsible suppliers, subsequent research revealed that “buyer demands, typically related to production times, price requirements, or change orders, can often cause or contribute to human rights violations.” (P. 9.) Ignoring buyers in the forced labor – supply chain calculus arguably incentivizes a “Somebody Else’s Problem” ethic since, after the initial supplier who engaged in forced labor practices, all other actors in the supply chain may focus on their role as buyers who did not themselves commit human rights abuses and therefore do not bear responsibility for those acts.

Second, the original MCCs 1.0 approached the problem of forced labor in supply chains through a series of representations and warranties purporting under which suppliers guaranteed to subsequent buyers that forced labor was not used in production. The MCCs 2.0 abandon this approach in favor of terms that

impose human rights due diligence obligations on the parties. This approach is more realistic than imposing warranties since some countries already require human rights due diligence in supply chains and since firms are more likely to operationalize a due diligence regime than a warranties regime:

> The regime of representations and warranties, with their accompanying strict liability – if they are not true, there is breach – is unrealistic and ineffective, and often so much so as to be downright fictitious. Frequently, this regime is thought to lead to what is called a "tickbox" or "checkbox" approach to supply chain management in which buyers require a laundry list of representations of compliance from their suppliers. Suppliers mechanistically provide them by checking the boxes, and everyone goes home happy (although they may be more than a little resentful of the time wasted filling forms). Little is achieved. (P. 11.)

The advantages of a due diligence regime over a warranties regime are captured by the authors' recognition that "Not everything can be made perfect, ever, much less all at once. Perfection is not and cannot be the standard. Priorities are necessary, as is reflected in MCCs 2.0…." (P. 11.) Forced labor hides in the shadows, meaning not only that warranties against slavery are likely breached in a massive number of contracts, but also that the buyers and sellers within the supply chain have strong incentives to put their heads in the sand rather than deal with potential liability and contract disruption that would result if they actually discovered the forced labor within their supply chains. Requiring perfect compliance through warranties creates perverse incentives. Requiring human rights due diligence "is a prospective, retrospective, and ongoing risk management process that enables businesses to respect human rights by identifying, preventing, mitigating, and accounting for how they address the impacts of their activities on human rights." (P. 11.)

Third, the MCCs 2.0 are intentionally modular, making them both scalable and flexible.

> A modular approach is the central drafting strategy of the MCCs…. The Working Group fully recognizes that not all companies are in the same place. Not only do they possess differing capabilities and face varying context, they are simply in different positions in their approach to human rights. Some companies—often those that have been involved in the worst problems—have advanced far in taking responsibility for the effects of their business on human rights. Other companies have taken only a few steps, and many have not yet started on the path. The MCCs are drafted for all of these companies and are designed so that counsel, with a minimum of effort, can adapt them to the particular circumstances of each company.

This modularity means that firms may flexibly adopt the model terms that fit their business context and may also scale up their efforts as they develop. Importantly, the flexibility of the MCCs both increases the likelihood that firms will feel comfortable adopting at least some of those terms and that the terms will not become barriers to entry. At the end of the day, creating a private law structure in which anyone can engage to protect human rights is infinitely preferable to a mandatory regime that prevents any participation at all.

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