

PROSOCIAL CONTRACTS: MAKING RELATIONAL CONTRACTS MORE RELATIONAL

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I.

INTRODUCTION

When the COVID-19 pandemic began to choke the global economy in 2020, many fashion brands suspended or canceled their garment orders, including those partially manufactured, completely manufactured, and even shipped.¹ When orders were not canceled outright, suppliers were forced to contend with major payment delays and demands from buyers for deal-eviscerating discounts.² This

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1. See *COVID-19 and Garment Workers*, WORKER RTS. CONSORTIUM (2021), <https://www.workersrights.org/issues/covid-19/> [<https://perma.cc/T95L-C3GQ>] (listing various reports); see also Mark Anner, *Viewpoint: How Major Apparel Brands Responded to the Covid-19 Pandemic*, in FASHION TRANSPARENCY INDEX 81 (2021) (stating that many brands “initially cancelled their orders without paying, causing enormous harm for suppliers and their workers in early 2020”); Annie Kelly, *Garment Workers Going Hungry as Fallout from Cancelled Orders Takes Toll – Report*, GUARDIAN (Dec. 3, 2020), <https://www.theguardian.com/global-development/2020/dec/03/garment-workers-going-hungry-as-fallout-from-cancelled-orders-takes-toll-report> [<https://perma.cc/PU98-YWE3>] (“Fashion brands cancelled an estimated \$15bn of orders when the global lockdown closed retail outlets . . . [m]any of these orders had already been completed but brands refused to accept shipment, leaving suppliers stranded with millions of pounds of unsold stock.”); Mei-Ling McNamara, *World’s Garment Workers Face Ruin as Fashion Brands Refuse to Pay \$16bn*, GUARDIAN (Oct. 8, 2020), <https://www.theguardian.com/global-development/2020/oct/08/worlds-garment-workers-face-ruin-as-fashion-brands-refuse-to-pay-16bn> [<https://perma.cc/R8M6-DAED>] (“In Bangladesh, more than a million garment workers have been fired or furloughed as a result of cancelled orders and buyers’ refusal to pay . . .”). For a discussion of how buyers have used contract provisions to cancel orders during the COVID-19 pandemic, see generally WORKER RTS. CONSORTIUM, *FARCE MAJEURE: HOW GLOBAL APPAREL BRANDS ARE USING THE COVID-19 PANDEMIC TO STIFF SUPPLIERS AND ABANDON WORKERS* (2020) [hereinafter *FARCE MAJEURE*] (discussing fashion brands’ possibly unlawful use of force majeure clauses to cancel contracts at the onset of the COVID-19 pandemic).

2. *Major Apparel Brands Delay & Cancel Orders in Response to Pandemic, Risking Livelihoods of Millions of Garment Workers in their Supply Chains*, BUSINESS AND HUMAN RIGHTS RESOURCE CENTER (Mar. 24, 2020), <https://www.business-humanrights.org/en/latest-news/major-apparel-brands-delay-cancel-orders-in-response-to-pandemic-risking-livelihoods-of-millions-of-garment-workers-in-their-supply-chains/> [<https://perma.cc/R6Q3-TUCF>]; RE:STRUCTURE LAB, *FORCED LAB. EVIDENCE BRIEF, COMMERCIAL CONTRACTS AND SOURCING 14* (2021) (“[C]orporate sourcing practices, including order cancellations, invocation of Force Majeure clauses, refusal to pay for orders already produced, and demands for discounted prices on existing and new orders, unleashed a domino effect in supply chains, leading to widespread factory closures and bankruptcy, mass worker layoffs, and a

made it all but impossible for suppliers to cover their costs, including labor costs. As a result, many apparel manufacturers shuttered, throwing millions of garment workers into unemployment, deeper poverty and food insecurity, and more dangerous exposure to the virus.³ Buyers whose contracts contained a *force majeure* clause invoked them to cancel their orders, regardless of whether the clauses contemplated pandemics as a *force majeure* event.⁴ However, even without such clauses, many buyers simply exited their contracts.⁵ They did not do this because they were allowed to contractually, but because buyer-firms, particularly big fashion brands, operate in a social context that stacks the commercial deck in their favor. The apparel sector is marked by particularly stark power disparities between the firms that make the stuff and the firms that buy the stuff. The latter can generally (mis)behave as they wish, with only passing concern for the economic and social repercussions of their actions.

In this anything-goes context, buyer-firms often engage in what I refer to as “extractive contracting” with their suppliers. With extractive contracting, the more powerful party—usually the buyer—prepares and performs the contract so as to extract the maximum possible commercial value from the deal, regardless of any negative social impacts. From a social cost of contract perspective, the problem with extractive contracts is that they place severe economic strain on suppliers and, by extension, on workers’ human rights, health, and safety.⁶ Until now, this has not posed a serious problem for firms, but, as formal and informal policing of corporate social performance intensifies across the globe, extractive contracts may also become a problem from a compliance perspective.

deterioration of working and living conditions, including increased exposure to forced labour.”) (emphasis omitted).

3. FARCE MAJEURE, *supra* note 1, at 1–2 (stating that, in Bangladesh alone, an estimated six billion U.S. dollars’ worth of orders has been suspended or canceled since the pandemic began, leading to mass unemployment – 1 million in Bangladesh – and pushing many manufacturers into or near bankruptcy); WORKER RTS. CONSORTIUM, FIRED, THEN ROBBED: FASHION BRANDS’ COMPLICITY IN WAGE THEFT DURING COVID-19 12 (2021) (“WRC has confirmed severance theft during the last 12 months at 31 garment factories in nine countries . . . [i]n the aggregate, these factories deprived 37,637 workers of an estimated \$39.8 million in legally due compensation.”); WORKER RTS. CONSORTIUM, HUNGER IN THE APPAREL SUPPLY CHAIN: SURVEY FINDINGS ON WORKERS’ ACCESS TO NUTRITION DURING COVID-19 2 (2020) (reporting that 88% of surveyed garment workers suffered from reduced food consumption as a result of diminished income during the pandemic, with 34% experiencing hunger at least once per week and 20% experiencing hunger every day); MARK ANNER, PENN STATE CTR. FOR GLOB. WORKERS’ RTS., LEVERAGING DESPERATION: APPAREL BRANDS’ PURCHASING PRACTICES DURING COVID-19 6 (2020) (reporting that 57% of garment businesses are either “somewhat likely” or “extremely likely” to go out of business because of buyer practices).

4. Elizabeth L. Cline, *Cancelling Fashion Orders: The Legal Rethink*, VOGUE BUS. (Apr. 26, 2021), <https://www.voguebusiness.com/fashion/cancelling-fashion-orders-the-legal-rethink-sears-pay-up> [<https://perma.cc/XR97-T9CW>] (stating that Joseph Saracheck, a lawyer whose firm represents suppliers, says that most of the apparel supply contracts he sees do not contain *force majeure* clauses).

5. *Id.*

6. David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 986–91 (2021). Note that the authors discuss the “social cost” of enforcing contracts in changed contexts, such as the pandemic; here, social cost refers to negative social impacts *generated by the contract itself*—even without enforcement and under non-crisis conditions. Also, rather than focusing on costs for the public at large, this Article focuses on a specific segment of the social-cost-of-contract-bearing public—workers.

The pandemic highlighted that extractive contracting is especially problematic in times of crisis. Faced with widespread cancellations and unilaterally modified payment terms that put their economic survival in jeopardy, suppliers tried different, mostly informal, tactics to preserve their contracts with buyers. They pleaded with buyers not to suspend or cancel orders and to pay for completed orders.⁷ Some suppliers even turned to U.S. courts for help: twenty-six Bangladeshi garment manufacturers sued the U.S. company Sears for breach of contract, alleging failure to pay for millions of dollars' worth of canceled orders.⁸ The details are confidential, but the suit yielded a settlement awarding suppliers a portion of the money owed, indicating that they had the better legal argument.⁹ Such offensive action by suppliers is extraordinarily rare in the apparel context where there is hesitancy to go after non-performing buyers for fear of being perceived as troublemakers and losing future contracts to competitors. Besides reputational barriers, recourse through litigation may also be inaccessible to suppliers due to cost, lack of legal capacity, and other logistical and jurisdictional hurdles. For these reasons, the likelihood of suppliers enforcing supply contracts is generally close to nil. The Sears lawsuit was therefore more indicative of suppliers' desperation than their litigiousness or legal prowess.¹⁰

How contracting parties behave with one another when prospects for legal enforcement are dim brings relational contract theory into play.¹¹ Had a relational contract theorist been asked to predict how brands would behave in the context of an event like the pandemic, they likely would have correctly predicted that brands would immediately cut and run and abandon their suppliers. That is because, in the layman's version of relational contract theory, the real deal in apparel supply chain contracting is that buyers can do whatever they want. Furthermore, because the real deal is bad, the paper deal is bad, too.¹²

7. Textile Excellence, *BGMEA Pleads with Western Buyers to Not Cancel Orders*, YOUTUBE (Mar. 26, 2020), <https://www.youtube.com/watch?v=oGbx-t1Y0ts> [<https://perma.cc/V8GA-FFW4>]; see also Brooke Bobb, *This Hashtag Unlocked \$15 Billion of Lost Wages Due to Cancelled Orders from Gap, Levi's, and Other Brands*, VOGUE (July 10, 2020), <https://www.vogue.com/article/remake-payup-campaign-social-media-garment-workers-wages-gap> [<https://perma.cc/P8P8-ULM5>] (discussing the Pay Up campaign).

8. Elizabeth L. Cline, *Bangladesh Garment Makers Settle with Sears Over \$40 Million in Canceled Orders*, FORBES (Jan. 30, 2021), <https://www.forbes.com/sites/elizabethcline/2021/01/30/bangladesh-garment-makers-score-victory-against-sears-in-40-million-lawsuit/?sh=7fe3b0e2470d> [<https://perma.cc/U6AD-JNDD>].

9. *Id.*; see also Chris Remington, *Sears Reaches US\$6.3m Settlement in Bangladesh*, ECOTEXTILE NEWS (Feb. 1, 2021), <https://www.ecotextile.com/2021020127306/fashion-retail-news/sears-reaches-us-6-3m-settlement-in-bangladesh.html> [<https://perma.cc/4Y64-XQK8>].

10. Reputational risks may have been somewhat lower in this case because Sears had filed for bankruptcy.

11. The term "relational contracts" usually describes long-term, complex contractual exchanges with repeated opportunities for performance, as distinct from discrete, one-off exchanges. It is also used for contracts that are incomplete, meaning that there are aspects of the deal that are (often intentionally) not spelled out in the writing. The parties effectively agree to address and fill in these gaps as they go. As such, relational contracts are self-policing and may not require legal enforcement for the parties to adjust their behavior.

12. Stewart Macaulay, *The Real Deal and the Paper Deal: Empirical Pictures of Relationships*,

Indeed, supply contracts tend not only to contain terms that are oppressively one-sided and buyer-friendly, but they also tend to be *used* opportunistically by buyers to justify unfair, selfish, and socially dangerous behavior.¹³

The question becomes, how do we improve the deal to achieve better outcomes for workers? And what role can, and should, the written deal play in supporting such improvement? In addressing these normatively, politically, and morally charged questions, this Article goes beyond relational contract theory. It offers prosocial contracts as a partial solution to the problem of protecting human rights in global supply chains. With prosocial contracting, the parties shift from an extractive model of engagement to one that is more intentionally relational and socially beneficial. Here, relational refers to the quality of the buyer-supplier contractual relationship,¹⁴ but also to how that relationship impacts stakeholders who are *not* contract parties.¹⁵ Otherwise put, prosocial contracting is concerned with improving the relationship between the parties, but also the relationship(s) between the parties and contract stakeholders. Contract stakeholders are those whose wellbeing is, in Iris Marion Young's terminology, "socially connected" to the contract.¹⁶ To achieve these relational objectives, prosocial contracting operationalizes a shared-responsibility model whereby buyer and seller share responsibility for the social performance of their contract. Indeed, a key takeaway from this Article is that, to do any real good, both for human rights and for social compliance, corporate social responsibility ("CSR") must be reconceived as *shared* social responsibility.

The prosocial approach builds on the insights of Lisa Bernstein, who explains that no contractual relationship stands alone and no single contract tells the whole relational story. Rather, contracts contain and are imbedded within networks of contractual and extra-contractual relationships that inform, shape, and often regulate and govern one another.¹⁷ As such, contracts possess relational

Complexity and the Urge for Transparent Simple Rules, 66 MOD. L. REV. 44, 44 (2003).

13. See, e.g., FARCE MAJEURE, *supra* note 1 (explaining the negative social impacts of oppressive contracting practices before and during the pandemic); John F. Sherman III, *Irresponsible Exit: Exercising Force Majeure Provisions in Procurement Contracts*, 6 BUS. & HUM. RTS. J. 127, 128–29 (2020) (explaining that the company Kohl's canceled its contracts and a week later paid its shareholders a \$109 million dividend).

14. Is it, for example, respectful, honest, cooperative, fair, trusting, enduring? These qualities echo the "six principles" of "formal relational contracting" developed by David Frydlinger, Oliver Hart, and Kate Vitasek in *A New Approach to Contracts*, HARV. BUS. REV., Sept.–Oct. 2019. The key difference between formal relational contracting and prosocial contracting is that the latter extends relational principles to extra-contractual relationships with non-party stakeholders.

15. The UNGPs define "affected stakeholder" as "an individual whose human rights have been affected by enterprise's operations, products or services." U.N. GLOB. COMPACT NETWORK GER. & TWENTYFIFTY, STAKEHOLDER ENGAGEMENT IN HUMAN RIGHTS DUE DILIGENCE: A BUSINESS GUIDE 12 (2014).

16. Iris Marion Young, *Responsibility and Global Justice: A Social Connection Model*, 23 SOC. PHIL. & POL'Y 102, 105 (2006).

17. See generally Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561 (2015) (describing the contractual and extra-contractual governance mechanisms operating among mid-western original equipment manufacturers); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation*

powers that can extend beyond the parties to reach, for example, workers and their communities. They do more than simply set out the terms of a single deal or transaction. They contain, express, and enshrine relational values. They can, therefore, be upgraded to contain better, fairer, more prosocial relational values.

This Article explains why companies should seriously consider upgrading to prosocial contracts now, not only because it is the right thing to do, but also because the legal, business, and reputational cases for doing so are becoming stronger by the day. Part II explains how contracts' regulatory and expressive powers can be harnessed to improve the social performance of international supply chains. Part III shows how extractive contracts not only aggravate human rights risks, but also undermine firms' own commitments to maintaining clean supply chains. Part IV analyzes how extractive contracting could soon become a source of increased legal risk for firms transacting internationally, particularly given recent human rights due diligence ("HRDD") legislation coming from Europe. This legislation, combined with the twin rise of Environmental, Social, and Governance ("ESG") investing and conscious consumerism worldwide, and the increased use by U.S. Customs and Border Protection ("CBP") of Withhold Release Orders ("WROs") to seize tainted goods at the U.S. border, signals a tidal shift in the case for transitioning to prosocial contracting. Lastly, Part V offers practical guidance for prosocial contracting using the Model Contract Clauses to Protect Human Rights in International Supply Chains ("MCCs") developed by an ABA Business Law Section Working Group.¹⁸

II

THE REGULATORY AND EXPRESSIVE POWERS OF CONTRACT

Contracts are potentially powerful instruments for effecting social change internationally.¹⁹ While national law is restricted in its ability to regulate corporate misconduct overseas, international law, which *does* cross borders, applies primarily to regulate the conduct of governments, not corporations. On the other hand, soft law instruments, such as the United Nations Guiding Principles on Business and Human Rights ("UNGPs") or the Organisation for Economic Co-Operation and Development Guidance on Responsible Business Conduct ("OECD Guidance"), which *do* apply to corporations, are not legally enforceable. Although HRDD legislation aims to bridge it, there continues to be a very large governance gap with respect to policing the social performance of

Through Rules, Norms, and Institutions, 99 MICH. L. REV. 1724 (2001) (describing the private legal system governing the cotton trade); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing the private legal system governing the diamond trade).

18. David V. Snyder, Susan Maslow & Sarah Dadush, *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, 77 BUS. L. 115 (forthcoming Winter 2021–2022).

19. The promise and limitations of using contracts to achieve better social outcomes is increasingly being explored in legal scholarship by authors such as Aditi Bagchi, Kevin Davis, Jonathan Lipson, Trang Nguyen, Kish Parella, John Sherman, David Snyder, and myself.

transnational corporations.

Against this backdrop, contracts offer a promising additional avenue for improving human rights in supply chains thanks to their hybrid nature. Contracts are a hybrid in that they operate at the intersection of soft and hard law. Although contractual commitments are voluntary at the outset, once made, they become legally binding and enforceable. Contracts can thus be understood—and deployed—as vessels for transporting voluntary but enforceable norms across borders. In this way, contracts can do what neither soft nor hard law does: directly regulate the conduct of private actors transacting internationally. In principle, then, contracts can address the multi-layered challenges of jurisdiction, scope, and enforceability in one fell swoop. This, in a nutshell, is contracts' regulatory superpower.

Contracts have expressive power, as well. They communicate and enshrine different social values and principles of engagement.²⁰ For example, a contract could express extractive values, or prosocial values, or some combination.²¹ Many types of contracts—including international supply contracts—operate on zero-sum principles of engagement: The more you get, the less I get, and, since more is better, I need to get as much as possible, and you need to get as little as possible; likewise, the more risks and obligations you take on, and the fewer I take on, the better. Zero-sum contracting instructs the parties to treat one another as adversaries, engaged in competition rather than a common endeavor. It keeps the parties singularly focused on their own interests and limits their incentives to consider—and perhaps even their ability to comprehend—the impacts of their decisions on contract stakeholders. This discourages cooperation, trust, and transparency between the parties, and instead encourages secrecy and deception. For example, as explained in *Contracting for Human Rights*, a garment supplier concerned with keeping the contract might conceal that it is having difficulty meeting the production timeline or that, to meet buyer's requirements, it subcontracted to another factory with lower human rights standards.²² Otherwise put, when there is a culture of distrust-cum-fear between the parties, zero-sum contracts can aggravate human rights risks by pushing bad practices deeper into

20. Jonathan C. Lipson, *Promising Justice: Contract (As) Social Responsibility*, 2019 WIS. L. REV. 1109, 1151–52 (2019) (explaining that although “[t]he literature on [legal] expressivism is largely foreign to the world of contract,” contracts may in fact create “more absolute expression than any other type of legal instrument”).

21. See generally HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017) (explaining that the parties can *choose* what values to enshrine and promote in their contract). See also Lynn Stout, *Picking Prosocial Partners: The Story of Relational Contract*, in *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* 194 (2010) (explaining that law can “serve an expressive function and change human behavior simply by sending authoritative messages about what sorts of values and behaviors are appropriate.”); Erin Ann O’Hara, *Trustworthiness and Contract*, in *MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY* 186 (Paul J. Zak ed., 2008) (“Contract law serves a type of expressive function by communicating to tradesmen that certain standards of decency will be required of their conduct.”).

22. Sarah Dadush, *Contracting for Human Rights: Looking to Version 2.0 of the ABA Model Contract Clauses*, 68 AM. U. L. REV. 1519, 1534–46 (2019).

the supply chain shadows.

Zero-sum contracting is not only common in commercial spheres, but also it is how transactional lawyers are taught to represent their clients' interests. Indeed, it is a measure of a lawyer's skill to negotiate grossly lopsided deals, so long as the lopsidedness favors their client. Although zero-sum contracts are not problematic *per se*, they can become extractive if there are serious power disparities between the parties that the stronger party unfairly exploits without sufficient consideration for the social implications. In such circumstances—common in apparel supply chains—zero-sum contracts can quickly go from being commercially sensible and advantageous to being extractive, irresponsible, and socially dangerous.

On the other hand, contracts that express prosocial values, such as mutual respect, cooperation, shared responsibility, reciprocity, trust, and loyalty can promote healthier, fairer dynamics between the parties. And, because prosocial contracting loosens the shackles of adversarial and defensive self-interest, it creates openings for the parties to consider *both* the economic and the social aspects of their deal. This, in turn, brings contract stakeholder interests into view and encourages the parties to consider the social—as well as commercial—impacts of their decisions.

1. Prosocial Distinctions

As a point of clarification, prosociality should not be confused with altruism. Prosocial psychology expert, Hans Bierhoff, explains that “prosocial behavior is often based on a mixture of more selfish (egoistic) and more selfless (altruistic) motivations.”²³ Thus, “prosocial responses need not be without personal gain.”²⁴ In other words, firms need not give up financial gain—or become charitable, non-profit organizations—to engage in prosocial contracting. They can do both. Firms could, as some say in the corporate governance context, adopt a “blended value”²⁵ or a triple bottom-line (profit, people, and planet) approach to contracting. Recognizing that contracts can generate commercial, social, and environmental value—or costs—firms could enlist their contracts as allies to increase each type of value. Proceeding this way, firms could increase their financial and their social or environmental returns, while simultaneously reducing their legal and reputational risk.

Indeed, when it comes to managing human rights risks, extractive contracts are simply not fit for purpose. Rather than reduce human rights risks, extractive contracts tend to exacerbate them. On the other hand, contracts that express and operationalize prosocial values and establish processes for collaboration and risk-sharing can do much more to manage-by-reducing human rights risks. Thus, one

23. Hans W. Bierhoff, *Prosocial Behavior*, in INTRODUCTION TO SOCIAL PSYCHOLOGY: A EUROPEAN PERSPECTIVE 179 (Miles Hewstone et al. eds., 4th ed. 2007).

24. *Id.* at 180.

25. See generally Jed Emerson, *The Blended Value Proposition: Integrating Social and Financial Returns*, 45 CAL. MGMT. REV. 35 (2003) (explaining the blended value proposition).

should not assume that prosocial contracting has only soft, or moral benefits; it also has commercial and legal benefits.

Prosocial contracts are a good example of what Jonathan Lipson calls “the use of contract to achieve social responsibility,” or “KSR.”²⁶ However, a key distinction is that prosocial contracts add a *shared-responsibility* requirement to the KSR analysis. As explained further below, unilateral approaches to responsibility whereby only the party who can directly inflict human harm bears responsibility for avoiding and remedying that harm are not only inadequate, but also dangerous. In the supply contract context, *both* parties, buyer and seller, must share responsibility for the social performance of their deal. The prosocial model would therefore reject KSR initiatives that create social obligations applicable only to one party.

Shared responsibility is a core principle of prosocial contracting, which is deeply inspired by the work of the late political philosopher, Iris Marion Young. Young persuasively argued that a crucial defect of the traditional “liability model” of responsibility is that it exonerates actors who do not directly cause human harm, even when they actively participate in the processes that create injustice:

where there is structural social injustice, a liability model is not sufficient for assigning responsibility. The liability model relies on a fairly direct interaction between the wrongdoer and the wronged party. Where structural social processes constrain and enable many actors in complex relations, however, those with the greatest power in the system, or those who derive benefits from its operations, may well be removed from any interaction with those who are most harmed in it. While it is usually inappropriate to *blame* those agents who are connected to but removed from the harm, it is also inappropriate, I suggest, to allow them (us) to say that they (we) have nothing to do with it. Thus, I suggest that we need a different conception of responsibility to refer to the obligations that agents who participate in structural social processes with unjust outcomes have. I call this a social connection model.²⁷

For Young, responsibility for (in)justice is always, necessarily shared. With international supply chains and manufacturing processes being as complex as they are, it is neither realistic, nor fair, nor effective to single out one bad actor for responsibility. From producers, to retailers, to consumers, to investors, to everyone and every entity in between, our decisions and actions are threads woven into a vast responsibility tapestry. Dissatisfaction with the liability model is also reflected in the UNGPs, which, as discussed below, say that *all* businesses should avoid not only “causing,” but also “contributing” to adverse impacts. Prosocial contracts seek to operationalize the shared-responsibility principles enshrined in the social connection model and the UNGPs *contractually*.

As a last point of distinction, prosocial contracts also bear similarity to “Formal Relational Contracts” (“FRK”), a term coined by Kate Vitasek, David Frydinger, and Oliver Hart to designate contracts that are “[d]esigned from the outset to foster trust and collaboration” between the parties.²⁸ Their research

26. Lipson, *supra* note 20, at 1116–32. “K” is the widely used shorthand for “contract.”

27. *Id.* at 118.

28. Frydinger et al., *supra* note 14.

suggests that there are economic gains to be had from pursuing a “vested methodology” for contracting “that establishes a ‘what’s in it for we’ partnership mentality” wherein “the parties have a vested interest in each other’s success.”²⁹ They explain that FRKs are particularly appropriate for contracts that involve repeated opportunities for performance, such as supply contracts.

While prosocial contracts do seek to improve the buyer-supplier relationship, they go beyond FRKs in that they also seek to improve the contract’s social performance. In this sense, prosocial contracts are like FRKs-*plus* because they expand the relational lens to include non-party, contract stakeholder interests. Additionally, FRKs are not well-suited to address situations where there are stark power disparities between the parties—as is often true in apparel—or where the contract stakeholders are particularly vulnerable—as is often true for garment workers. By contrast, prosocial contracts expressly take such disparities and vulnerabilities into account in contractualizing social responsibility. Under the prosocial model, the parties would systematically consider the social impacts of their deal at each stage of their contractual relationship, including termination. And, if a human rights harm occurs, both parties would provide remedy to the adversely affected stakeholders in proportion to their contribution to the harm—something not at all contemplated by FRKs. Perhaps one way to conceptualize prosocial contracts is as a hybrid of KSR and FRKs. With this conceptual background set out, the next Part examines the various ways in which extractive contracting is problematic for human rights.

III

THE PROBLEM(S) OF EXTRACTIVE CONTRACTING FOR HUMAN RIGHTS

Commercial relationships in apparel supply chains are plagued with inequality, asymmetry, and disfunction. The pandemic underscored the unfairness that permeates buyer-supplier relationships and its effects on non-party stakeholders—garment workers and their communities. But extractive dynamics existed long before anyone had ever heard of COVID-19.

Apparel manufacturing is labor intensive but not particularly skills intensive. Consequently, the costs for buyers to switch suppliers are relatively low. Contract price becomes the main competitive advantage that one supplier has over another. The supplier that offers (or takes) the lowest price wins, even when that price is insufficient to cover the costs of production, including labor. This intense price-driven competition creates a race to the bottom for human rights. In relational contract terminology, the real deal is that buyers run the show, while suppliers are under such intense competitive pressure to get and keep the deal that their freedom of contract is shallow at best.

These extractive relational dynamics translate into the paper deal.³⁰ Apparel

29. *Id.*

30. I deliberately do not use “contracts of adhesion” or “unconscionable” because, although some supply contracts could be found to be illegally oppressive, the concern here is less with the legality of

supply contracts tend to be excessively one-sided and buyer-friendly. They are often negotiated, drafted, performed, and terminated in ways that are egregiously advantageous for buyers and disadvantageous for suppliers. Such lopsidedness is dangerous for garment workers because it is they who ultimately bear the social costs associated with commercial “squeezing.”³¹ This makes sense: suppliers pressed to produce as many garments as possible, as quickly as possible, for as little money as possible, are likely to pass that strain onto their workers. This certainly does not justify supplier-level abuses of workers’ human rights, but it does offer an explanation for those abuses that is often overlooked: buyers’ irresponsible purchasing practices.

Irresponsible purchasing practices that can negatively impact social performance include: imposing prices that cannot possibly cover production costs, let alone the costs of socially responsible production; requiring too-short turnaround times for manufacturing and delivery; poorly forecasting requirements and making last-minute changes to orders; making late payments; and, exiting the contract in a cut and run fashion, without giving the supplier adequate notice, paying for outstanding invoices, or taking measures to mitigate the social impacts of termination.³² Such practices intensify commercial pressures on suppliers, making it harder for them to meet buyers’ own human rights standards. Under such circumstances, suppliers become more likely to squeeze their workers by suppressing wages, requiring excessive or illegal overtime, cutting corners on safety and sanitation, or engaging in union busting.³³ Viewed in this light, the line between commercial abuse and human abuse becomes vanishingly thin.

Perhaps counterintuitively, another aspect of extraction involves the inclusion of social terms in supply contracts. Social terms are contract terms that pertain specifically to social performance—workers’ human rights, health, and safety. They expand the contractual lens to bring contract stakeholders into view. They are distinct from commercial terms, such as price, payment terms, delivery timelines, etc. They are also distinct from order-specific terms, such as quantity, material, design, etc. While commercial and order-specific terms inform the parties’ obligations to one another, social terms inform the parties’ obligations to others beyond the contract—people and planet. Social terms can be included in the contract either as contractual clauses or as codes of conduct or human rights policies incorporated by reference.

It is not uncommon for fashion brands to include social terms in their supply contracts since doing so is a relatively straightforward way to respond to public—

extractive terms and practices than their (un)fairness, and the implications of that unfairness for social performance.

31. RE:STRUCTURE LAB, *supra* note 2, at 14 (“Even where supply chains are ethically certified, cutthroat purchasing practices make it impossible for suppliers to meet relevant social standards.”); FARCE MAJEURE, *supra* note 1, at 2–3; Anner, *supra* note 1, at 81.

32. Anner, *supra* note 1, at 81; FARCE MAJEURE, *supra* note 1, at 1; ETHICAL TRADING INITIATIVE, ANNUAL IMPACT REPORT (2020).

33. FARCE MAJEURE, *supra* note 1, at 3.

especially consumer and investor—concerns about, for example, the use of sweatshops or forced or child labor in the supply chain.³⁴ Contractualizing social commitments allows brands to say that they are taking measures to maintain clean supply chains while reducing their exposure to reputational and legal risk, at least in theory. This is only in theory because not all social terms are created equal. Well-conceived social terms can certainly support the successful implementation of companies' risk management strategies. However, if the terms are designed primarily to protect the company—not human rights—they may undermine the risk management strategy, defeating the very purpose they set out to achieve. Otherwise put, social terms whose chief purpose is to mitigate companies' legal and reputational risk rather than human rights risks tend to increase risk all around—for workers, buyers, and suppliers.

To be effective, social terms must address the root causes of negative social performance, and, as noted, not all root causes lie with suppliers. Buyers' irresponsible purchasing practices are an important source of human rights trouble. Therefore, for social terms to do good risk-management work, it is essential for parties to share responsibility for the social performance of their contract. This is a very different tack from the one that buyers' lawyers—especially litigation-wary American lawyers—would typically take, which is to place all the legal risks associated with human rights onto suppliers' side of the contractual balance sheet.

Unless anchored in shared-responsibility principles, social terms that ostensibly serve to uphold human rights can turn out to be dangerously extractive. To understand this, consider that buyers generally offer very little, if any support to suppliers in meeting buyers' own human rights standards. Yet, meeting standards can increase suppliers' production costs and further compress profit margins, especially for suppliers with multiple buyers, each with different standards. Cost pressures in turn incentivize suppliers to engage in problematic behavior such as (mis)representing that they meet buyer's standards even when they do not, engaging in potentially dangerous sub-contracting to access cheaper labor, concealing human rights issues that arise, or cutting back on workplace safety expenditures. All of this aggravates human rights risks, and, by extension, company risk.

When social terms are included in contracts, they typically only bind suppliers—not buyers. This means that only supplier is contractually obligated to uphold human rights and only supplier can be in breach if rights are violated.³⁵ Such unilateralism is rooted in the common, but mistaken, assumption that because human harms occur at the manufacturer level, only supplier is

34. See generally FASHION REVOLUTION, FASHION TRANSPARENCY INDEX (2021), <https://www.fashionrevolution.org/about/transparency/> [<https://perma.cc/BYH5-FH5P>] (firms subject to the California Transparency in Supply Chains Act or to any of the various Modern Slavery Acts may also be inclined to contractualize social terms).

35. See generally Dadush, *supra* note 22 (discussing the dangers of ignoring the buyer piece of the human rights problem and imposing contractual liability only on suppliers).

blameworthy if something bad happens. It follows that only supplier needs to be regulated contractually. But, as explained, the notion that there are no bad buyers—just bad suppliers—is false. How buyers behave, particularly their purchasing practices, matters a great deal for the social performance of supply chains.³⁶ Thus, unilateral social terms are problematic because they miss a crucial piece of the human rights in supply chains problem—the buyer piece—in a way that tends to aggravate human rights risks.

When buyers engage in irresponsible practices, they can actively—if not intentionally—interfere with suppliers’ performance of the social terms, potentially pushing suppliers into a social breach of contract that puts workers’ human rights at risk.³⁷ When buyer interference is connected to a social breach in this way, buyers can fairly be described as having *contributed* to the breach—and to any resulting human harm—even if they did not directly ‘commit’ the breach. In such instances, buyer and supplier should be viewed as co-breaches and responsibility for remedying the breach should be fairly-apportioned between them.

Specifically, when a buyer contributes to a social breach through irresponsible purchasing practices, it should participate in providing remedy to victims in proportion to its contribution. This remedies-outcome differs substantially from the one generated by the conventional liability model where remedies would flow between the parties, not to the non-party victims of the social breach. Take the example of money damages: following a breach by supplier, either supplier would pay damages to buyer as compensation or, less likely, the damages owed by supplier would be reduced in proportion to buyer’s contribution to the breach.³⁸ Neither formula is suitable for addressing social breaches that result in human harms to workers. Social breaches that harm workers should be addressed by directing remedies to the victims—not the other party.

Allowing buyers to be compensated for harms suffered by workers is not only grossly extractive, but also it fails to make anyone properly whole. Buyers may have already received the economic benefit of the bargain by the time a social breach is discovered, so compensating them for the breach, on top of the value of the goods, would constitute a form of unjust enrichment. Meanwhile, traditional inter-party remedies would fail to make whole those harmed by the social breach—the workers. To avoid this injustice, when a social breach results in

36. See generally BETTER BUYING INST., BETTER BUYING: GUIDELINES FOR “BETTER” PURCHASING PRACTICES AMIDST THE CORONAVIRUS CRISIS AND RECOVERY (2020) (drawing lessons from the COVID-19 pandemic to suggest improvements to purchasing practices); FARCE MAJEURE, *supra* note 1; ANNER, *supra* note 3; ETHICAL TRADING INITIATIVE, *supra* note 32.

37. The term “social breach” refers to breaches that arise from non-performance of social terms. Like any breach, social breaches are breaches of the entire contract.

38. See Ariel Porat, *A Comparative Fault Defense in Contract Law*, 107 MICH. L. REV. 1397, 1399 (2009) (“Prevailing contract law would take a binary approach to such situations: either A or B would shoulder any losses due to nonperformance in their entirety. The choice between the two alternatives would hinge on the interpretation of the contract. Courts rarely opt for an intermediate solution that apportions damages between the parties.”).

human harms, both parties should provide remediation to the victims in proportion to their contribution to the breach. This is the remedies-outcome that prosocial contracts would seek to ensure.

In sum, even social terms can be extractive. Particularly in the intensely competitive context of apparel manufacturing where there are serious power disparities between buyers and suppliers, unilateral-responsibility models can generate precisely the types of negative social costs that social terms seek to avoid.³⁹ Without parallel obligations for *buyers* to uphold human rights, engage in responsible purchasing practices, and participate in human rights remediation if they contribute to a social breach, the contract can turn on itself and undermine its own social terms.⁴⁰

The phenomenon of companies committing to improving human rights but undermining their own efforts through their contracts perfectly illustrates the “coherence gap.”⁴¹ The coherence gap refers to the disconnect between firms’—public or institutional—commitments to improve their social (and environmental) performance and their legal and operational practices in relation to those commitments. As discussed, when firms behave poorly behind the closed doors of their contracts, they compromise their own ability to achieve positive social performance. Lack of coherence between what a company communicates about its values and social commitments to consumers, investors, and employees and how it actually lives those values in its private, legal and operational life presents several problems. It presents a social performance problem because when companies fail to align their practices with their social commitments, human rights can suffer. It presents an institutional effectiveness problem because it creates tension between the firm’s social policies and its legal and operational practices, compromising the integrity and success of the policy implementation process. Lastly, when a firm publicly commits to improving its social performance but fails to make the institutional changes necessary to meet those commitments, engaging instead in behavior that undercuts those

39. To be clear, advocating for shared responsibility is not the same as saying that there are no bad suppliers. On the contrary, the idea is to increase responsibility for socially costly behavior across the board.

40. This gives rise to fascinating contract law questions: When a contract is set up to fail by its own terms, can contract law help? More specifically, what can courts do when they find that a contract undermines the very purpose it set out to achieve? The short answer is, not much. The law should do more in situations involving social breaches, where the set-up-to-fail terms pertain not to economic matters, but to human rights. In *Other People’s Contracts*, Aditi Bagchi zooms in on this issue, explaining that there is “little attention given to the externalities *produced by joint action through contract*.” 32 *YALE J. REGUL.* 211, 240 (2015) (emphasis added). In such cases, she argues, it may make sense to use contract law as an externality-reducing vehicle. Specifically, she proposes that when a contract contains an ambiguous term, the court should favor the interpretation that “generates fewer negative externalities.” *Id.* at 242. I would go further and recommend that contracts with social terms be interpreted to contain an obligation for buyers not to interfere with suppliers’ social performance through irresponsible purchasing practices. In other words, contracts with—even unambiguous—social terms should be interpreted prosocially.

41. Olivia Windham Stewart & Sarah Dadush, *Sharing Responsibility for Human Rights in Contracts*, BLOOMBERG L., PROFESSIONAL PERSPECTIVES 2–3 (2021).

commitments, the coherence gap potentially presents a “greenwashing” or “fairwashing” problem by creating a false impression of the company’s goodness.⁴² Until now, the coherence gap has not presented a legal problem for firms. As the next Part discusses, however, that may be changing.

IV

THE PROBLEM OF EXTRACTIVE CONTRACTING FOR LEGAL COMPLIANCE

Extractive contracts formalize and widen the coherence gap, baking it into the DNA of supply chain relations. Companies that include social terms in their contracts can truthfully say they are taking measures to protect human rights in their supply chains, while continuing to engage in commercial practices that endanger human rights. Until now, such deficiencies have been relatively costless for buyer-firms, at least legally. But change is underway thanks to recent legislative developments coming from the European Union (“E.U.”).

On February 23, 2022, the European Commission published a Proposal for a Directive on Corporate Sustainability Due Diligence (“the Draft Directive” or “Directive”).⁴³ Although not yet finalized, the Draft Directive is an advanced version of text that will eventually become hard law, applying to all E.U. Member States. When it becomes law, the Directive will create an enforceable legal requirement for companies—E.U. and non-E.U.—of a certain size and revenue, to carry out human rights and environmental due diligence in their supply chains.⁴⁴ Since this Article focuses on human rights, it will only discuss the HRDD aspect of the legislation, not the environmental aspect.

To meet their HRDD obligations under the Directive, companies will be required to (1) integrate due diligence into their policies; (2) identify actual or potential adverse human rights impacts; (3) prevent and mitigate potential adverse impacts, and bring actual adverse impacts to an end and minimize their extent; (4) establish and maintain a complaints procedure; (5) monitor their due diligence strategy for effectiveness; and, (6) publicly communicate on due diligence.⁴⁵ These requirements effectively transpose the HRDD standards set out in the UNGPs and the OECD Guidance into hard law.

To fully grasp the potential for HRDD legislation to fundamentally shift the corporate liability landscape, one must understand that the UNGPs and the OECD Guidance serve as something akin to founding documents for the new

42. Although related to greenwashing (and fairwashing), the coherence gap is more inward-looking and focused on how the firm’s institutional practices can support—or undermine—its goodness claims. Additionally, while greenwashing is often associated with trickery and deception, the same is not necessarily true about the coherence gap. A coherence gap could exist without greenwashing, and vice-versa. A firm could be entirely sincere about wanting to achieve positive social outcomes and still suffer from a coherence gap if its contracts stymie progress.

43. *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022) [hereinafter *EU Directive*].

44. *Id.* art. 2, at 46.

45. *Id.* art. 4, at 53.

regime and, more specifically, that these instruments enshrine shared responsibility as a core principle for upholding human rights in supply chains. This Part finds that the extractive contracting practices described above would likely be viewed as non-compliant with the UNGPs and with the E.U. Directive.

Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs are a profoundly influential soft law instrument comprising thirty-one Guiding Principles (“GPs”) on business and human rights.⁴⁶ The UNGPs fall under three pillars: Pillar I addresses nation states’ “Duty to Protect” human rights; Pillar II addresses businesses’ “Responsibility to Respect” human rights; and Pillar III on “Access to Remedy” outlines nation states’ *and* businesses’ obligation to ensure that victims have access to remedy.⁴⁷ For present purposes, Pillar II is of greatest relevance because it details what businesses are and are not responsible for with respect to human rights.

Crucially, GP13 says that “*businesses are responsible, not just for harms they directly cause, but also for harms to which they contribute*”:⁴⁸

The responsibility to respect human rights requires that business enterprises . . . [a]void *causing or contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur⁴⁹

Since it is unlikely that a fashion brand would directly cause human rights harms—harms are more likely caused by suppliers or sub-suppliers—the contribution aspect is most significant because it is broad enough to encompass behavior such as irresponsible purchasing practices and extractive contracting. Indeed, the UN’s Interpretive Guide on The Corporate Responsibility to Protect Human Rights offers this example of how a business might contribute to adverse human rights impacts: “Changing product requirements for suppliers at the eleventh hour without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.”⁵⁰ Similarly, Shift, an organization that describes itself as “the leading center of expertise on the [UNGPs]”⁵¹ uses this example: “Companies may contribute to negative impacts, for example if their purchasing practices incentivize suppliers to force workers into unpaid overtime to meet contract requirements.”⁵²

These examples strongly suggest that when buyers engage in practices that push suppliers to commit social breaches and interfere with suppliers’ ability to discharge their social obligations—set out contractually or in national labor

46 See U.N. HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011) [hereinafter *UNGPs*].

47 *Id.* at iii.

48 *Id.* at 14.

49 *Id.* (emphasis added).

50 U.N. HUM. RTS., THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS: AN INTERPRETIVE GUIDE 17 (2012).

51 *Who We Are*, SHIFT, <https://shiftproject.org/who-we-are/> [<https://perma.cc/KP8G-P2N4>] (Apr. 1, 2022).

52 *UN Guiding Principles 101*, SHIFT, <https://shiftproject.org/resources/ungps101/> [<https://perma.cc/35RU-X7DC>] (Apr. 1, 2022).

laws—buyers contribute to adverse impacts. Put differently, extractive contracting would likely be viewed as a source of UNGP non-compliance. It is hard to overstate the significance of the contribution prong of UNGP-responsibility. It opens an entirely new area of corporate accountability by bringing *indirectly harmful* conduct into the frame. As GP13 becomes hardened into law through the Directive, the prospects for holding businesses accountable for extractive practices should improve substantially.

Another aspect of UNGP compliance that is relevant for contracting is that it is both forward and backward-looking. Indeed, “adverse human rights impacts” refers to actualized or existing harms, but also to potential harms: “Actual impact is one that has occurred or is occurring. Potential impact is one that may occur but has not yet done so.”⁵³ Thus, responsibility kicks in at the risk prevention stage, not just the after-the-bad-thing-has-happened stage. In our context, this means that fashion companies should not only avoid sourcing from bad suppliers with problematic human rights track records, but also negotiating, performing, modifying, and terminating their contracts in ways that are likely to create or aggravate human rights risks *down the line*. Thus, to be UNGP-compliant, buyers should avoid engaging in extractive practices that could *potentially* lead to the suppression of workers’ human rights.

Under the UNGPs, the principal way for businesses to avoid causing or contributing to adverse impacts is to carry out robust HRDD. As reflected in the Draft Directive, HRDD requires businesses to conduct human rights risk assessments to identify risks that exist or may arise in their supply chains. But HRDD asks companies to do more than simply collect risk-information. Businesses must take affirmative measures—appropriate to the severity of the risk at issue—to prevent it from materializing into actual harm. GP17 says:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, *integrating and acting upon the findings*, tracking responses, and communicating how impacts are addressed.⁵⁴

Four aspects of HRDD deserve highlighting: First, HRDD is not a one and done exercise; rather, it is an ongoing, dynamic process that businesses must engage in for as long they are in business.⁵⁵ Second, risk-identification is *not* the end of HRDD, but a component of HRDD. Businesses must *do* something to address the risks they identify through the assessment process. This makes HRDD legislation—which transforms GP17 into hard law—fundamentally different from simple disclosure laws like the California Transparency in Supply Chains Act or the United Kingdom Modern Slavery Act. Third, HRDD obligations extend to *all* the businesses involved in a supply chain. They all must avoid causing, contributing, or being linked to adverse impacts. Should one

53. *Id.* at 15.

54. *Id.* at 17 (emphasis added).

55. *Id.* at 17–18.

business fail to discharge its HRDD responsibilities, the burden for others would not be lessened; on the contrary, they would be responsible for picking up the slack. Fourth, HRDD includes risk prevention, mitigation, and *victim-centered remediation*. GP13 says that businesses that caused or contributed to an adverse impact must participate in providing remedy to affected stakeholders.⁵⁶ Businesses that are only “linked” to the impact must use their leverage to ensure that the businesses that caused or contributed to the impact provide remedy to victims.⁵⁷ Thus, ensuring access to remedy is also a matter of shared responsibility. Here again, social terms that place the entire burden for remedying social breaches on suppliers and do not channel remedies to victims would likely be viewed as non-compliant.

1. Contracts and Human Rights Due Diligence

Contracts have a significant role to play in carrying out effective HRDD, both under the UNGPs and the Draft Directive. Turning to the latter, contracts are specifically mentioned in two key Articles: Article 7 on “Preventing adverse impacts,” and Article 8 on “Bringing adverse impacts to an end.”⁵⁸ To prevent potential and end actual adverse impacts, businesses must “seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company’s code of conduct and, as necessary, a *prevention action plan*” (for Article 7), or a “*corrective action plan*” (for Article 8).⁵⁹ Additionally, “[w]hen contractual assurances are obtained from, or a contract is entered into, with [a small or medium sized enterprise], *the terms used shall be fair, reasonable and non-discriminatory.*”⁶⁰ Further, “[w]here measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification.”⁶¹

It is perhaps too early to say, since the Directive is not finalized, but the current language does (a) explicitly recognize the role of contracts in HRDD, both for purposes of preventing and remediating adverse impacts, and (b) appears to identify unfair, unreasonable, and discriminatory contract terms as inadequate for meeting the legal requirements laid out in Article 7 and Article 8. This preliminary assessment suggests that extractive contracts could, potentially, be a source of liability for companies subject to the E.U. law. This would make sense given that the law is rooted in the UNGPs and the OECD Guidance. Conversely, prosocial contracts that are fair, other-regarding, and that operationalize shared-responsibility principles could potentially be a source of legal compliance for firms subject to the new regime. If this initial assessment is

56. *Id.*

57. GP19(b)(ii) says that “[a]ppropriate action will vary according to” whether a business causes or contributes to an adverse impact or is only linked to the impact and “[t]he extent of its leverage in addressing the adverse impact.” *Id.* at 21.

58. *EU Directive, supra* note 43, at 55 (emphasis added).

59. *Id.* at 55–56 (emphasis added).

60. *Id.* at 55.

61. *Id.*

correct, then this would be the perfect time for companies to start upgrading their contracts to prosocial contracts.

Before getting too carried away, however, it must be noted that several civil society organizations, including Shift, have expressed concern that the Draft Directive puts *too much* emphasis on contracts and that it creates the possibility that firms will be able to meet their legal HRDD requirements simply by obtaining certain “contractual assurances” from suppliers.⁶² While my own view is that this safe harbor concern is somewhat overblown, I absolutely agree that companies should not be able to contract their HRDD obligations away.⁶³ This is why the European Commission’s guidance on model contractual clauses contemplated in Article 12 will be so critical.⁶⁴ Hopefully it will establish, once and for all, that responsibility for upholding human rights in supply chains is—and must be—shared and that firms that attempt to contractually offload that responsibility onto other, weaker actors down the chain will open themselves up to, rather than shield themselves from, liability.

To sum up, shared-responsibility principles are core to HRDD under the UNGPs and the Draft Directive. Fashion companies should therefore expect it to become harder to avoid responsibility for adverse impacts to which they contribute through their extractive purchasing and contracting practices. Legal compliance could itself become a more holistic affair, with commercial behavior being scrutinized not just through the narrow lens of corporate ownership or contractual privity, but also *relationally*, looking at how business decisions reverberate across the supply chain to impact human rights.

Before moving to the how-to of prosocial contracting, it is worth mentioning recent developments in the United States. Although the United States does not have HRDD legislation, businesses are not free to disregard the social performance of their supply chains entirely. For instance, firms that wish to sell goods in the United States must contemplate the possibility that tainted goods, meaning goods that are believed to have been made with forced, trafficked, or child labor, may be seized at the border by CBP through the issuance of a WRO.⁶⁵

62. SHIFT, THE EU COMMISSION’S PROPOSAL FOR A CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: SHIFT’S ANALYSIS 5–6 (2022).

63. Addressing civil liability, Article 22 says that: “where a company has taken the actions referred to” in Articles 7 and 8, “it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner . . . unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.” *EU Directive, supra* note 43, at 59 (emphasis added). This language outlines a reasonableness standard that should warn firms against making unreasonable use of their contracts to offload their HRDD responsibilities onto their suppliers and sub-suppliers. *Id.*

64. Article 12 states that “to provide support to companies to facilitate their compliance” with Articles 7 and 8, the European Commission “shall adopt guidance about voluntary model contract clauses.” *EU Directive, supra* note 43, at 59.

65. President Obama revitalized this regulatory instrument by removing the consumptive demand exemption in 2016. JONES DAY, COMBATING FORCED LABOR: THE INCREASED USE OF WITHHOLD RELEASE ORDERS AND FORMAL FINDINGS 2 (2020); Sarah Carpenter, *Global Forced Labor: U.S. Government Continues Record-Setting Enforcement*, ASSENT COMPLIANCE BLOG (Nov. 23, 2020),

Such goods will only be released if the importer can prove that they maintain a clean supply chain. If they are unable to prove this, they could suffer serious financial losses. The CBP has expanded its use of WROs in recent years, signaling a shift in U.S. regulators' understanding of corporations' responsibilities to uphold human rights in their supply chains.

On the market regulation side, the twin-rise of conscious consumerism and ESG investing in the United States and worldwide is creating strong incentives for businesses to pay attention to their social (and environmental) performance, alongside their financial performance. ESG investors may be dissolving the boundaries between financial and non-financial performance by giving the “E” and the “S” more weight in investment decisions and treating ESG factors as material to financial performance.

The pandemic has pushed us, as members of a global community, to fundamentally rethink how we understand responsibility—individual, corporate, and contractual. In particular, the social performance of transnational corporations is coming under greater scrutiny than ever before. The emergence of HRDD legislation, alongside other developments, marks a sea-change in the moral, legal, and business cases for transitioning to prosocial contracts. Young's social connection model and the UNGPs provide conceptual blueprints for prosocial contracting, but neither offers concrete guidance on the *content* of prosocial contracts. The next Part addresses this gap.

V

PROSOCIAL CONTRACTING IN PRACTICE

While shifting to prosocial contracting will not, on its own, solve the problem of human rights in supply chains, it is a necessary part of the solution. For those companies wanting to make the shift, however, there is a major educational challenge involved. Buyer-firms, such as fashion brands and retailers, are not accustomed to considering the social implications of their commercial practices, let alone their contracting practices. They therefore tend to be ill-equipped to take such implications into account contractually. In this regard, Version 2.0 of the MCCs, published in 2021, provides helpful guidance.⁶⁶ The MCCs are neither perfect nor final—a Version 3.0 is already being contemplated. That said, they represent a first attempt at translating the UNGPs into contractual obligations, which matters because aligning supply contracts with the shared-responsibility

<https://blog.assentcompliance.com/index.php/wro-enforcement-expands/> [https://perma.cc/7NCX-H4PE] (“The Government Accountability Office (GAO) reported in 2020 that the Forced Labor Division conducted five times more investigations related to forced labor in 2018 to early 2020 than it had in 2016–2017. Twelve WROs have been issued in 2020, up from seven in 2019 and just two in 2018.”) (citing U.S. GOV'T ACCOUNTABILITY OFF., FORCED LABOR IMPORTS: DHS INCREASED RESOURCES AND ENFORCEMENT EFFORTS, BUT NEEDS TO IMPROVE WORKFORCE PLANNING AND MONITORING (2020)).

66. See generally David V. Snyder et al., *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, 77 BUS. L. 115 (Winter 2021-22) (explaining the transition to version 2.0 of the MCCs and containing thirty-three new MCCs).

principles enshrined in the UNGPs could help companies improve social performance while simultaneously improving legal compliance.

The MCCs are modular, meaning that they can be selectively adopted and adapted to fit different companies' needs. For simplicity's sake, the below describes key aspects of a fully MCC-aligned supply contract, highlighting three areas of prosocial innovation: The MCCs (1) commit *both* buyer and supplier to engage in HRDD throughout their relationship and throughout their supply chains—not just the first tier; (2) commit buyer to engage in responsible purchasing practices and treat irresponsible practices that contribute to adverse impacts—potential or actual—as a source of breach; and, (3) place victim-centered human rights remediation ahead of traditional contract remedies and commit buyer to provide remedy in proportion to its contribution to the adverse impact.⁶⁷

What follows is a brief overview of the MCCs that best capture each of these prosocial innovations:

1. HRDD

MCC 1.1 abandons the traditional model of supplier-only representations and warranties of compliance with applicable human rights standards because such representations “will often be untrue, and therefore routinely breached.”⁶⁸ Instead, MCC 1.1 commits both parties to establish and maintain an HRDD process (appropriate to their size and circumstances) to identify, prevent, mitigate, and account for how they each address the impacts of their activities on the human rights of individuals directly or indirectly affected by their supply chains, consistent with the UNGPs.⁶⁹

2. Buyer's Commitment to Support Supplier Compliance with Schedule P

MCC 1.3 commits buyer to support—not interfere with—supplier's compliance with buyer's human rights policy (for example, a supplier code of conduct), referred to throughout the MCCs as “Schedule P.”⁷⁰ Like MCC 1.1, this MCC builds shared-responsibility into the contract and contains several sub-commitments for *buyer* to:

- Engage in responsible purchasing practices.⁷¹
- Provide reasonable (technical and financial) assistance to supplier to support compliance with Schedule P.
- Collaborate with supplier to agree on a contract price that that accommodates costs associated with upholding responsible business conduct.

67. *Id.* at 118.

68. *Id.*

69. *Id.*

70. *Id.*

71. In addition to the MCCs, the Working Group also developed a model Responsible Purchasing Code of Conduct, or “Buyer Code,” referred to as Schedule Q. *See id.*

- Consider the potential adverse impacts of making material changes to the order and take measures to avoid or mitigate any adverse impacts from order changes.
- Excuse non-performance by supplier if supplier cannot perform without causing or contributing to an adverse impact.
- Consider the potential adverse impacts of termination and employ commercially reasonable efforts to avoid or mitigate such impacts. Buyer must exit the contract responsibly by providing reasonable notice to supplier and paying for goods produced before termination.⁷²

3. Human Rights Remediation

MCC 2.3 says that, in the event of an un-remediated social breach by supplier, buyer must—in cooperation with other buyers, where appropriate—require supplier to prepare and implement a remediation plan, the purpose of which must be to restore affected stakeholders to the situation they would have been in had the adverse impact not occurred.⁷³ Remediation must be proportionate to the adverse impact and may include apologies, restitution, rehabilitation, financial and non-financial compensation, and preventive measures to avoid the re-occurrence of harm.⁷⁴ Furthermore, supplier must provide evidence to show that it has consulted with affected stakeholders, both in preparing the remediation plan and in assessing its implementation.⁷⁵

If buyer causes or—more likely—contributes to an adverse impact by failing to meet its commitments under MCC 1.3, then buyer must participate in preparing and implementing the remediation plan, including by providing capacity-building, technical, or financial assistance, in proportion to its contribution.⁷⁶ In line with the UNGPs, the MCCs place victim-centered human rights remediation ahead of traditional Uniform Commercial Code (UCC) remedies, such as rejecting or revoking acceptance of non-conforming goods and expectation damages. Furthermore, where buyer can access UCC remedies, these will be limited in proportion to buyer's contribution to the adverse impact(s).

A last noteworthy aspect of MCC-aligned contracts is found in MCC 6.3, which deals with damages. It contractualizes the principle that the parties should not profit from social breaches:

Neither Buyer nor Supplier should benefit from a Schedule P violation or any human rights violation occurring in relation to this Agreement. If damages are owed that would result in a benefit to Buyer or Supplier, such amounts should go toward supporting the remediation processes set out in Section 1.4 and Article 2. A 'benefit' is here understood

72. *Id.* at 135–37.

73. *Id.* at 139.

74. *Id.*

75. *Id.* at 139–40.

76. *Id.* at 141.

to mean being put in a better position than if this Agreement had been performed without a Schedule P Breach.⁷⁷

This brief overview of the MCCs provides a flavor for how prosocial contracting, rooted in shared-responsibility principles, could look in practice. Again, the MCCs are not perfect, but they offer a helpful guide for enlisting a firm's supply contracts as allies in improving the social performance of their supply chain.

A closing note on enforcement is called for. As discussed, the likelihood that a supplier would sue a buyer for breach, particularly a social breach, is very low. The likelihood that a buyer would sue—versus simply terminate—a supplier for a social breach is similarly very low. This does not mean, however, that prosocial contracts such as those incorporating the MCCs would be useless. As Lipson explains, even unlikely-to-be-enforced KSR terms can serve a positive social function.⁷⁸ Specifically, they can teach the parties to change how they approach and, more importantly, *use* their contracts to achieve better social performance and better compliance. Indeed, prosocial contracting purposefully raises the status of the contract from that of a mere transactional document to something akin to a relational operating manual that the parties can consult throughout their engagement—not just when things go wrong. It can help bridge the coherence gap by institutionalizing contractual processes designed to facilitate cooperation, reduce secrecy, and improve social performance—all without the ‘threat’ of enforcement.⁷⁹ In fact, rather than view low enforcement prospects as a weakness of prosocial contracting, one could view this as an opportunity: why not explore upgrading to prosocial contracting since it can bring significant benefits—improved cooperation and efficiency, better social outcomes, and legal compliance—without significantly increasing contractual liability? Furthermore, given that HRDD legislation may close the contractual enforcement gap in the years to come, this seems like an especially good time to engage in prosocial explorations, particularly in a domain that firms have dominion over—their contracts.

VI

CONCLUSION

The pandemic did not create the extractive relational dynamics at play in the apparel sector; those existed long before anyone had heard of COVID-19. It did, however, expose the toxicity of these dynamics, revealing the vanishingly thin line between commercial abuse and human abuse. The future undoubtedly holds

⁷⁷ *Id.* at 146–47.

⁷⁸ Lipson, *supra* note 20, at 1151–55 (“[E]ven if KSR terms fail in a conventional sense, they are likely to express norms in a way that is tailored to the interests and needs of the parties and, in that tailoring process, to internalize those norms” and “KSR promises justice not because its terms will produce binding judgments in all cases, but because it is an incremental and plausible step in larger efforts to change norms reflecting a wide range of social, economic and environmental concerns.”).

⁷⁹ See generally Bernstein, *supra* note 17 (demonstrating that contracts have relational value that far exceeds their enforcement potential); David V. Snyder, *Contracting for Process*, 85 LAW & CONTEMP. PROBS., no. 2, 2022 (discussing contracting for process versus simply for goods or services).

more pandemics and pandemic-like events in store. It is therefore crucially important to learn from this crisis and envision new, fairer models of commercial engagement, particularly where human rights are concerned. In the context of supply chain relations, this means leveraging the regulatory, expressive, and relational powers of contract for good, by shifting to prosocial contracting models that promise to do a much better job of upholding human rights and ensuring legal compliance than extractive contracting.