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Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Section of Business Law

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Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk

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I. INTRODUCTION

In cooperation with other groups in the ABA Business Law Section and the wider American Bar Association, the ABA Business Law Section formed the Working Group to Draft Human Rights Protections in International Supply Contracts (“Working Group”). This is part of a larger effort to achieve widespread implementation of the ABA Model Business and Supplier Principles on Labor Trafficking and Child Labor¹ as well as other human rights protections.

* This report is the product of the Working Group, as explained in the text, and reflects the rough (and sometimes debated) consensus of the Working Group. While produced under the auspices of the Uniform Commercial Code Committee of the American Bar Association Business Law Section, the report has not been approved or endorsed by the Committee, the Section, or the Association as of the time of publication. Accordingly, the report should not be construed to be the action of either the American Bar Association or the Business Law Section. 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. This report and the clauses and other materials herein are intended for educational and informational purposes only. The lawyer who advises on the use of these clauses must take responsibility for the legal advice offered.

** David Snyder as chair and Susan Maslow as vice chair served as principal drafters of the report. David Snyder is Professor of Law and Director of the Business Law Program at American University Washington College of Law in Washington, D.C., and would like to acknowledge grant funding from the law school as well as travel funding from the American Bar Association. He would also like to thank Michael T. Francel, Chiara Vitiello, and Katherine Borchert for excellent research assistance. Susan Maslow is a partner at Antheil Maslow & MacMinn, LLP in Bucks County, Pennsylvania.

1. There are both ABA Model Business and Supplier *Principles* on Labor Trafficking and Child Labor (“ABA Model Principles”) and ABA Model Business and Supplier *Policies* on Labor Trafficking and Child Labor (“Model Policies”) (emphasis added). The ABA Model Principles are the high level articulation of the detailed material in the Model Policies. The ABA Model Principles also form Part II of the Model Policies. Only the ABA Model Principles were adopted by the ABA House of Delegates, so only the ABA Model Principles represent the official position of the American Bar Association. For a detailed discussion, see E. Christopher Johnson, Jr., *Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor*, 70 BUS. LAW. 1083

We cannot stand by when children are trafficked and traded or when workers die in factory collapses and fires. The hope is that following the steps outlined in the ABA Model Principles will help eradicate labor trafficking and child labor from supply chains, making a difference to real people—their health, safety, and freedom—and, in some cases, saving lives.

In addition, companies need to comply with an increasing number of human-rights-related laws and regulations. The clauses below are designed to be compatible with a company's policies with respect to any human-rights-related subject, including anti-trafficking, worker safety, conflict minerals, antidiscrimination, and sustainability. In this sense, the clauses are agnostic as to subject. The substance and content of those policies is beyond the scope of this Working Group; they were the subject of earlier ABA work² and have also been the subject of similar projects at the United Nations, the Organisation for Economic Co-operation and Development ("OECD"), and elsewhere. The foundational idea behind the present work is to move the commitments that companies require, whatever they may be, from corporate policy statements to the actual contract documents where those policies may have greater impact.

At the same time, the clauses below seek to minimize the risks inherent in the adoption of any corporate policy. Claims have been made against companies based on those companies' undertakings as buyers in the supply chain. In other words, there is risk for such companies, often unrecognized and inadequately addressed in current supply contracts. The disclaimers included below address these issues, although no risk can be eliminated entirely.

II. PROTECTION THAT IS LEGALLY EFFECTIVE AND OPERATIONALLY LIKELY

Adoption of policies at the corporate level, while a good start, is not always enough: principles need to be put into practice. One way to do so is to integrate the policies into supply contracts, purchase orders, and similar documents that are part of the operational as well as the legal life of buyers and suppliers. The contracts and related documents are what govern, and often guide, the behavior of the parties. Enlightened contractual terms have great potential to make a difference when combined with effective remedies for their violation and a willingness to enforce them.

III. READY-MADE LANGUAGE FOR TRICKY ISSUES: CLAUSES TO MANAGE RISK AND MINIMIZE EXPOSURE FOR COMPANIES WHILE PROTECTING WORKERS AND COMPLYING WITH REGULATIONS

The mission of the Working Group is to make available well considered clauses that protect workers and that are sensitive to the legal and business

(2015). See also the Model Principles Task Force website: http://www.americanbar.org/groups/business_law/initiatives_awards/child_labor.html.

2. See *supra* note 1.

risks that companies face. The drafting is challenging. Sales law and contract law are keyed to production of conforming goods, like well-stitched soccer balls. The background law does not deal easily with the problem of soccer balls that are perfectly stitched but that were sewn by child slaves. Further, companies reasonably wish to minimize the litigation risk and liability exposure while remaining compliant with generally applicable laws, particular regulations (like the Federal Acquisition Regulation), and moral imperatives. The clauses suggested below aim to address these sometimes conflicting goals, and they recognize that there are inevitably risks, which can be mitigated and perhaps minimized but not eliminated. The proposed clauses include annotations to explain the choices made and their benefits and risks. For those who want in-depth treatment, an upcoming symposium will be published later this year in the *American University Law Review*.³

Companies may wish to adopt these clauses for a number of reasons:

- Compliance with U.S. anti-trafficking statutes;⁴
- Compliance with other U.S. laws, such as regulations or prohibitions of imports made with child labor or forced labor;⁵
- Compliance with U.S. state laws, like the California law on supply chain transparency;⁶
- Compliance with the Federal Acquisition Regulation (“FAR”);⁷
- Compliance with foreign law,⁸ such as the national transpositions of the EU non-financial reporting directive;⁹ and
- Mitigation of potential liability under state statutory and common law theories such as undertaking liability,¹⁰ third-party beneficiaries,¹¹ and deceptive advertising.¹²

3. 68 AM. U. L. REV. (forthcoming 2019).

4. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7114 (2018); see also 18 U.S.C. §§ 1589–1592 (2018) (criminal sanctions for forced labor, trafficking, and peonage); Trafficking Victims Protection Reauthorization Act of 2013 (TVPRA) (Title XII of the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013)).

5. See, e.g., Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2016).

6. CAL. CIV. CODE ANN. § 1714.43 (West 2018).

7. Federal Acquisition Regulation, 48 C.F.R. §§ 52.222–50 to 52.223-7 (2018).

8. See, e.g., UK Modern Slavery Act 2015, c. 30 (Eng.); France’s Corporate Duty of Vigilance Law, Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, Journal officiel de la République française.

9. See Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

10. See *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016).

11. See *Doe I v. Wal-Mart Stores*, 572 F.3d 677, 681–82 (9th Cir. 2009).

12. See, e.g., *Nat’l Consumers League v. Wal-Mart, Inc.*, No. 2016 CA 007731 B, 2016 WL 4080541, at *7 (D.C. Super. Ct. July 22, 2016) (order denying defendant’s motion to dismiss); the chocolate cases, such as *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016 (N.D. Cal. 2016), *aff’d*,

Whatever moral and legal commitments companies want to require can be accommodated in what this Working Group entitles Schedule P,¹³ which the model clauses incorporate, but the actual content of Schedule P is beyond the scope of this Working Group.

CLAUSES TO BE INSERTED INTO SUPPLY CONTRACTS, PURCHASE ORDERS, OR SIMILAR DOCUMENTS FOR THE SALE OF GOODS

The following clauses are designed for supply contracts. They assume that assurances with respect to compliance with certain human-rights-related policies is desired or required by the buyer and that such policies will appear in an appendix to the agreement, Schedule P, just as the buyer's specifications for goods themselves are likely to appear in an appendix. The clauses below are intended to make those policies legally binding and to provide enforceable remedies for their violation while also managing the risk that may come with such policies.

*The ABA Model Principles and Policies¹⁴ are an example of what might appear in Schedule P; many companies may wish to adopt or adapt them. Some companies may prefer or need something broader (see *infra* note 18 regarding certain laws that apply to some buyers), and other companies may need something broader still (e.g., to comply with the FAR, other human rights and health and safety standards, or moral obligations). Other possibilities include the OECD Guidelines and the UN Guiding Principles (the Ruggie Principles). Many companies will already have supplier codes of conduct or similar documents that they can use as the content of Schedule P, or Schedule P may simply require obtaining and maintaining certification from a designated third party. The content of Schedule P will likely vary significantly by industry and is beyond the scope of this Working Group.*

The text proposed assumes that buyers are located in the United States and that the applicable law is the Uniform Commercial Code (the "U.C.C.") or the United Nations Convention on Contracts for the International Sale of Goods (the "CISG," a treaty to which the United States is a party). Buyers and suppliers in other jurisdictions may also find these clauses a useful starting point.

Note on negotiation stance. *The proposed text is buyer-friendly, sometimes extremely so, and it could be perceived by some suppliers as unduly aggressive. The drafters have crafted the text this way because some buyers may have the leverage to use the proposed text, and in any case, these clauses are aimed primarily at companies in the*

891 F.3d 857 (9th Cir. 2018); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954 (N.D. Cal. 2016), *aff'd*, No. 16-15794, 2018 WL 3358227 (9th Cir. July 10, 2018); *Dana v. Hershey Co.*, 180 F. Supp. 3d 652 (N.D. Cal. 2016), *aff'd*, No. 16-15789, 2018 WL 3358223 (9th Cir. July 10, 2018) and the fishermen cases, such as *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569, at *1 (N.D. Cal. Jan. 15, 2016). Other cases are pending and some have recently been filed. For more comprehensive consideration of recent and pending litigation in this area, see generally Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery: The Business Case for Eradicating Slave Labor in the Supply Chain to Reduce Domestic Liability*, 68 AM. U. L. REV. (forthcoming 2019).

13. The letter "P" was chosen to designate the schedule because it stands for "Principles" or "Policies" such as the ABA Model Principles and Policies.

14. See *supra* note 1.

role of buyer. The text as proposed gives an indication of what a company would want as buyer, and each company can decide if particular provisions need to be adjusted or eliminated based on its negotiating position and its stance in other transactions (given that most companies are sometimes in the position of buyer and sometimes in the position of seller).

1. Representations, Warranties, and Covenants on Abusive Labor Practices. Supplier represents and warrants to Buyer, on the date of this Agreement and throughout the contractual relationship between Supplier and the Buyer, that:

1.1 *Compliance.* Supplier and its subcontractors and [to Supplier's [best] knowledge]¹⁵ the [shareholders/partners, officers, directors, employees, and] agents of Supplier and all intermediaries, subcontractors, consultants and any other person providing staffing for Goods¹⁶ or services required by this Agreement [on behalf of Supplier]¹⁷ (collectively, the "Representatives") are in compliance with Schedule P.¹⁸ Each shipment and delivery of Goods shall constitute a representation by Supplier and Representatives of compliance with Schedule P; such shipment or delivery shall be deemed to have the same effect as an express representation. [Supplier's delivery documents shall include Supplier's certification of such compliance.]¹⁹

15. An unqualified representation supports Buyer's goals to allocate the risk of undiscovered issues to Supplier and contractually encourage Supplier to gather accurate information about its subcontractors. The parties may negotiate the knowledge qualifier and the degree of knowledge required as it relates to additional levels of subcontractors and any other third party and whether "best" knowledge should be defined to include the imposition of certain periodic inquiry obligations on Supplier. It can also reinforce the Buyer's right to revoke acceptance under U.C.C. section 2-608.

16. "Goods" is assumed to be defined earlier in the Agreement (and not defined in Schedule P). See also *infra* note 29 (on the definition of "Nonconforming Goods").

17. Supplier may attempt to negotiate the use of the phrase "on behalf of Supplier" here, but such a phrase might allow Supplier to argue that the breaching Representative did so without Supplier's knowledge or authority, which defeats the purpose of a strict representation and covenant.

18. The content of Schedule P is beyond the scope of this document, but note that some suggest the best practice is to avoid reference to specific laws in favor of a general reference because legislative initiatives in some countries are broader than in others. In the event that the drafter nevertheless wishes to require that Supplier specifically represent compliance with anti-trafficking and similar legislation, consider avoiding the term "applicable," which will limit required adherence by companies that do not meet the size or revenue requirements of certain legislation. Prominent guidance can be found, for example, in the sources listed at *supra* note 4, as well as the U.N. Guiding Principles on Business and Human Rights (often called the Ruggie Principles); see John Ruggie (Special Representative of the Secretary-General), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, annex (Mar. 21, 2011), https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf. Note again however, that specific guidance with respect to law that might be desired by Buyer or Supplier to be included in Schedule P is beyond the scope of this document, and this note does not attempt to be exhaustive (omitting, for example, certain anti-trafficking legislation as well as conflict mineral issues and the EU rules on non-financial and diversity information).

19. The bracketed sentence may support Buyer's continuing reliance upon Supplier's monitoring and compliance. The actual express representation would arguably make reliance more reasonable, and such reliance may delay Buyer's discovery and could help explain periodic rather than constant or continual audits by Buyer. See also *infra* section 2.4. Delivery documents could include commercial invoices, packing lists, beneficiary's certificates, or an additional document delivered with the goods or tendered through banking channels to obtain payment for the goods. See *infra* note 38. If the bracketed language is included, the second clause of the preceding sentence should be deleted.

1.2 *Schedule P Compliance Through the Supply Chain.* Supplier and its Representatives shall make the performance of all of its Representatives subject to the terms and conditions in Schedule P and Supplier shall ensure that Supplier, its Representatives, and all of its and their respective Representatives acting²⁰ in connection with this Agreement do so throughout the contractual relationship only on the basis of legally binding and enforceable written contracts that impose on and secure from the Representatives terms [in compliance with] [equivalent to those imposed by] [at least as protective as those imposed by] Schedule P. To restate for clarity, each Supplier and each Representative shall require each of its Representatives' compliance so that such obligations are required at each step of the supply chain. Notwithstanding anything contained herein to the contrary, Supplier shall be responsible for the strict observance and performance by Supplier and its Representatives of the terms and conditions in Schedule P and shall be directly liable to Buyer for any violation by Supplier or its Representatives of Schedule P.

1.3 *Supplier's Policies.* Supplier shall establish and maintain throughout the term of this Agreement its own policies and procedures to ensure compliance with Schedule P ("Supplier's Policies"), which shall include a reporting mechanism for Representatives to report potential and actual violations of Supplier's Policies and/or Schedule P.²¹ Within ____ days of (a) Supplier having reason to believe there is any potential or actual violation of Supplier's Policies and/or Schedule P, or (b) receipt of any oral or written notice of any potential or actual violation of Supplier's Policies and/or Schedule P, Supplier shall provide a detailed summary of (i) the factual circumstances surrounding such violation, (ii) the specific provisions of the Supplier's Policies and/or Schedule P that are alleged to have been violated, and (iii) the investigation and remediation that has been conducted or that is planned.²²

1.4 *Provision of Information.* Upon request, Supplier shall deliver to Buyer such information and materials as Buyer reasonably requires with respect to the subject matter of Schedule P.

20. Supplier may again attempt to negotiate the use of the phrase "acting on the behalf of Supplier" here. Buyer, if possible, will want to avoid such language. See *supra* note 17.

21. As part of Buyer's due diligence in choosing its Supplier, it should request copies of all anti-trafficking policies, as well as similar policies, and should determine, for example, how and when training is conducted and to whom it is given, how Supplier's policies are monitored, and how compliance is checked and certified. If Supplier does not have its own policies against forced and child labor, including worker health and safety, for example, or if Buyer prefers, Supplier can be required to adopt Buyer's policies.

22. All of the covenants set forth above are prospective. Counsel to Buyer may consider requiring Supplier to state that it has no history of using forced labor or underage workers, subjecting workers to hazardous conditions or other similar conduct, and has never been the subject of investigations or proceedings relating to such conduct. In some industries and for some companies, such historical assurances cannot be made or expected, even though the companies are currently compliant and may have been compliant for a number of years.

2. Rejection of Goods and [Cancellation] [Avoidance] of Agreement.

2.1 *Strict Compliance.* It is a material term of this Agreement that Supplier and Representatives shall strictly comply with Schedule P.

2.2 *Rejection.* Buyer shall have the right to reject any Goods produced by or associated with Supplier or Representative that Buyer has reason to believe has violated Schedule P, regardless of whether the rejected Goods were themselves produced in violation of Schedule P, and regardless of whether such Goods were produced under this or other contracts.²³

2.3 *[Cancellation.] [Avoidance.]* Noncompliance with Schedule P [substantially impairs the value of the Goods and this Agreement to Buyer]²⁴ [is a fundamental breach of the entire Agreement]²⁵ and Buyer may immediately [cancel] [avoid]²⁶ this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies.²⁷ Buyer shall have no liability to Supplier for such [cancellation] [avoidance].

2.4 *Timely Notice.* Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] [Articles 38 to 40 of the CISG] [and U.C.C. §§ 2-607 and 2-608]),²⁸ Buyer's rejection of any Goods²⁹ as a result of noncompliance with

23. See U.C.C. §§ 2-601, 2-602 (2011).

24. Because installment contracts under Article 2 of the U.C.C. do not enjoy the "perfect tender" rule applicable to a single-delivery contract, such installment contracts should include the phrase within the first bracket. The additional phrase within the first bracket "and this Agreement" should be included if Buyer wishes not only to reject goods based on noncompliance with Schedule P but also wishes to terminate the installment contract in its entirety in light of, for example, Buyer's internal policy, the possible damage to Buyer's reputation, or justifiable fear of a repeated breach by Supplier.

25. The phrase within the second bracket is applicable for agreements to which the CISG applies, whether for a single delivery or an installment contract, under article 49.

26. "Cancellation" occurs when a "party puts an end to the contract for breach by the other" under U.C.C. section 2-106(4). "Avoidance" is the appropriate term under CISG article 49.

27. This section expressly provides for cancellation as a remedy in the event of Supplier's failure to comply with a human rights policy adopted as part of a supply contract. Ultimately, without a contract clause expressly permitting cancellation for human rights policy breaches, Buyer may have a difficult time assembling compelling evidence that the value of the goods was fatally and "substantially impaired" due to the violation of the policy. The value of a particular good supplied in violation of a human rights policy might not necessarily change in the marketplace due to the troubled and tainted background of manufacture.

28. Articles 38 to 40 of the CISG require that Buyer examine the goods or cause them to be examined within as short a period as is practicable. Buyer loses the right to rely on a lack of conformity of the goods if it does not give Supplier notice within a reasonable time after Buyer discovers or ought to have discovered a defect and, at the latest, within two years of the date of delivery (or other contractual period) unless Supplier knew or could not have been unaware of the defect. Because U.C.C. section 2-607(3)(a) provides a similar argument that Buyer's failure to notify Supplier of a breach within a reasonable time bars any remedy, it is suggested that the contractual text be included to limit disputes about what constitutes a reasonable time. If the U.C.C. is referenced in the text, the applicable state version should be cited.

29. "Nonconforming Goods" and "Inspection Period" are assumed to be defined earlier in the Agreement (and not defined in Schedule P). The definitional portion of the Agreement must include as "Nonconforming Goods" any goods received by Buyer that Buyer has reasonable grounds to believe (i) include any materials in fabrication, assembly, packaging, or shipment, directly or indirectly, that do not

Schedule P shall be deemed timely if Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.

2.5 *No Right to Cure*. Supplier hereby acknowledges that it shall have no right to cure by substitution and tender of Goods created and/or delivered without violation of Schedule P if Buyer elects to refuse such tender, in Buyer's sole discretion.³⁰

3. *[Revocation of Acceptance]*.³¹

3.1 *Notice of Buyer's Discovery*. Buyer may revoke its acceptance, in whole or in part, upon notice sent [in accordance with Section ____] to Supplier of Buyer's discovery of Supplier's noncompliance with Schedule P, which the parties have agreed in Section 2 above is a nonconformity that substantially impairs the value of the Goods and this Agreement to Buyer.

3.2 *Same Rights and Duties as Rejection*. Upon revocation of acceptance, Buyer shall have the same rights and duties as if it had rejected the Goods before acceptance.

3.3 *Timeliness*. Notwithstanding any provision of this Agreement or applicable law (including without limitation [the Inspection Period in Section ____ of this Agreement and] U.C.C. § 2-608), Buyer's revocation of acceptance of any Goods as a result of noncompliance with Schedule P shall be deemed timely if

comply with Schedule P; or (ii) originate from or are associated with a Supplier or Representative that [may have] [is reputed to have] [has] violated human rights protections similar to Schedule P.

30. This clause negates Supplier's right to cure under U.C.C. section 2-508 and CISG articles 37 and 48. In cases of mere technical or recordkeeping violations, Buyer may elect to accept the tender of a cure. In other cases, Buyer may not want to do business with a Supplier that violates Schedule P. Under the provision as drafted, Buyer retains discretion here. Many parties, however, may prefer to provide a right to cure; experience suggests that many violations may consist of recordkeeping problems or other clerical shortcomings. Even in cases of substantive violations of health and safety standards, for example, the parties may prefer to institute a program to alleviate the problems (e.g., by providing for appropriate working conditions) rather than to end the Agreement and throw the employees out of work. For these reasons, a "notice and cure" clause may be preferable to the elimination of any cure right for Supplier. In such a situation, this section should add, "Except as provided in Section ____," at the beginning. Another section can then provide for Buyer to give notice of default to Supplier. That default notice would trigger a cure period, either set by this Agreement or by the notice (as the parties prefer), and if cure is not effected within that period, then Supplier would be in breach, which would then trigger the remedies provided in the Agreement. In this way, a Supplier who does not comply with Schedule P is in default but is given a chance to fix the problem. A Supplier who implements a successful fix thus avoids breach, and Buyer will have no right to a remedy (but perhaps no need for one either). A notice-and-cure mechanism may make the Agreement more palatable to Supplier, although Buyer may prefer the stronger rights provided in the text as drafted, or Buyer may need them under the FAR. See 48 C.F.R. § 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will "monitor, detect, and *terminate* the contract with a subcontractor or agent engaging in prohibited activities" (emphasis added)). The text as drafted avoids the problem of disputes about whether a cure is successful. Further, nothing in the text as drafted prevents Buyer from forbearing to exercise its remedies and giving Supplier a period to cure if Buyer thinks a cure would be appropriate. The provision on Notice of Breach appears in section 5.1. Any forbearance should include an appropriate notice of reservation of rights.

31. The clauses on revocation of acceptance are designed primarily for use in contracts governed by the U.C.C. and are drafted with U.C.C. section 2-608 in mind. They should be omitted in contracts governed by the CISG. For this reason, section 3 is bracketed.

Buyer gives notice to Supplier within a reasonable time after Buyer's discovery of same.]

4. *Nonvariation of Matters Related to Schedule P.*

4.1 *Course of Performance, Established Practices, and Customs.* Course of performance and course of dealing (including, without limitation, any failure by Buyer to effectively exercise any audit rights)³² shall *not* be construed as a waiver and shall *not* be a factor in Buyer's right to reject Goods, [cancel] [avoid]³³ this Agreement, or exercise any other remedy. Supplier acknowledges that with respect to the matters in Schedule P, any reliance by Supplier on course of performance, course of dealing, or similar conduct would be unreasonable. Supplier acknowledges the fundamental importance to Buyer of the matters in Schedule P and understands that no usage or practice established between the parties should be understood otherwise, and any apparent conduct or statement to the contrary should not be relied upon.³⁴ The parties agree that no usage of trade, industry custom, or similar usage shall apply to this Agreement to the extent such custom or usage would lessen the protections provided or the obligations imposed by Schedule P. No person except [Title/Officer] has authority on behalf of Buyer to vary Schedule P or any provisions relating to it, and any such variation must be in a signed writing or an authenticated electronic communication.

4.2 *No Waiver of Remedy.* Buyer's acceptance of any Goods in whole or in part will not be deemed a waiver of any right or remedy³⁵ nor will it otherwise limit Supplier's obligations, including, without limitation, those obligations with respect to warranty and indemnification.

5. *Remedies.*

5.1 *Notice of Breach.* If Buyer has reason to believe, at any time, that Supplier or a Representative is not in compliance with Schedule P, Buyer shall notify Supplier [in accordance with Section ____]. [Buyer's notice requesting remediation as well as Buyer's notices of breach or rejection [or revocation]³⁶ may be given orally or in writing.] A notice to remediate noncompliance with Schedule P also constitutes notice of breach of this Agreement.³⁷

5.2 *Investigation and Suspension of Payment.* Buyer has the right to suspend all payments to Supplier, whether due under this Agreement or other agreements,

32. What audit rights Buyer has, if any, are beyond the scope of this document and should be set forth in Schedule P.

33. "Cancel" for agreements under the U.C.C., "avoid" for the CISG. See *supra* note 26.

34. The first phrase uses the terminology of U.C.C. section 1-303 and the second phrase uses the terminology of CISG article 9(1).

35. U.C.C. § 2-601 (2011).

36. Again, revocation language should be used in U.C.C. but not CISG contracts.

37. This section addresses notice requirements under Article 2 of the U.C.C. For instance, section 2-607(3)(a) requires notice of a breach within a reasonable time after constructive discovery of the breach. A buyer who fails to give such notice will find its claims barred, with many courts holding that pre-suit notice is required.

if Buyer deems, in its sole discretion, that investigation of possible noncompliance with Schedule P is advisable. Such suspension of payments will continue during investigation. Supplier shall fully cooperate with investigation by Buyer or Buyer's agents. Without limitation, such cooperation shall include, at Buyer's request, working with governmental authorities to enable Buyer or its agents to enter the country, to be issued appropriate visas, and to investigate fully.³⁸

5.3 *Exercise of Remedies.* Remedies shall be cumulative. Remedies shall not be exclusive of, and shall be without prejudice to, any other remedies provided at law or in equity. Buyer's exercise of remedies and the timing thereof shall not be construed in any circumstance as constituting a waiver of its rights under this Agreement. In addition to the right to [cancel] [avoid] this Agreement, in whole or in part, and any other remedies available to Buyer, in the event that Supplier or a Representative fails to comply with Schedule P, Buyer may:

- a. deem itself insecure and demand adequate assurance from Supplier of due performance in conformance with Schedule P;
- b. obtain an injunction with respect to Supplier's noncompliance with Schedule P, and the parties agree that noncompliance with Schedule P causes Buyer great and irreparable harm for which Buyer has no adequate remedy at law and that the public interest would be served by injunctive and other equitable relief;

38. Some supply contracts will call for payment by letter of credit, which will complicate the right to suspend payment. When a documentary credit is involved, the supply contract and letter of credit should require presentation of a certificate of compliance with Schedule P. Ideally the certificate would be issued by a third party that has audited the Supplier or Representatives, but a beneficiary's certificate may also be helpful if a third-party certificate is impractical. Under U.S. law, a false beneficiary's certificate could allow an injunction against payment on grounds of "material fraud by the beneficiary on the issuer or applicant." See U.C.C. § 5-109(b) (2011). Purposeful falsity of the certificate might perhaps be helpful even if suit must be in London or in a jurisdiction following English law, which requires fraud on the documents. The leading case from the House of Lords is *United City Merchants (Invs.) Ltd. v. Royal Bank of Canada*, [1983] A.C. 168, 183 (referring to "documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue"); see also *Inflatable Toy Co. Pty Ltd v. State Bank of New South Wales Ltd*, [1994] 34 NSWLR 243 (applying Australian law). If the violation of Schedule P constitutes an illegal act, the illegality theory may also be useful in a suit governed by English law. In any case, the certificate should be required to be dated within a reasonably short time of the draw. Many banks probably will not object to the requirement of an additional certificate as certificates (e.g., by SGS) are commonplace in such transactions, and environmental certificates are similar to (and in some cases may be the same as) a certificate of compliance with Schedule P. While some banks may resist the requirement of such a certificate because of fear of injunction actions and the concomitant extension of the credit risk if the injunction is ultimately denied, most banks seem unlikely to be concerned by the requirement of one more certificate, and any additional credit risk from an injunction may be mitigated by a bond or other credit support as contemplated by U.C.C. section 5-109(b)(2) and comment 7, or by the civil procedure laws or rules of certain jurisdictions or by collateralization or bonding provisions in the reimbursement agreement. Still, despite all of these efforts, suspension of payment may be impossible in cross-border documentary credit transactions because frequently a foreign bank will have honored before the injunction can issue. Once one bank honors in good faith, the commitments along the chain all become firm and cannot be enjoined. See U.C.C. § 5-109 (2011).

- c. require Supplier to remove an employee or employees and/or other Representatives;
- d. require Supplier to terminate a subcontract;
- e. suspend payments, whether under this Agreement or other agreements, until Buyer determines, in Buyer's sole discretion, that Supplier has taken appropriate remedial action;
- f. decline to exercise available options under this Agreement; and
- g. obtain damages.³⁹

5.4 *Damages*. [Supplier acknowledges that it may be difficult for Buyer to fix actual damages or injury to its business, prospects and reputation with respect to Goods produced in violation of Schedule P or associated with a company that has violated Schedule P, and the parties have therefore agreed to liquidated damages in an amount calculated as follows: _____.] [In the event Supplier or Representative fails to comply with Schedule P, Buyer shall be entitled to all general and consequential damages [together with the liquidated damages set forth above],⁴⁰ including but not limited to losses arising from:

- a. procurement of replacement Goods;
- b. non-delivery of Goods;
- c. diminished sales of Goods arising not only from the Goods to have been sold under this Agreement, but to include other diminished sales caused by noncompliance with Schedule P; and
- d. [harm to reputation⁴¹].⁴²

39. This section reflects the remedies provided in the FAR § 52.222.50 relative to combating trafficking in persons. Additionally, the clause adds an insecurity provision under U.C.C. section 2-609. The clause also clarifies that injunctive relief may be necessary. In addition, while Buyer may want to work with a Supplier toward full compliance, Buyer should be prepared to face waiver arguments. The timing of the exercise of remedies is sensitive and the exercise of remedies and any requests for damages may themselves have impacts on human rights. Therefore, this provision expressly recognizes that such careful consideration of the exercise of remedies by Buyer does not constitute a waiver of any rights. Further, with respect to removal of employees (section 5.3.c.), *see infra* note 48. Note also that the remedies provisions here (including sections 5.2 and 5.3.e. on suspension of payments) do not mention setoff, *see* 11 U.S.C. §§ 506(a)(1), 553 (2018) (setoff is a secured claim in bankruptcy), recoupment, clawback, or similar remedies; if those remedies are not already provided in the main agreement, counsel may wish to consider making such rights explicit in this clause.

40. While Buyer in some industries may prefer to adopt a liquidated damages clause, U.C.C. section 2-718 generally prohibits penalties, including providing that "unreasonably large liquidated damages [are] void as a penalty." The ultimate enforceability of these provisions will turn on whether the exercise of the remedy in the contractual clause was reasonable. Particular care should be exercised if Buyer includes the bracketed language that allows liquidated damages in addition to other damages.

41. If no liquidated damages are included above for harm to reputation.

42. Section 5.4 addresses monetary remedies, including consequential and special damages, recoverable in the event of a breach by Supplier. While measures such as diminished sales and harm to reputation are specifically included, Buyer may face challenges with respect to proving damages. This is common in claims for breach of contract, but Buyer may have special challenges with respect to the impact on its brand that results from violations of human rights policies. It is not

5.5 Return, Destruction or Donation⁴³ of Goods; Nonacceptance of Goods.

- a. Buyer may, in its sole discretion, store the rejected Goods for Supplier's account, reship them back to Supplier or, if permitted under applicable law, destroy or donate the Goods, all at Supplier's sole cost and expense.
- b. Buyer is under no duty to resell any Goods produced by or associated with a Supplier or Representative who Buyer has reasonable grounds to believe has not complied with Schedule P, whether or not such noncompliance was involved in the production of the Goods. In an effort to reduce its possible damages and not as a penalty, Buyer is entitled to discard, destroy or donate to a charitable entity any such Goods. Notwithstanding anything contained herein to the contrary or instructions otherwise provided by Supplier, destruction or donation of Goods rejected [or as to which acceptance was revoked],⁴⁴ and any conduct by Buyer required by law that would otherwise constitute acceptance, shall *not* be deemed acceptance and will *not* trigger a duty to pay for such Goods.⁴⁵

5.6 *Indemnification.* Supplier shall indemnify, defend and hold harmless Buyer and its officers, directors, employees, agents, affiliates, successors and assigns (collectively, "Indemnified Party") against any and all losses, damages, liabilities, deficiencies, claims, actions, judgments, settlements, interest, penalties, fines, costs or expenses of whatever kind, including, without limitation, the cost of storage, return, or destruction of Goods, the difference in cost between Buyer's purchase of Supplier's Goods and replacement Goods, reasonable attorneys' fees, audit fees, and the costs of enforcing any right under this Agreement or applicable law, in each case, that arise out of the violation of Schedule P by Supplier or any of its Representatives. This Section shall apply, without limitation, regardless

clear that suppliers will agree to the inclusion of Buyer's lost profits, real or imagined, as damages. Nor is it clear, however, that Supplier will have strong views on damages; Supplier may be judgment proof—for lack of assets or for procedural reasons—and damages may not be a realistic remedy in any case. The suggested text is presented as a starting place for discussions with respect to damages. An agreed liquidation amount may be an acceptable compromise.

43. Donation of goods manufactured or otherwise delivered with the use of forced labor may not be permitted by the U.S. Customs and Border Protection, Cargo Security, Carriers and Restricted Merchandise Branch, Office of Trade. Buyer's only option as an importer may be to return or export the goods. Other countries may have similar restrictions on the possession and ownership of merchandise mined, produced, or manufactured in any part with the use of a prohibited class of labor and such laws, which are beyond the scope of this document, must be examined before donations are made.

44. See *supra* note 31.

45. This section is drafted to address concerns that might be raised with respect to the U.C.C. section 1-305 mandate to place the aggrieved party in the position of its expectation, without award of consequential or penal damages unless specifically allowed, particularly with respect to minimizing damages. See also U.C.C. § 2-715 (2011) (consequential damages cannot be recovered if they could have been prevented). With an understanding that mitigation applies and may be non-waivable, particularly with respect to claims of consequential damages, an attempt by Buyer to avoid mitigation might be seen as a lack of good faith. Nevertheless, reselling the goods that are produced in violation of a human rights policy may be understood as increasing Buyer's damages, rather than reducing them. Accordingly, Buyer should be entitled to discard, destroy, or donate to a charity any goods produced in violation of a human rights policy as an attempt toward mitigation, rather than against it.

of whether claimants are contractual counterparties, investors, or any other person, entity, or governmental unit whatsoever.

5.7 *Disclaimer Clauses.* Notwithstanding anything contained herein:

- a. Buyer does not assume a duty to monitor Supplier or its Representatives, including, without limitation, for compliance with laws or standards regarding working conditions, pay, hours, discrimination, forced labor, child labor, or the like;⁴⁶
- b. Buyer does not assume a duty to monitor or inspect the safety of any workplace of Supplier or its Representatives nor to monitor any labor practices of Supplier or its Representatives;⁴⁷
- c. Buyer does not have the authority and disclaims any obligation to control (i) the manner and method of work done by Supplier or its Representatives, (ii) implementation of safety measures by Supplier or its Representatives, or (iii) employment or engagement of employees and contractors or subcontractors by Supplier or its Representatives;⁴⁸
- d. There are no third-party beneficiaries to this Agreement; and
- e. Buyer assumes no duty to disclose the results of any audit, questionnaire, or information gained pursuant to this Agreement other than as required by applicable law.⁴⁹

46. This disclaimer conflicts with the requirements of the FAR, 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018) (requiring contractor certification (within threshold limits) that it will “monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities”).

47. Again, note the conflict with the FAR. See 48 C.F.R. §§ 52.222–56, 22.1703(c) (2018).

48. Note *supra* section 5.3.c. This disclaimer is included to help negate claims of undertaking liability or liability under the peculiar risk doctrine. See *Rahaman v. J.C. Penney Corp.*, No. N15C-07-174MMJ, 2016 WL 2616375, at *9 (Del. Super. Ct. May 4, 2016). This disclaimer could conflict with the section noted above, however, and counsel should consider whether it is better to have the power to require that its suppliers fire employees or other representatives or whether the disclaimer as to this factor (which relates to whether a supplier is an independent contractor) is more important. See also *supra* section 5.3.b.

49. This provision emphasizes that Buyer is assuming no contractual duties to disclose although Buyer may have duties to disclose under other standards (legal or non-legal). For example, Buyer must determine if it provided false or misleading information to Customs and Border Protection and other officials in the event that goods are initially accepted and removed from the dock but are later determined to be tainted by forced labor. If the original information is false, a duty to amend may arise. See, e.g., 18 U.S.C. § 541 (2018); 19 C.F.R. § 12.42(b) (2018). As another example, under the FAR, contractors and subcontractors must disclose to the government contracting officer and agency inspector general “information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct.” 48 C.F.R. § 22.1703(d).