

# SETTING HUMAN RIGHTS STANDARDS THROUGH INTERNATIONAL CONTRACTS

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Legal Briefings - By **Stephane Brabant**

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## INTRODUCTION

Good afternoon and thank you for the opportunity to speak today.

In 2016, corporations are facing ever-increasing pressure to ensure [human rights](#) are respected throughout their supply chains. And as global supply chains grow in length and complexity, the difficulties of doing so are significant.

One way businesses are responding to this pressure is by introducing provisions in their contracts requiring their commercial partners to respect human rights. The parties to such contracts are often spread across the globe - in states that differ in their legal traditions, their cultural traditions, and their socio-economic profiles.

The UN Convention on Contracts for the International Sale of Goods (**CISG**) was drafted with the following purpose in mind: to facilitate cross-border transactions through the unification and harmonization of laws across multiple and distinct legal jurisdictions.

The CISG was signed thirty-six years ago, and is a testament to the international community's efforts to create a uniform text of law for the international sale of goods. The CISG has managed to unite some 80 States across the globe to facilitate the international exchange of goods. One may note though that it concerns commercial matters between business entities only.

Reaching an international consensus on 'business and human rights' came much later than the CISG. 30 years after actually. A humbling fact for a business and human rights lawyer.

One could witness, over the past decades, the development of international and national soft law and hard law requiring businesses to respect human rights. A main starting point in 2000 and to start the 21st century was the creation by former UN Secretary General, Kofi Annan, of the Global Compact and its ten voluntary principles on human rights, labour, environment and corruption. The Global Compact, initiated a decade of continuous efforts by Kofi Annan, working alongside Professor John Ruggie appointed as Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, to raise business' awareness of the importance of respecting human rights. These efforts culminated in the United Nations Human Rights Council's endorsement in 2011 of the UN Guiding Principles on Business and Human Rights (also called Ruggie's Principles) that requires, in particular, that States protect human rights but also that business respect human rights. There is still a long way to go, but one can be confident that we are walking in the right direction.

In our global economies, with supply chains spread across the world, with varying levels of human rights protection between countries, we have also witnessed a race to the bottom. A race to the lowest production costs, which too often results in violating the human rights of workers, children, or local communities. In his extensive consultations over the course of six years between 2005 and 2011, Professor John Ruggie observed and reported on this race to the bottom. In this context, the necessity for the Guiding Principles became very clear.

In the electronics industry, textile, agribusiness, extractive industries, hydropower, there are indeed striking examples of human rights violations by companies or along their supply chains.

A salient example, in the textile industry, that most of you may think of, is the Rana Plaza tragedy in Bangladesh in 2013. The factory's collapse is the worst ever industrial accident to hit the garment industry. Many global brands were implicated in the disaster, and the human costs of cheap fashion were brought into stark reality.

This example is useful to place the issues we're discussing today in context. It also underlines the legal, financial and reputational risks a company faces when it disregards internationally recognised human rights standards - or laws in its home country - in favour of lower standards in countries where local legislation is weak or not enforced.

Some are talking about creating an internationally binding instrument to have businesses respect human rights in their activities worldwide. This debate has been around for some time and will go on. But in the meantime, lawyers need to become familiar with how to incorporate human rights standards in commercial contracts and deal with the legal issues that arise because clients will demand this. These demands are growing as corporations implement the Guiding Principles - and more specifically, the responsibility to respect human rights - in their operations.

John Ruggie - with his colleague John Sherman, the General Counsel and Senior Advisor at Shift - has recently written about this in the context of FIFA's decision to make the UNGPs compulsory for its contractual partners and supply chain. They argue that this is clear evidence that the Guiding Principles are adding significant human rights punch to the private law of contracts.

This raises the following questions: what role could the CISG play in these scenarios? Could it be used as a vehicle to integrate human rights, as immaterial (or social) standards, into international commercial transactions? Does this need to occur explicitly - as a term of the contract - or is implicit acknowledgement of a company's corporate responsibility standards and commitments enough? These are some of the issues I'm keen to explore with you today.

## **THE UNGPS, HUMAN RIGHTS STANDARDS AND HUMAN RIGHTS CLAUSES**

But first, it is critical to understand better a few key points from the perspective of international human rights law.

International human rights law has its origins in the Universal Declaration of Human Rights and has evolved into a significant body of international law. But there's an important gap - it requires states to ensure human rights are respected and protected, but did not set similar requirements for companies except a mention to organs of Society.

The United Nations and other international efforts have attempted to grapple with this problem by creating non-binding, soft-law standards or rules of law such as the OECD Guidelines, the UN Global Compact and the UN Guiding Principles on Business and Human Rights.

Following their unanimous endorsement by the UN Human Rights Council in 2011 - and broad support by business, States and the NGO sector - the Guiding Principles have initiated a momentum for business and human rights and benefited from a significant uptake in the business world.

Businesses have a responsibility to respect human rights. This responsibility is set as one of the three main pillars of the Guiding Principles. This means that businesses must avoid causing or contributing to adverse impacts on human rights. It also means businesses have to prevent or mitigate adverse impacts on human rights that are directly linked to their operations, products or services through their business relationships.

The Guiding Principles recognise that business has the capacity to impact *all* human rights and that violations can take many forms. From forced labour, child labour, displaced communities, to pollution affecting living conditions; from human rights violations along the supply chain, to violations in distribution chains, all across the world, businesses can adversely impact human rights. Sometimes they are aware of these impacts. Other times they might not be aware of them, when they take place in remote parts of their supply chain.

The Guiding Principles may be soft law but increasingly there are hard sanctions for businesses which fail to respect human rights. Sanctions may include civil litigation or criminal prosecution. Equally importantly, there can be heavy reputational sanctions, international organisations and banks may withdraw financing, shareholders may take action; or human rights crises may disrupt business operations. Increasingly, companies are facing more and more 'new judges' and experiencing sanctions and censure in the courts of public opinion – that is, from the communities they operate in. This is only likely to increase given social media and the 24 hour news cycle.

To fulfil the responsibility to respect human rights, the Guiding Principles set a number of actions. Businesses need to conduct human rights due diligence of their activities on an ongoing basis. They also need to conduct due diligence of suppliers prior to entering into a contract with them and on an ongoing basis. It should be emphasised that human rights due diligence is different to standard corporate due diligence. It includes not only asking questions about risks to the company, but also requires the company to consider the risk that its activities will have an adverse impact on the human rights of employees, community members and other third parties.

As I've mentioned, an increasingly common practice to integrate human rights as a standard in commercial transactions is to include clauses in contracts. The introduction of human rights reporting requirements in many jurisdictions have been an essential driver for the inclusion of human rights clauses in contracts.

Standards that refer to human rights, or social or environmental obligations, could be called 'immaterial' or social standards. I view 'immaterial standards' as those that don't relate to the physical characteristics of the goods. An example is if the contract specifies that the supplier must not use child labour. A breach of this clause won't affect the physical appearance of the product, but it may of course affect consumers' perceptions and therefore the value of the product.

This brings us back to the CISG, which governs the formation of international contracts and the substantive rights and obligations of sellers and buyers. Considering the critical importance of the Guiding Principles for business to respect human rights all along their activities and supply chain, it is now time to consider whether some human rights provisions should be integrated into the CISG. I'll talk more about this in a moment, but first I want to consider a range of practical and legal problems in relation to human rights clauses themselves.

## **PRACTICAL AND LEGAL PROBLEMS ARISING WITH THESE CLAUSES**

Human-rights related clauses can set out the expectations of both parties regarding the formation and performance of the contract, and allow them to better control their risks and to allocate responsibilities in the event of adverse human rights impacts.

Sometimes these clauses are not solely about human rights, but are included in a larger package labelled as 'immaterial standards' or 'corporate social responsibility clauses'. They pose a number of challenges to businesses and lawyers in view of their substance, their form and their effect.

Such challenges include the wording and content of these clauses that are sometimes imprecise, their enforcement and monitoring. In particular, if suppliers have no prior human rights policies in place, and no capacity to address human rights issues, would a human rights clause be sufficient to secure compliance with human rights? Should this clause also apply when a company's supplier is using sub-contractors? Further, can human rights conditions in a contract create any unintended risks or a duty of care for the parties? Eventually, what are the consequences if the clause is breached? Is the termination of a contract the best way to incentivise good performance?

As you can see, there are many questions. However, because business and human rights is a relatively new field, there are few clear answers. Which leads us to wonder whether it's now time to consider integrating human rights directly into the CISG.

## **IMMATERIAL/ SOCIAL STANDARDS AND THE CISG**

So where do we go from here and what opportunities does the CISG offer to incorporate human rights considerations in contracts in a harmonised way?

I need to mention the elephant in the room at this point. The CISG explicitly excludes legal issues pertaining to the validity of contracts. This means considerations of duress, fraud and unconscionability (among others) fall outside the CISG framework.

Many everyday contract problems are issues of validity. These issues are likely to be particularly relevant to international commercial transactions with dispersed global supply chains, involving parties with different levels of influence and bargaining power, scattered around developed and developing regions of the world. Moreover, these issues often arise in connection with human rights abuses in the supply chain.

But despite the omission of validity, some argue that the CISG as it stands has scope to protect human rights that could be at risk in the sale of international goods. Two provisions are worth noting:

Article 7(2) of the CISG provides that 'questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based'. As a matter of treaty interpretation, these 'general principles' may be interpreted with reference to international human rights law and the Charter of the United Nations. This offers a potential opportunity to safeguard human rights in the international sale of goods.

Likewise, Article 35, the fit-for-purpose/conformity provision, arguably provides some protection for human rights. Where human rights conditions have been *expressly* made known to the other party, their violation may mean that the goods supplied under the contract are not fit for purpose, are not delivered in conformity with the conditions stated in the contract.

We can also turn to the UNIDROIT Principles of International Commercial Contracts and the Hague Principles on Choice of Law in International Commercial Contracts which can help address the gaps in the CISG, especially with regards to validity.

These are some possible leads that UNCITRAL, as CISG experts, may have already been reflecting on. These leads could pave the way to further cooperation between UNCITRAL, businesses, and human rights lawyers.

As we have seen earlier, human rights clauses alone may not be sufficient to ensure human rights are respected in commercial transactions. But investigating how the CISG could be used to reinforce human rights compliance and offering guidance to parties to integrate human rights compliance into their transactions would be a positive step forward.

Given the number of international sales of goods governed by the CISG across supply chains and the number of goods produced in countries with insufficient human rights protections, if the CISG were to offer human rights protection, the CISG could be a powerful tool for better compliance with human rights across supply chains worldwide. The CISG could also allow them to fulfil their responsibility under the Guiding Principles to respect human rights and to minimise the risks of a situation like the Rana Plaza happening again.

The CISG could then be used in conjunction with the growing ecosystem of supra-national and national law that directly and indirectly seeks to safeguard human rights in supply chains, as the conflict mineral regulations in the US and in Europe, and the due diligence of supply chains to prevent forced labour under the Modern Slavery Act in the UK.

## **CONCLUSION: CISG AND B&HR EXPERTS WORKING TOGETHER**

I cannot help but be optimistic. Business' obligation to respect human rights in their supply chains is no longer an option. Yes, many corporations still have a long way to travel: to develop a human rights policy, to establish ongoing due diligence processes, to fulfil their reporting obligations, to insert explicit human rights clauses in their commercial contracts, and to provide remedies when human rights violations occur. But even the fact we are having this conversation today is testament to how far we have travelled in the past 10 years. It is not enough for companies to publish statements in favour of human rights or to prepare a human rights policy. The same companies also need to make sure they know their supply chains and that any adverse impacts on human rights are reported and remediated.

A few decades, or even a few years ago, some multinationals did not feel concerned by human rights, and did not want to hear about respecting human rights. Since the Global Compact and the endorsement of the UNGPs, some of the very same companies have become model citizens when it comes to integrating human rights considerations into their activities. They have internal human rights policies, they conduct due diligence in their supply chains, they are making important efforts to ensure working conditions are respectful of human rights. In the same way advances in information technology have completely transformed business operations and compelled multinationals to adapt, so too human rights considerations should transform how business is carried out around the world. Some multinationals have already changed their mind-sets to increasingly integrate respect for human rights into their activities and along their supply chains, but an enormous amount remains to be done by business worldwide.

The cooperation with the UNCITRAL and the UN Working Group on Business and Human Rights has already started. This cooperation can pave the way to further integration of immaterial or social standards, particularly on human rights, into contracts for the international sale of goods. Setting human rights standards through international contracts can have an incredible normative power. Most importantly, the outcomes will be seen throughout the supply chain and on the factory floor.

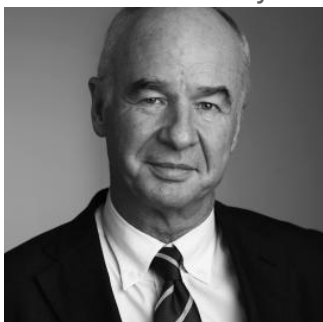
In conclusion, there is no denial that business can make profits. However, the impetus is also now stronger than ever for business to respect the human rights of *all* stakeholders. These stakeholders range from those who are directly or even indirectly involved in the production of goods to those who use such goods.

Thank you.

\*Partner at Herbert Smith Freehills (**HSF**); Co-Head of the HSF Business and Human Rights Practice Group; former Co-Chair of the IBA CSR Committee. I would like to thank Antony Crockett, Alex Newton, Donald Robertson and Elsa Savourey for their valuable comments and contributions on earlier versions of this speech.

## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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