

**CONTRACTUAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS IN THE
CLOTHING INDUSTRY.**

GIACOMO MARIA CREMONESI

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Supervisor: Professor A. JAN A. J. EIJSBOUTS

MAASTRICHT UNIVERSITY

European Master's Programme in Human Rights and Democratisation (E.MA)

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ABSTRACT

In the absence of a strong system of global justice, and given the limited ability of many developing countries to enforce Human Rights Law or even their own national labour laws, multinational corporations (MNCs) have developed their own “codes of conduct” as well as a variety of “monitoring” mechanisms aimed at enforcing their compliance.

In order to reduce reputational risks and to enforce the HR norms included in their Corporate Social Responsibility (CSR) codes of conduct an increasing number of MNCs are incorporating these norms into contracts stipulated with their suppliers.

This thesis analyses the main aspects and the possible benefits that this “contractualization” of Human Rights can provide for the implementation of HR law and for a correct Human Rights due diligence.

In consideration of the peculiarities of the clothing industry, it is then illustrated how companies of this sector are currently enforcing CSR norms through contracts with particular attention to the sanctions provided therein. Moreover this dissertation analyses the possible legal consequences under international commercial law for non compliance with HR standards by the suppliers.

Being aware of the shortcomings and weaknesses of contractual control, starting from an analysis of the best practices among the existing multi-stakeholders initiatives (MSI), it is proposed what should be the “new” role of an independent MSI in order to make contractual remedies an ethical instrument for a credible and effective HR protection.

In the light of the foregoing this thesis contains a model contract clause for the clothing industry that aims to provide a better protection of HR standards in the supply chain and to strengthen the trust of the “ethical consumer”.

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“Le cose buone richiedono tempo, quelle fantastiche avvengono in un lampo”.

“Good things take time, but great things happen all at once”.

“Nel frattempo, chiuso fuori, aspetto di venirmi a prendere”.

Introduction

The production in the garment industry is mostly not mechanized and it is carried out by low skilled employees. Down the supply and production chains of this industry often occur many of the adverse consequences of corporate activities (i.e. child labour, hazardous working conditions, discriminatory practices, forced labour etc.), particularly because the supplier factories are located in countries where the legislation designed to protect workers' rights is inadequate or not enforced.

In the absence of a strong system of global justice, multinational corporations (MNCs) have developed their own “codes of conduct” to safeguard Human Rights standards as well as a variety of “monitoring” mechanisms aimed at enforcing compliance with these provisions.

Non-governmental organizations (NGOs) are still sceptical regarding these CSR initiatives and the MNCs’ commitment to HR issues. Therefore they are mobilizing the purchasing power of consumers on the issue of working and environmental conditions of the textile industry and nowadays for an increasing number of customers the quality of an item of clothing does not concern anymore only its physical condition but also the way in which it was produced.

In order to reduce reputational risks and to enforce the HR provisions included in CSR codes of conduct an increasing number of MNCs are incorporating them into their contracts stipulated with suppliers. I will analyze the main aspects and the possible present and future benefits that this “*contractualization*” of Human Rights can provide for the implementation of HR Law in general and for a more effective protection of Human Rights down the supply chains in the apparel sector .

Contractual control in fact is not simply another tool to enforce CSR norms but may lead to a revolutionary approach in the implementation of Human Rights Law in country where it is not enforced and to operate a correct “human rights due diligence”.

I will then illustrate the way in which big retailers in the clothing industry are currently enforcing CSR norms through contracts with particular attention to the sanctions provided therein. Moreover I will try to identify the possible legal consequences under international commercial law for non compliance with HR standards by the suppliers.

Being aware that contractual remedies presents ethical and practical inconveniences, starting from an analysis of the best practices among the existing social standards and Multi-Stakeholders Initiatives of the textile sector I will try to identify what should be the “new” role of Multi-Stakeholder Initiative in order to make contractual remedies an ethical instrument for a credible and effective HR protection.

In the light of the foregoing I will draft a model contract clause for the clothing industry that aims to provide a better protection of HR standards in the supply chain and to strengthen the trust of the “ethical consumer”.

Chapter 1

1. Context: Business and Human Rights in an Era of Globalization

Globalization has brought and is still bringing changes that are epoch-making as those occurred during the industrial revolution. A set of processes is taking place affecting different aspects of our society and leading to profound modifications of it.

One of the most significant of these processes is the so-called “Economic Globalization” that can be described as a process aimed at breaking down State borders in order to allow free flow of finance, trade, production, and at least in theory labour.¹

Whether or not we agree that states are losing their sovereignty², we can infer that in this new context states are encouraged by a variety of public and private actors not to use their sovereign power to impede this process.³ In fact Globalization is characterized by a limited set of global governance mechanisms and weakened national governments but also by an unprecedented private sector wealth and power.⁴

Economic Globalization has resulted in an enormous increase in international trade and investment. Particularly trade can be considered the engine of this process.

In fact world trade in manufactured goods increased more than 100 times (from \$95bn to \$12 trillion) in the 50 years since 1955, much faster than the overall growth of the world economy.⁵

Nowadays multinational corporations (MNCs) are competing in a global common market based on the freedom of exchange of goods and capitals. Moreover there is a broader access to a range of foreign products for consumers and enterprises⁶ at low cost.

¹ K. De Feyter, 2009, p. 51.

² See J. Pikalo, 2007, pp.1 – 4.

³ K. De Feyter, 2009, p. 51.

⁴ See. M. Blowfield, 2011, p. 107.

⁵ Steve Schifferes, <http://news.bbc.co.uk/2/hi/business/6279679.stm> .

⁶ <http://en.wikipedia.org/wiki/Globalization>.

In this context companies are willing, and to a certain extent forced, to adapt their structure and productive organization in order to be competitive on a global scale. Therefore business activities are outsourced to countries with the most advantageous conditions for setting up business. This situation is particularly relevant with regard to MNCs due to their great economic power and ability to choose globally the state with the most advantageous conditions to relocate production or source products.

In this context of economic globalization business can have positive effects on society such as producing economic growth or reducing poverty but can also have negative impacts on the lives of individuals and communities such as harming Human Rights (HR). Multinational corporations in fact may have an enormous impact on individuals' fundamental rights through their core business practices, including employment and environmental policies, interactions with governments and other activities.

Production in fact is often relocated to countries with low Human Rights protection and without any meaningful government control. Down the supply and production chains often occur many of the adverse consequences of corporate activities (i.e. child labour, hazardous working conditions, discriminatory practices, forced labour etc..) because many of them are based in poor countries where the laws designed to protect workers' rights are inadequate or not enforced. HR violations occurring down the supply chain are frequent in the clothing industry as I will explain later.

Of course, in some cases, it may not even be the case that globalization is the primary source of these problems, but for sure it exacerbates and amplifies them by making things quicker, larger and more visible than ever before.

Despite the fact that MNCs directly or indirectly can have an impact on virtually the entire spectrum of internationally recognized human rights⁷, business enterprises cannot be held directly responsible for violating HR by international organs⁸ and this situation creates a lack of protection especially when it is related with the phenomenon of weak states or the so-called failed states. Moreover while business is transnational, global

⁷ GUIDING PRINCIPLES FOR THE IMPLEMENTATION OF THE UNITED NATIONS 'PROTECT, RESPECT AND REMEDY' FRAMEWORK, John Ruggie, 2008.

⁸ Weschka M., ZaoRV 2006, pp. 628-629.

institutions for governance are not well developed especially when it comes to enforcement which is still state based.

In this respect the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie noted that : *“The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge”*.⁹

2. The Normative Framework of Business and Human Rights

As I mentioned, notwithstanding this new historical context, international human rights law still recognizes only states as primary duty bearers of human rights¹⁰ ignoring the original HR violator, the private company.

The attempt by the UN Sub-Commission on Human Rights to create an international regulatory framework under which companies could be held liable for violating Human Rights failed in 2004, when the UN Commission on Human Rights decided not to adopt the “UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”.¹¹

To date, there is no normative framework of *hard law* at the global level that clarifies and imposes duties and responsibilities on private enterprises¹². Therefore Corporate Social Responsibility is the primary normative tool for the issue of “Transnational Corporations and Human Rights” and the soft law process is its primary form of regulation¹³.

⁹ A/HRC/8/5, 2008, cf footnote n. 7.

¹⁰ See Cassese, 2005, p.71.

¹¹ For an in-depth examination on the Norms see: D. Kinley, 2006, pp.448-497.

¹² For a comprehensive analysis of the matter see Marella Fabrizio, 2009.

¹³ I will provide a description of CSR below Chapter 1 paragraph 2.2 and 3.

2.1 *The Ruggie Framework*

After the Norms were put on hold the Secretary-General appointed John Ruggie, Harvard Professor, Special Representative on the issue of Human Rights and Transnational Corporations and other Business Enterprises to review the whole matter and provide recommendations to clarify the respective responsibilities.

The product of his work the “Protect, Respect and Remedy” framework, was welcomed by the Human Rights Council in its resolution 8/7. The Council also extended the Special Representative’s mandate until June 2011, asking him to “operationalize” the Framework by providing concrete and practical recommendations for its implementation. Therefore the Special Representative in this last part of its mandate prepared the Report: “*Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*” that was unanimously endorsed by the UN HR Council on 17 June 2011.

The Ruggie Framework (along with the Guiding Principles) is the main point of reference for business and human rights and it is considered a “*seminal turning point in how business, governments and other stakeholders understand Human Rights, state and corporate responsibility in the global business context*”.¹⁴

The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.

Particularly interesting for my analysis is the second pillar: the corporate responsibility to respect Human Rights.

The term responsibility is not used as a legal term and it is not meant to impose direct obligations on companies but it means acting with due diligence to avoid infringing the

¹⁴ Marzena Czarnecka, 2011, p. 56.

rights of others and addressing harms. *“It is a standard of expected conduct acknowledged in every voluntary and soft law instrument related to corporate responsibility”*.¹⁵

What is required by the Framework is an ongoing process of “human rights due diligence”, whereby companies become aware of, prevent, and mitigate adverse human rights impacts caused by their activities and those of their business partners. The four core elements of “human rights due diligence” were outlined in the 2008 report: **having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance.**

This responsibility to act with due diligence can be considered as an obligation of conduct and it extends also to third parties connected with the activity of the company such as the supply chain, business partners, State and non-State actors.

In this respect the Special Representative observed that: *“Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. **The challenge for buyers is to ensure they are not complicit in violations by their suppliers. How far down the supply chain a buyer’s responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices”***.¹⁶

What is the legal value of the Framework and of the Guiding principles? It can be inferred that the principles do not create any new legal obligations, but they do establish clear benchmarks for States, and for businesses. It can be considered soft law and it can evolve into international customary law¹⁷ and therefore become a binding norm of

¹⁵ See the Un Protect, Respect, Remedy Framework 2008, A/HRC/14/27.

¹⁶ Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, A/HRC/11/13 22 April 2009.

¹⁷ Customary international law is a source of International Law. The elements of customary international law are the state practice and the *opinio juris*. The notion of state practice requires that the practice is followed regularly by a sufficient number of states over time with absence of substantial dissent. *Opinio Juris* requires that the international act must occur out of a discernible sense of obligation.

international law¹⁸. *“The Framework and the Principles provide a benchmark which business, and governments, must now expect campaigners, local communities, and consumers to judge them against. They are already informing the development of key international frameworks which shape the business operating environment, such as: the OECD Guidelines for Multinational Enterprises¹⁹, the International Finance Corporation’s Performance Standards, and the Global Reporting Initiative. Further, they have sparked the interest of many governments, the European Union, and in particular in the emerging economies of the South, where the social impacts of business activities are often hardest felt.”*²⁰

2.2 Codes of conduct

In the absence of international regulation Multinational corporations in the framework of their Corporate Social Responsibility (CSR) have adopted private initiative to protect and promote human rights by implementing codes of conduct and product labeling schemes as a result of pressure from consumers, NGOs and also governments.

Responses by corporation to the negative consequences of globalization, including of course HR violations by corporations, have become an important driver of contemporary Corporate Responsibility as a whole.

In order to define CSR we can make use of two definitions. In the **normative** sense CSR is the responsibility of the corporation to meet the legitimate expectations of society to conduct its businesses in ways that produce economic, social and ecological benefits to all its stakeholders and society at large (often also referred to as “the social license to operate”).

In the **operational** sense CSR is the structured and systematic approach in which corporations are embedding all aspects of the CSR norms in their daily operations at all levels, monitor compliance and results and report to all its stakeholders and society at large. This approach can be supported by different forms of regulation of the relevant

¹⁸ It should be remembered that in any case international law recognizes only states as primary duty bearers of human rights and not private actors such as companies. See Cassese, 2005, p.71.

¹⁹ The Guidelines have been updated in May 2011 to reflect the Ruggie’s Framework.

²⁰ See <http://www.twentyfifty.co.uk/news/art/21>.

CSR norms, implying that the often claimed “voluntary” nature of CSR only relates to the form and not to the subject of CSR.

Codes of conduct form a significant part of the regulatory mix of CSR and they are created to regulate the behavior of business entities.

CSR Codes can be drafted by various entities such as: multilateral government settings, single governments, NGOs and of course single companies or business support groups such as industry and trade association.

The source of a CSR Code is relevant in order to determine its legal value and its effects. However in this dissertation I will focus on the content of a Code (the rights protected and the issues addressed) and particularly on how it is monitored²¹ and enforced by a corporation.

3. The features of the clothing industry and the potential impact of CSR

The clothing industry presents three specific characteristics that are particularly relevant for this dissertation: I) it is a highly labour intensive industry, II) the production is carried out through global supply chain or global value chains, III) the reputation of the brand is essential for the big retailers such as Zara, Nike, Dolce and Gabbana, H&M etc..

Because of these peculiarities Corporate Social Responsibility can have a significant potential in order to ensure minimum labour standards and to address Human Rights violations through global supply chains.

3.1 The features of the clothing industry relevant for CSR:

I) *It is a highly labour intensive industry and therefore attention should focus mainly on HR of workers.*

The cut–make–trim stage of the production of clothes is a highly labour-intensive industry. The apparel production in fact is difficult to mechanize and manpower is

²¹ See chapter 5 paragraph 1.2 of this dissertation.

essential. Sewing machines are cheap and mobile and no invention can yet compete with the speed and dexterity of a human worker.²²

Factories are created around the world in search of new low-cost competitive locations and developing countries in particular are able to provide the low skilled labour force that this industry needs.

II) *The production is carried out through global supply chain, but Corporations owning the brand²³ govern all aspects of productions and are able to exercise contractual control over suppliers.*

In order to be profitable big brands and retailers have become ‘global sourcing companies’, outsourcing the production of the goods they sell to tiers of suppliers and producers through complex international networks. Most of the big brands in fact do not produce clothes themselves but they focus on design, distribution and marketing and they sell finished products. **Therefore almost all the production is carried out by network of global suppliers linked with the retailer only by a contractual relationship.**

These supply relations often function through highly integrated global supply chain, the so called “global value chains”(GVCs) coordinated by big brands.

“Global supply chains have created new opportunities for labour-intensive exports from low-cost locations. The result is a dramatic growth in the number of producers, heightening competition among the world’s factories and farms for a place at the bottom of the chain. At the top end, however, market share has tended to consolidate among a few leading retailers and brand names.

Such an imbalance between intensely competing producers and relatively few buyers in the global marketplace gives retailers and brands the upper hand over their supply chains.

Through the contracts that they negotiate and the conditions they demand, they can capture much of the gain generated by trade.”²⁴

²² Oxfam International 2004, p. 48.

²³ such as Zara, Nike, Dolce and Gabbana etc..

²⁴ Barrientos & Smith, 2007, p.720.

Due to this system MNCs of the clothing industry are able to govern all aspects of production, distribution and retail through Global Value Chains.

Often the purchasing policies adopted by many MNCs require tight schedule for the production and delivery of the products and they do not allow suppliers to comply with standards of labor practices outlined in national labor laws and voluntary codes of conduct.²⁵

III) The reputation of the brand is essential for a company of the sector.

For MNCs of the apparel industry, image and reputation are intangible assets, but they can be worth billions.²⁶ The reputation of the brand is essential in an industry that is so sensitive to consumers choices. Allegation of HR violations can create serious economic damages to the company. Ethical consumers are willing to pay a higher price for clothes produced under circumstances that safeguard ethical standards. For an increasing number of customers the quality of an item of clothing does not concern anymore only its physical condition but also the way in which it was produced.

3.2 The importance of CSR for the clothing industry

The practice of offshore production in clothing that I described above drew attention to poor working conditions in these global supply chains.²⁷

While corporations and suppliers are trying to lower costs and increase their profits, workers are placed at the low end of the system and down the supply chains often occur many of the adverse consequences of corporate activities.

Problems which arise in supplier factories include child labour, forced labour, insufficient workplace safety, wages barely meeting even minimum levels, interference in labour union creation, hampering the work of employee representatives, excessive

²⁵ SOMO Bulletin on Garments & textile, the production is carried out through global supply chain or global value chain. 1, May 2003.

²⁶ in 2003 the value of Nike's brand alone was estimated at US\$8.2bn, Gap's brand at US\$7.7bn, and Levi's brand at US\$3.3bn. see Oxfam International 2004.

²⁷ The UN "Protect, Respect and Remedy" Framework for Business and Human Rights, A/HRC/14/27, 2008.

regular working and overtime hours and all possible forms of discrimination²⁸ including sexual harassment.

Current human rights discussions are increasingly focusing on the conditions under which clothes are produced in developing and newly industrialised countries and today's globalization has created more awareness of these circumstances in countries all over the world.

NGOs are mobilizing the purchasing power of consumers on the issue of working and environmental conditions of the textile industry.

Information on working conditions in the garment industry is distributed via newsletters, actions, the internet, movies (e.g. 'China Blue') and research publications. Opinion leaders like pop stars, actors and TV celebrities are active in campaigning and have a great influence on young and fashionable consumers.

Consumer studies show that a growing number of consumers are interested in the social and environmental conditions under which the garment and textiles were produced.²⁹

Consumers are demanding more information about the production of what they wear every day and if the clothes of a certain brand are produced in an "unethical way" then they are not fashionable anymore. As I mentioned above in the clothing industry the reputation of a brand is essential for its survival and therefore, retailers and brand companies are more and more concerned about how consumers perceive their company. Scandals concerning HR violations occurred down the supply chain are able to produce deep economic damages to MNCs.

As a response to the international attention about CSR issues, NGOs and consumer pressure, the most important brands such as Prada, Nike, Zara, H&M, Levi's, Reebok, Gap and others developed codes of conduct designed to ensure that suppliers in which they had only a contractual relationship to produce goods complied with a basic standard of workplace practices.

In order to help companies to address various aspects of CSR, schemes and standards for workplace conditions in the supply chain have been developed worldwide.³⁰ Some

²⁸ See Rules and Functioning of the Business Social Compliance Initiative.

²⁹ Michiel van Yperen, 2006, pp.19-20.

³⁰ The major standards for workplace conditions in supply chains are SA8000 (from Social Accountability International and for use in any manufacturing sector), WRAP (for apparel) and a number of initiatives

of these international social standards are developed only for the textile sector, like WRAP, FLA, CCC, FWF and WRC, while others like SA8000 and ETI can be applied also for other sectors.³¹

The big brands in fact are serving the consumer markets and are more likely to feel demand for CSR than those companies that are serving the business markets.

CSR is nowadays necessary for companies of the sector to maintain their license to operate from customers, NGO and governments.

MNCs believe that an effective CSR policy can protect them from boycott actions and that consumer are willing to pay an extra price for goods produced under “fair trade” standard.

In consideration of the fact that the production in the clothing industry is carried out by suppliers that are connected to the multinationals only through contracts, **the emergent trend is to impose contractual obligations on suppliers to meet specified CSR standards.**

The possible benefit of this contractual control over suppliers to prevent Human Rights violation down the supply chain will be analyzed in the next chapter.

based on a membership model such as the Business Social Compliance Initiative (BSCI), Fair Labour Association (FLA, for apparel), Ethical Trading Initiative (ETI, based in UK and with member companies across a number of sectors, particularly retailers), Worker Rights Consortium (WRC, with membership based on US colleges and universities in a range of manufacturing sectors but mainly apparel), the Clean Clothes Campaign (CCC, a European NGO based on apparel production), and the Fair Wear Foundation (FWF, based in the Netherlands and targeting apparel). For a complete description see Michiel van Yperen, 2006 and chapter 5 par. 1 and 1.2 of this dissertation.

³¹ See Chapter 5 par. 1 of this dissertation.

Chapter 2

In this chapter I will first describe what could be the benefits that the use of instruments of private law such as contracts of MNCs can provide for the protection of Human Rights.

1) The potential of contractual control and “contractualisation” of Human Rights.

The reputation of a brand can be seriously damaged by practices adopted by external suppliers even if the corporation is not “legally” responsible for the behaviour of its business partners.

As I mentioned at the end of the previous chapter, in order to reduce risks an increasing number of MNCs are including into supply contracts some or all the provisions related to Human Rights of their CSR codes.

In fact Suppliers are generally required to adhere to the code of conduct of the buyer, moreover specific codes of conduct for suppliers are increasingly being created and becoming the basis for contractual obligation.³² In this way Corporations are capable to exercise a **contractual control** over suppliers in order to monitor and enforce their code of conducts.

This trend is called by some authors as the “**contractualisation**” of Human Rights:

*“the present trend in CSR involves translating certain Human Rights rules and principles into codes of conduct and make these codes binding by contract. We are faced, then, with a new phenomenon: the “contractualisation” of Human Rights”.*³³

This strategy to enforce workers rights through instruments of private law presents a number of opportunities for a better integration of Corporate Social Responsibility into a company and for a correct “Human Rights due diligence”³⁴,

³² See Doreen Mc Barnet and Marina Kurkchiyan, 2007, p. 65.

³³ Marella Fabrizio, 2007, p.305.

³⁴ See Chapter one p. 4 for a more extensive explanation of Human Rights due diligence.

for a better protection of HR of workers in countries where Human Rights Law is not enforced and also for civil society activism.

1.1) *The opportunities of contractual control for CSR and for the HR due diligence*

The supply chain has become a growing issue on the CSR agenda. Corporations know that the simple adoption of a code of conduct is not enough anymore because the real issue is its implementation and enforcement through the network of suppliers.

NGOs are accusing companies to adopt HR policies that are indented to remain on paper. The credibility of Corporate Social Responsibility is at stake and therefore also its benefits for business. If customers do not trust the enforcement of CSR policies and they perceive that the so-called “ethical trade” is only a form of advertising they won’t be willing anymore to pay a little extra for “ethical products”.

Corporations risk to lose their competitive advantage and the simple fact that they have adopted a code is not able to protect them anymore from reputational and legal risks.³⁵

In Europe legal risks for companies concern mainly the law of misleading advertisement (DIRECTIVE 84/450/EEC) that form part of the law of unfair competition. The EU Directive 2005/29/EC for example concerns unfair business-to-consumer commercial practices in the internal market and pays attention to codes of conduct³⁶ and allows consumer organisations to file complaints.³⁷

³⁵ See Kasky Nike case M. Sutton, ‘Between a Rock and a Judicial Hard Place: Corporate Social Responsibility Reporting and Potential Legal Liability Under Kasky v. Nike’, 72 *UMKC Law Review*, 2004, p. 1159.

³⁶ The Directive prohibits misleading the “average consumer”. In particular the following commercial practices are considered unfair in all circumstances: 1. Claiming to be a signatory to a code of conduct when the trader is not. 2. Displaying a trust mark, quality mark or equivalent without having obtained the necessary authorization. 3. Claiming that a code of conduct has an endorsement from a public or other body which it does not have. 4. Claiming that a trader (including his commercial practices) or a product has been approved, endorsed or authorised by a public or private body when he/it has not or making such a claim without complying with the terms of the approval, endorsement or authorisation.

³⁷ Article 11 concerning the Enforcement of DIRECTIVE 2005/29/EC provides: 1. *Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers. Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may:*
take legal action against such unfair commercial practices; and/or
(b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

In a sector like the apparel industry, where the production is outsourced to a network of external suppliers, contractual control is a great opportunity to show that CSR is for real. If Corporations monitor and enforce through contracts their CRS policy, possibly by binding suppliers to take remedial actions and terminating contracts where violations persist, their commitment will acquire credibility in the eyes of consumers and NGOs.

In respect of Human Rights protection, **contractual control represents a powerful tool for a correct “human right due diligence”**. In particular contractual control can play a key role for a better integration of a company’s HR policy into all its relevant business function.

In fact, according to the UN Special Representative on Business & HR for a correct HR due diligence companies are required to *“have in place policies and processes appropriate to their size and circumstances, .., and 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 addressed³⁸.”*

Concerning integration, the guiding principles also state that *“business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and **take appropriate action**³⁹”* and also *“where a business enterprise contributes or may contribute to an adverse human rights impact, it should **take the necessary steps to cease or prevent its contribution** and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist **where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm. Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity... among the factors that will enter into the determination of the appropriate action in such situations is the enterprise’s leverage over the entity concerned.**”*

³⁸ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 21 March 2011.

³⁹ Cf. footnote 38, A/HRC/17/31, 21 March 2011 p. 18.

It is indisputable that western companies of the clothing industry exercise a great leverage over their suppliers. As I explained in chapter 1⁴⁰, through the contracts that they negotiate and the conditions they demand, MNCs of the clothing industry are able to govern all aspects of production, distribution and retail through Global Supply Chains.

Trough contractual control in fact big brands are already able to achieve exacting technical, product, safety, quality and delivery standards through their supply chains. Therefore also ensuring labour standard should be achievable.⁴¹

For a correct HR due diligence companies are required to take *appropriate actions* and to convert the HR provisions of their CSR codes in contractual obligations is an effective approach, probably the most effective in the apparel industry where suppliers are linked with the retailer only by a contractual relationship. In fact the purchase contract is the language corporations speak and the language business parties understand.

The importance of this approach was recognised also by the “UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”.⁴²

In fact article 15 of the General provisions of implementation of the UN Norms provides that: “***Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers,, that enter into any agreement with the transnational corporation in order to ensure respect for and implementation of the Norms***”.⁴³

Moreover the commentary of article 15 of the UN norms states that: “*Transnational corporations and other business enterprises shall ensure that they only do business with (including purchasing from and selling to) contractors, subcontractors, suppliers,*

⁴⁰ See chapter 3 par. 3.1.

⁴¹ See Oxfam international, 2004, pp. 11-12.

⁴² As I mentioned in Chapter I page 3 of this dissertation the Norms never entered into force but they can still give us some indications concerning contractual control.

⁴³ E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

*licensees, distributors, and natural or other legal persons that follow these or substantially similar Norms. Transnational corporations and other business enterprises using or considering entering into business relationships with contractors, subcontractors, suppliers, ..., or natural or other legal persons that do not comply with the Norms shall initially work with them to reform or decrease violations, but if they will not change, the enterprise shall cease doing business with them".*⁴⁴

Therefore we can say that contractual control was considered as a primary tool also for the enforcement of the Norms.

It is also relevant to remark that a preeminent international social standard like the SA 8000⁴⁵ requires contractual control of suppliers.⁴⁶ Moreover even analyzing the case-law of the Alien Tort Claim Act⁴⁷ it is possible to understand the significance of contractual control.⁴⁸

⁴⁴ Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003).

⁴⁵ Cf. footnote 30 of this dissertation.

⁴⁶ See Social Accountability 8000 par. *Control of Suppliers/Subcontractors and Sub-Suppliers*

9.7 The company shall maintain appropriate records of suppliers/subcontractors' (and, where appropriate, sub-suppliers') commitments to social accountability, including, but not limited to, contractual agreements and/or the written commitment of those organisations to: a) Conform to all requirements of this standard and to require the same of sub-suppliers; b) Participate in monitoring activities as requested by the company; c) Identify the root cause and promptly implement corrective and preventive action to resolve any identified non-conformance to the requirements of this standard; d) Promptly and completely inform the company of any and all relevant business relationship(s) with other suppliers/subcontractors and sub-suppliers.

9.9 The company shall make a reasonable effort to ensure that the requirements of this standard are being met by suppliers and subcontractors within their sphere of control and influence.

9.10 In addition to the requirements of Sections 9.7 through 9.9 above, where the company receives, handles, or promotes goods and/or services from suppliers/subcontractors or sub-suppliers who are classified as home workers, the company shall take special steps to ensure that such home workers are afforded a level of protection similar to that afforded to directly employed personnel under the requirements of this standard. Such special steps shall include, but not be limited to: a) Establishing legally binding, written purchasing contracts requiring conformance to minimum criteria in accordance with the requirements of this standard;

b) Ensuring that the requirements of the written purchasing contract are understood and implemented by home workers and all other parties involved in the purchasing contract;

c) Maintaining, on the company premises, comprehensive records detailing the identities of home workers, the quantities of goods produced, services provided, and/or hours worked by each worker;

d) Frequent announced and unannounced monitoring activities to verify compliance with the terms of the written purchasing contract.

⁴⁷ The Alien Tort Claims Act (ATCA) is a section of the United States Code that states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." From the case *Filartiga v. Pena-Irala*, this Act

According to the Guiding Principles on Business and Human Rights of John Ruggie, for a better integration of a Human Rights policy, *“the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard of Human Rights”*.⁴⁹

In a corporation of the clothing industry embedding the policy mainly means to bring Human Rights in the buying department.

Sebastian Siegele, of Sustain Consulting in Germany notes that: *“The buying department in fact is traditionally seen as the heart of a retailing company and it is difficult to make changes that this department does not agree. The buyer’s counterpart is the supplier, and together they negotiate the price”*.⁵⁰

According to influential studies and NGOs like the Ethical Trade Initiative (ETI) or the Clean Clothes Campaign **companies need to change their purchasing practices, if their commitments to be socially responsible are to be more than empty word.**

In fact poor working conditions are often caused by or at least related to the purchasing practises of multinational companies.

According to the NGOs and civil society activism the same current purchasing practices of big retailers of the clothing industry are reducing significantly the capacity of the suppliers to comply with labour standards. On one hand in fact famous brands demand respect for labour standards imposing their codes of conduct but on the other hand they reduce delivery times and profits for the suppliers without assuming responsibility for the consequences of this behaviour. This conflict logic may also be due to a lack of coordination between different departments of a corporation.

allowed US courts to hear human rights cases brought by foreigners for tort committed outside the United States.

⁴⁸ See Saipan Case available at <http://www.globalexchange.org/campaigns/sweatshops/saipan/summary112399.html> consulted on 4. 6.2011 where it is stated that At the heart of the prospective relief provisions is a comprehensive new Saipan Code of Conduct. Every settling retailer has agreed, as a condition of settlement, to include in all future contracts with Saipan-based contractors a new series of provisions requiring the contractors' strict adherence to a set of detailed standards governing working and living conditions in the Saipan factories and barracks.

⁴⁹ A/HRC/17/31, 21 march 2011 p. 16.

⁵⁰ Nina Ascoly, 2003.

In this respect the Clean Clothes Campaign states that: *“Companies need to address the conflicting logic of simultaneously pursuing lower prices and shorter delivery times whilst at the same time pursuing compliance with labour standards. In practice, companies often run parallel and often uncoordinated systems: one to assure the maximizing of profits and one to assure compliance with ethical standards. Current purchasing practices on the part of buyers tend to undermine the capacity of the supplier to comply with labour standards”*.

“To address these issues, close co-operation between the procurement department, the CSR department, and the suppliers is necessary”.⁵¹

Moreover, according to Ivanka Mamic, codes of conduct are better implemented and monitored when there is *“a close relationship between the CSR compliance staff and the purchasing staff. Thus, whilst purchasing decisions generally take place through a matrix of interaction between the product, sourcing and country managers, they also take account of Code of Conduct performance”*.⁵²

Therefore, in order to create ethical purchasing practices and pricing, the Human Rights policy has to be brought at the heart of the apparel corporation: the buying department where contracts are negotiated.⁵³

This approach gives the possibility to reflect the HR policy into contracts and agreements with suppliers. Again contractual control can be of great help in this respect.

1.2) *The opportunities of the “contractualisation” of HR to enforce Human Rights Law*

⁵¹Clean Clothes Campaign, Full package approach to labour codes of conduct, 2008 pp. 7-8.

⁵² Typically, sourcing personnel are concerned with issues regarding price, quality and location whilst compliance personnel are interested in ensuring that the principles in the CoC are met by the supplier factory.

Mamic Ivanka, 2005.

⁵³ This approach is consistent with the Ruggie’s Framework because it attempts to avoid a separation between the line and the compliance department of a corporation in the implementation of the CSR policy.

By lack of an International binding legal framework for business and HR, uniformity can be promoted by Human Rights “contractualisation”. However it must be clear that this approach cannot be a permanent substitute for forms of control more universal and uniform in their application.

Highly globalised TNCs may establish, via their transnational contracts, a network of contractualised HR that may set even higher standards than those provided by the local law of a given country. In fact most of these codes of conduct that form an integral part of purchase agreements are based on international workplace norms outlined in the ILO conventions⁵⁴, the International Bill of Human Rights (UDHR, ICCPR ICESCR), UN Convention on the Elimination of All forms of Discrimination against Women and the Convention on the Rights of the Child.

Even if most of the developing countries have signed all the relevant treaties, in some cases the obligations undertaken at international level have not been transposed into domestic law or they are not enforced in order to make the country more attractive for foreign investors.

Moreover, the law can also be ignored by the victims of HR violations. Workers may be not aware of their rights or they may be inhibited by social imperatives telling them that resort to law is not acceptable.

Even lawyers may not have adequate knowledge of Human Rights Law especially those who are dealing with commercial law and contracts.⁵⁵

The standards set out in supply codes sometimes go beyond the substantive requirements of domestic law in the supplier’s country but it would be more accurate to

⁵⁴ See Van Yperen Michiel, 2006, p. 20. *The ILO has issued almost 200 conventions on working conditions. Eight of these specify the four fundamental labour rights: • Freedom of association and the right to collective bargaining; • A ban on forced labour; • A ban on child labour; • A ban on discrimination in the workplace and in professions. The ILO conventions focus in particular on governments responsibilities with respect to labour rights. The Tripartite declaration of Principles Concerning Multinational Enterprises and Social Policy extends the ILO Conventions, listing corporate responsibility with regard to labour issues and also including a number of additional labour standards falling under the specific responsibility of corporations.*

⁵⁵ I worked for two years in an international law firm in Italy and some of my colleagues never heard about the ILO conventions or the International Bill of Human Rights.

see contractual control as a potential enforcement mechanism for International HR Law that is espoused locally in the law books but not in practice.⁵⁶

Some contracts provide that in case domestic law guarantees an inferior protection than international standards, international provisions should prevail over domestic law. On issues like child labour the standard is often expressly set higher than domestic law.

For example Marks & Spencer, one of the UK's leading retailers of clothing, in its Global Sourcing Principles provides: *“Each supplier must, as a minimum, fully comply with all relevant local and national laws and regulations. Moreover, whatever the local regulations, workers should normally be at least 15 years old; as a norm, they should be free to join lawful trade unions or worker's associations”*.⁵⁷

Legal problems are created when the local law is conflicting with the standards of the purchasing agreement.

The most famous example is the CSR requirement⁵⁸ of freedom of association and the possibility of create independent trade unions and its prohibition in countries like China. Different solutions may be envisaged to solve or mitigate these conflicts: *“In such cases interviewees reported, suppliers are still encouraged by the purchasing company to initiate some kind of workers’ representative body that can operate with the consent of the management and consult with it about the running of business”*.⁵⁹

In this respect the SA 8000⁶⁰, that also require contractual control of suppliers, provides at paragraph 4.2 that: *“in situations where the right to freedom of association and collective bargaining are restricted under law, the company shall allow workers to freely elect their own representatives.”*

This process of “contractualisation” of HR can be considered for some aspects the other side of the coin of the “constitutionalisation” of private law described by scholars.⁶¹

⁵⁶ See Mc Barnet Doreen, 2007, pp. 66-68.

⁵⁷ <http://www.examtutor.com/business/resources/companyprofiles/marksandspencer/ethicaltrading.php>

⁵⁸ This CSR norm find its origins into the International Covenant on Civil and Political Rights (ICCPR) and various ILO conventions.

⁵⁹ See Doreen Mc Barnet and Marina Kurkchiyan, 2007, p. 71.

⁶⁰ Cf. footnotes 30 and 46 of this dissertation.

⁶¹ Generally speaking, the constitutionalisation of private law can be described as the increasing

If on one hand fundamental rights can have an influence over private law, on the other hand also private law can have an influence over the development of International Human Rights Law. Codes and practices of corporation especially when included in contracts can influence the development of soft law and hard law.

In this respect authors like Chip Pitts of Stanford Law School and John F. Sherman, at Harvard Kennedy School of Government report: “*soft law concretizes quickly into hard law when binding contracts incorporate nominally voluntary codes*”.⁶²

3) The opportunities for NGOs and civil society activism.

NGOs are often accusing companies to adopt HR policies that are indented to remain on paper because they have no real intention to put them in practice. Contractual control offers several opportunities for NGOs to check if a CSR policy of a corporation is nothing more than a marketing instrument.

In fact often there is a large difference between the HR policies advertised on corporations websites and what they actually do in their daily business. Corporations claim to adopt several steps in order to encourage suppliers to comply with their codes, but their statements are questionable if these policies are not reflected in their agreements.

Moreover, taking into account that the purchasing practices of the multinationals of the clothing industry are often considered by NGOs as one of the main sources of the HR violations down the supply chain, it becomes essential to know what a company adopts in its agreements.

Agreements are also an important tool in case of on-site visits to suppliers' factories by a NGO, in order to understand if suppliers are actually committed to respect certain standards and if purchasing policies presents possible conflicts with the achievement of those standards.

influence of fundamental rights in relationships between private parties. See inter alia FW. Grosheide, J.M. Smiths or Olha O. Cherednychenko, *Fundamental rights and private law: a relationship of subordination or complementarity?* in *Utrecht law review* volume 3 2007.

⁶² Pitts Chip and Sherman John, 2008.

NGOs seem not to have completely understood the possibilities of the “contractualisation” of HR for their campaigns and activism.

The Clean Clothes Campaign for example created the “*Code of Labour Practices for the Apparel Industry Including Sportswear*”, and in this model code provides for a strict contractual control⁶³. Despite the conception of this clever code the Clean Clothes Campaign is not monitoring the purchase agreements of corporations and their contractual clauses concerning HR.

In fact I asked them via e-mail: “What kind of contractual remedies have multinational companies of the textile industry adopted for failure to observe their codes of conduct by suppliers? What should the General Conditions of international purchase contracts exactly provide for?” And the answer was: “*It is difficult to know what purchase contracts provide for, these documents are normally not shared with us. We know, however that some companies, Adidas for instance, made the code of conduct an integral part of the contract*”⁶⁴.

Unfortunately NGOs do not possess this information and corporations are not willing to share this kind of information, not even just as an example. This attitude clearly shows that what is stated on a web site of a corporation does not necessarily correspond to its actual practice.

NGOs should question multinationals of the clothing industry on the content of their purchase/supply agreements (at least in respect of HR clauses) with determination, just as they do since years for the extractive industry⁶⁵. Of course the differences between these two businesses are huge but the aim pursued is the same: achieve greater transparency.

⁶³ “*The company will ensure that all agreements it enters into concerning the production of apparel and sportswear allow for the termination of the agreement for failure to observe the code by any contractors, sub-contractors and suppliers.*

The company shall authorise a procedure with fixed time limits to rectify situations where its code is not being fully observed by a contractor, sub-contractor or supplier. The agreement by the contractor, sub-contractor or supplier to abide by this procedure would enable the continuation of the agreement with the company. The company shall require contractors or suppliers to institute similar procedures with respect to their contractors, sub-contractors or suppliers.” Clean Clothes Campaign Code available at <http://www.cleanclothes.org/resources/ccc/corporate-accountability/the-ccc-model-code>.

⁶⁴ E-mail from Clean clothes campaign Jeroen Merk, research coordinator at Clean Clothes Campaign. Location: Amsterdam Area, Netherlands sent on the 14-3-2011 11:44.

⁶⁵ Rosenblum and Maples, 2009, pp.33-41.

Furthermore NGOs should be aware that “contractualisation” could present a brand new opportunity for victims of HR violations to participate in business to business arbitral proceedings.

In this respect professor Marella wrote: *“Since CSR is translated into a system of contractual clauses whose violation can lead to termination of a transnational contract, it follows that arbitration may become a new and unexpected forum for litigating HR issues in a business to business context. Victims of HR abuses are typically not parties of this arbitral proceedings, however they may be heard as witnesses since the breach of contract is caused by an allegation of such abuses by one of the TNCs parties to the business dispute”*.⁶⁶

⁶⁶ Fabrizio Marella, 2007, p. 305.

Chapter III

In this chapter I will illustrate how companies in the clothing industry are enforcing the norms contained in their codes of conduct through contracts with particular attention to the sanctions provided therein.

1) Contractual provisions and remedies adopted by corporations to enforce their codes of conduct.

1.1 Different forms of contract

This trend of incorporating codes of conduct provisions into contracts with suppliers presents different shades. In fact the methods of incorporation into the agreements, the typology of the contract and the sanctions therein contained can vary significantly.⁶⁷

When we say contract we do not necessarily mean an elaborated signed and written agreement. A contract can assume different forms depending on the character and duration of the business relationship (a single purchase or a long term relationship) but also on the bargaining power of the retail company. In the clothing industry another factor that characterizes the form of the contract is the structure of subcontracting and the position of the supplier in the supply chain. Depending on these various factors the contract can range from an e-mail exchange, a brief letter of agreement to a written document.⁶⁸

⁶⁷ Before analyzing this agreement it is important to mention that the corporations of the clothing industry engage in extensive screening of foreign garment contractors prior to entering into a supply relationship. The United States labour department noticed that : “*The supplier's ability to comply with labor standards provisions in codes of conduct - and child labor provisions in particular - is increasingly part of the screening process*”. See United States Department of Labour, <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/apparel3.htm#F.%20Enforcement>.

⁶⁸ See Doreen Mc Barnet and Marina Kurkchian, 2007, p.68.

The type of contract often used for long-term business relations characteristic of many supplies can be defined as “soft contract”⁶⁹ in the context of its CSR specifications and its actual structure can be minimal.

The purpose of a soft contract is to establish a partnership approach with the supplier and engage in a constructive dialogue. There is a CSR business case behind this approach and purchasing companies are willing to show their commitment to work together with the suppliers and not to unilaterally impose strong obligations. However the genuineness of this partnership approach is being highly criticized by NGOs.

A “soft contract” gives wide flexibility in deciding the actual level of standards that according to the corporation is “suitable” and “reasonable” to expect from an individual supplier in a particular state under a specific set of circumstances.

In order to start business the common practice is to use a short letter of agreement often very broad and brief, followed later by a commercial document describing terms and conditions of business in detail. Two are the main purposes of these letters of agreement. The first is for the supplier to have some acknowledgement that his stipulation would be followed as a condition for doing business and the second objective is for the corporation to grant itself the right to monitor compliance through *in loco* inspections.

Here is one example of a letter of agreement: *“The Supplier warrants that the goods conform to all (the purchasing company’s) Policies, which are notified by (the purchasing company) to the Supplier in connection with the supply of goods’*, with the terms and conditions usually also establishing the right to assess and monitor compliance: *“(the purchasing company) reserves to carry out a Social Accountability Assessment at the Supplier’s premises”*.⁷⁰

⁶⁹ *How soft the contract is usually depends on how far conditions are simply imposed by one party or involve a more collaborative approach and how far issues are open to interpretation and further negotiation, rather than imposed as strict and sharply defined obligations from the outset. CSR requirements are normally set out in agreements designed at the “softest” end of the spectrum.* Doreen Mc Barnet and Marina Kurkchian, 2007, p.69.

⁷⁰ See Doreen Mc Barnet and Marina Kurkchian, 2007, p.69.

Another interesting example of letter of agreement for a clothing company connected to its sourcing policy is the one of Jones Apparel Group: *“Your endorsement of this letter will authorize us to send a Jones representative or agent to your premises from time to time to perform such work as is necessary to ensure that you are in compliance with our standards. You agree to cooperate fully and to provide our representative or agent with any and all information requested which is necessary to prove your compliance with the applicable laws or other matters reviewed. Please sign and return to us a copy of this letter, which evidences your agreement to comply with Jones' policy, and with the employment standards and legal requirements of your country, with respect to the manufacture of all goods and services which you supply to us.”*

The real challenge for an effective monitoring system is to extend the control beyond the first-tier contractors and this way attempt to impede violations of the code by smaller subcontractors. For this reason a corporation may require a supplier to disclose the name of its subcontractors and make them sign the code of conduct.⁷¹ For example Fruit of the Loom in its agreements provides: *“Contractor hereby certifies that it proposes to (___)/will not (___) use any subcontractors or agents in connection with the manufacture and/or assembly of products for Fruit. If Contractor proposes to utilize any suppliers of component parts, subcontractors or agents in connection with the manufacturer or assembly of products for Fruit, Contractor agrees to attach to this Code of Conduct:*

- (a) a statement (on the form supplied by Fruit) disclosing the company name, plant address, telephone and fax numbers and contact names of any such suppliers, subcontractors or agents, all of whom shall be subject to review and prior written approval or disapproval by Fruit, and*
- (b) a signed Fruit of the Loom Contractor Code of Conduct signed by each such person or entity.”*

As we can notice letters of agreement directly refer to codes of conduct where usually requirements are also expressed in a “soft” manner. For example “supplier must meet

⁷¹ International Labour Office Bureau for Workers' Activities.

all the appropriate relevant industry and country standards” or “*as a norm employees should be free to join a lawful union or association*”.⁷² However it should be noted that, in respect of Human Rights protection, the wording of the provisions contained in codes of conduct is often more precise (i.e. the prohibition of forced or child labour).

The letter of Agreement of course is not the only document containing the supplier commitment to the code of conduct of the buyer. Suppliers are often required by MNCs to fill out questionnaires explaining how they meet code requirements and their response is intended to take on contractual status.⁷³

Contractual clauses concerning the respect of the code of conduct are also contained in single purchase agreements and it is there that often the sanctions for non compliance are specified.

In addition some corporations are requiring a further certification of compliance to be sent together with the shipping documents. For example Talbots requires supplier’s shipping documents which accompany all merchandise to include the following language: *"We hereby certify that the merchandise covered by this shipment was produced in compliance with all applicable requirements of the wage and hour laws of the country of manufacture and without the use of child (under the age of 15), prison or slave labour. We further certify that all merchandise covered by this shipment was produced solely in factories that were inspected and approved in writing by your authorized representative and we have in effect a program of monitoring any contract sewing shops and other designated contract facilities which performed work for us in connection with the production of such merchandise for compliance with the requirements set forth above"*⁷⁴.

⁷² See Doreen Mc Barnet and Marina Kurkchian, 2007, p.70.

⁷³ See Doreen Mc Barnet and Marina Kurkchian, 2007, p.70.

⁷⁴ Any merchandise shipped by the supplier that is not accompanied by a shipping document bearing the required language will be subject to denied entry and the supplier will be assuming responsibility for said goods. <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/code/talbots.htm>.

Even if corporations grant themselves the right to monitor compliance the enforcement of these soft contracts can also be defined as “soft”.

In fact according to Doreen Mc Barnet: *“there is a direct commercial rationale behind the frequent reluctance of major firms to press hard for the supplier to meet the highest of the standard set by a literal reading of the code of conduct⁷⁵”*. Corporations are reluctant to increase pressure on their suppliers in order to enforce compliance with their code because they fear that this approach could potentially increase unit prices⁷⁶.

Regarding enforcement a key role is played by monitoring and especially by the related sanctions in case of non compliance.

Unfortunately concerning sanctions, a preeminent study stated that: *“While, as noted above, all of the codes required some acknowledgement that stipulations would be followed as a condition for doing business, less than two-thirds of the codes (17 of 27) included a specific mention of sanctions for noncompliance⁷⁷”*.

Authoritative studies focus on the importance of sanctions in order for labour conditions to improve and violations to diminish. In the next paragraph I will focus on sanctions adopted by MNCs to redress failure of suppliers to comply with code requirements.

1.2 Sanctions provided in contracts: the state of the art.

A study by Ans Kolk, Rob van Tulder, and Carlijn Welters of 132 codes of conduct shows that monitoring and sanctions remain the most important test for the seriousness of the codes' implementation: *“the inclusion of sanctions in codes may deter firms from breaking their commitment, and increase the compliance likelihood⁷⁸”*. In fact the positive impacts of the adoption of a code of conduct *“will likely be short-lived if unethical behaviour continues without sanction⁷⁹”*.

Corporations of the clothing industry use different and combined approaches to respond to a violation. The most common sanctions are: a) monetary fines or penalties; b)

⁷⁵ See Doreen Mc Barnet and Marina Kurkchyan, 2007, p.70-71.

⁷⁶ Bulut Tugce, 2009, p. 263-284.

⁷⁷ See Emmelhainz, Margaret A., Adams, Ronald J., 1999, pp.51–57.

⁷⁸ Ans Kolk, Rob van Tulder and Carlijn Welters, 1999, pp. 143-176.

⁷⁹ See Patrick M. Erwin, 2010.

probationary status; c) demand for corrective action; d) providing education (particularly where child labour violations are involved); e) cancellation of an individual order; f) termination of the contract; g) refusal to deal with the other party in the future but also notification of the violation to the responsible national authorities.⁸⁰

In this paragraph I will attempt to present, for illustrative purposes, some examples of what can be found in a contract between a retailer and a supplier.

a) monetary fines or penalties:

Where the parties have agreed in a contract upon a liquidated damages clause or a contractual penalty a corporation can obtain a monetary fine or a penalty in case of a violation of its code.

This type of sanction has proven to be very effective because it represents a strong incentive for the supplier to comply with the code and it can operate as both a compensatory remedy as well as a deterrent. However **when human rights violations occur, this kind of remedy is neither adequate nor ethical if the economic sanction remains at the disposal of the corporation.**⁸¹ In fact, by receiving the agreed sum, a company will increase its profit as a result of a HR violation. This counter-indication can be overcome by investing the money of the fine for the purpose of increasing labour standards in the supply chain or, as I will explain in Chapter 5, by donating the sum to an independent foundation created under the umbrella of a multi-stakeholder initiative.

b) probationary status;

While the United States labour department mentions also to this type of sanction in order to respond to a CSR code violation in the apparel industry, I haven't found any significant example of this kind of contractual clause.

c) demand for corrective actions;

⁸⁰ The united states labour department, The apparel industry and codes of conduct, <http://www.dol.gov/ILAB/media/reports/iclp/apparel/main.htm>, consulted the 21 of April 2011

⁸¹ See Massimo Caiazza, 2008, pp. 206-208

This type of sanction is utilized by most of the corporations of the sector and it is strongly supported by civil society organizations. Often NGOs involved in monitoring are themselves drafting a recommended plan of action after their *in loco* inspections⁸².

Gap, a corporation leader in clothing and accessories, provides this kind of sanction: “*If Gap determines that any factory has violated this Code, Gap may either terminate its business relationship or require the factory to implement a corrective action plan. If corrective action is advised but not taken, Gap will suspend placement of future orders and may terminate current production*⁸³.”

Unfortunately demand for a corrective action is not always effective especially when it is not followed by a sanction in case of non compliance with the “agreed” plan and credibility of these corrective plans is often doubtful. In respect of cases when auditors reported serious violations of code standards, a representative of an MSI stated: “*Buyers are open to negotiation in terms of compliance with labour standards. **Then, they draw a roadmap for remedial action to be undertaken within three years. And by the end of three years, if they are not compliant yet, they just draw a new plan. It can go forever like that. I cannot see how this is enforcement***⁸⁴.”

d) providing education (where child labour is involved)

When a case of child labour is detected within the supply chain, some corporations are willing to take direct remedial action in order to protect their reputation and they are willing to contribute to the education of the child.

The SA 8000 include a provision that can be considered exemplificative of this approach, requiring the company involved to “*provide adequate financial and other support to enable such children to attend and remain in school until the child turns 15 years old*⁸⁵”.

e) cancellation of an individual contract and notification to the responsible authorities;

⁸² See chapter 5 par. 1. and 1.2 on monitoring.

⁸³ See International Labour Office Bureau for Workers' Activities.

⁸⁴ See Bulut Tugce, 2009.

⁸⁵ See SA 8000 article 1.2 of the Social Accountability requirements.

The Limited one of the largest corporate collections of apparel retailers provides in its purchase agreements with its suppliers that “*a violation of the letter or spirit of our policies constitutes a breach of our relationship, which may result in a cancellation of orders and /or in a notification to responsible national authorities*”⁸⁶.

f) termination of the contract;

Termination of the agreement is the most common sanction included in contracts between a company of the clothing industry and a supplier.

Considering this fact, I will provide here some examples:

Prada Group provides in its code of conduct and in its contracts that “*any infringement of the provisions contained in the code of conduct can constitute breach of the contractual obligations undertaken, with all the legal consequences as regards the termination of the contract and the compensation of the deriving damages*”.

VF Corporation for its Contractor terms of Engagement provides: *VF Corporation and its divisions reserve the right to cancel all current purchase orders in case the contractor is found to be in violation of the required standards*”.⁸⁷

Fruit of the Loom provides: “*The undersigned understands that Contractor's failure to abide by the terms of this Code of Conduct may result in Fruit's immediate cancellation or termination of any and all outstanding agreements and purchase orders between Fruit and Contractor, including, without limitation:*

(aa) Fruit's cancellation of orders for goods made while Contractor was not in compliance with this Code of Conduct or goods in process or scheduled to be made at the time of cancellation or termination, whether involving raw materials, work in process or finished goods, or in Contractor's, Fruit's or a third party's possession; and

(bb) Contractor's prompt refund to Fruit of any monies paid in connection therewith”.⁸⁸

⁸⁶ See International Labour Office Bureau for Workers' Activities.

⁸⁷ See International Labour Office Bureau for Workers' Activities.

⁸⁸ See International Labour Office Bureau for Workers' Activities.

Unfortunately, often the termination clause is the only sanction included in a supply/purchase contract, but considering its severity it is used only for violations that are likely to incite public reaction such as child labour and occupational health and safety standards⁸⁹.

On one side the termination clause can show the determination of a company to not be complicit in a Human Rights violation and it has proven to be a very effective remedy for the elimination of child labour through the supply chain of the clothing industry.

On the other side, when termination is the only sanction provided in the contract, too much discretionary power is left to the corporation and there is the risk that this sanction could be used only for opportunistic reasons.

Furthermore NGOs consider termination as non-compatible with an effective protection of Human Rights especially when it is not preceded by an attempt to remedy at the violation through a plan of action.

The Clean Clothes Campaign answering at the question “is the simple termination of the agreement enough and is it compatible with an effective HR protection?” replied: *“Termination is of course not an efficient way of protecting Human Rights, it is rather an example of running away from issues. We normally argue that the buyer should try to improve the situation in a factory using the leverage it has. If it does not work, a last resource should be terminating the contract”*⁹⁰.

Also J. Ruggie shares these concerns and in its guiding principles states that it should be evaluated *“whether terminating the relationship with the entity itself would have adverse human rights consequences”*⁹¹.

We will see in chapter 5 of this dissertation that a Multi-stakeholders Initiative can play an important role in this respect.

⁸⁹ In case of child labour termination clause is usually used.

⁹⁰ E-mail from Clean clothes campaign Jeroen Merk. research coordinator at *Clean Clothes Campaign*. Location: Amsterdam Area, Netherlands sent on the 14-3-2011 11:44.

⁹¹ Guiding Principles on Business and Human Rights, A/HRC/17/31, 2011, p. 18.

g) refusal to deal with the other party in the future

Despite the fact that a number of sanctions are usually provided in a contract, it has to be noted that, in term of legal consequences, non-compliance with the obligation of the code included in the contract is unlikely to end up in court.

In fact, the refusal to deal with a supplier by declining to place a new order is the most common measure to follow from contractual non-compliance but even this measure in the partnership approach taken by CSR in supply contracts is to be considered as an exception.⁹²

1.3 Conclusions

The following conclusions can be drawn from the following analysis:

- Contractual clauses created to enforce codes of conduct may be included into different typologies of contract. Weather the contract is a brief letter of agreement or a written witnessed document the main purposes of these contractual clauses are:

- 1) to make clear to the supplier that the respect of the code is a condition for doing business and;
- 2) to grant the retailer the right to monitor compliance through *in loco* inspections.

Moreover a real challenge for an effective contractual clause is to extend its control beyond the first-tier of contractors.

- The sanctions provided into these contractual clauses, if considered alone, may be not adequate to provide a satisfactory answer to the peculiar ethical questions that are raised in connection with the violation of HR standards.

In particular, as we noticed, agreed monetary fines may offer the opportunity for a company to increase its profit as a result of a HR violation. On the other hand, when termination is the only sanction provided in the contract, too much discretionary power is left to the corporation and there is the risk that this sanction could be used only for opportunistic reasons. Also in respect of demand for corrective actions or providing education in case of child labour, I have pointed out that contractual control may be not enough and the intervention of an NGO may be necessary.

⁹² See Doreen Mc Barnet and Marina Kurkchian, 2007, p.79-80.

Therefore, according to these considerations, we shall see in chapter 5 how these ethical and practical inconveniences connected with contractual control can be overcome with the help of an independent Multi-Stakeholders Initiative.

Chapter 4

In this chapter I will try to identify what could be the remedies that a retailer/buyer can adopt if he discovers that the clothes that he has purchased were produced under sweatshop conditions assuming that the applicable law is the CISG. Moreover I will question the validity of certain purchasing practises adopted by MNCs under the applicable law.

1. Legal consequences under international commercial law for non compliance with HR standards included in the codes of conduct by the supplier.

In a context of international sale the law governing the contract is likely to be the United Nations Convention on Contracts for the International Sale of Goods (CISG), in fact, according to its first article, the Convention is applicable to *“contracts of sale of goods between parties whose places of business are in different States when the States are Contracting States or when the rules of private international law lead to the application of the law of a Contracting State”*.

This Convention has been ratified by 76 states including China, where most of the apparel production is located.⁹³

International Commercial Law and Human Rights Law are usually considered parallel entities that do not influence each other. However I will attempt to describe some circumstances in which the Convention on Contract for the International Sales of Goods (CISG) can be used as a helpful tool to protect Human Rights and also some circumstances in which Human Rights Law can assist the CISG in *promoting uniformity in its application*.⁹⁴

⁹³ Turkey is the second larger supplier in textile for the EU and it is also a contracting party of the CISG.

⁹⁴ See art. 7 CISG.

The CISG in fact is an international document created by the United Nations and its existence is related with the purposes of this international organization like promoting and encouraging respect for human rights and for fundamental freedoms. *“As such, the CISG's purpose should not be isolated from the other documents that serve as sources of international understanding and general principles of international law”*.⁹⁵

Assuming that the CISG is applicable, first of all it is important to determine in which cases CSR norms protecting HR can become part of the contract between the producer (seller) and the retailer (buyer).

1.1 Contractual control or “contractualization” of Human Rights and the CISG

As I explained there is an emerging trend to incorporate the Code of Conduct of the buyer into purchase agreements. In fact Suppliers are generally required to adhere to the code of conduct of the buyer, moreover specific codes of conduct for suppliers are increasingly being created and becoming the basis for contractual obligations.⁹⁶

In this way Corporation are capable to exercise a **contractual control** over suppliers in order to monitor and enforce their codes of conduct. As mentioned before, this trend is called by some authors **“contractualisation”** of Human Rights.⁹⁷

When the CSR provisions are incorporated into the contract there is no doubt that they become legally enforceable contract clauses and that they will enjoy the same status as any other term of contract. In fact contract law is based on the principle of party autonomy that allows the contracting parties to determine freely their mutual obligations according to their needs.

As mentioned above, Prada Group provides for example in its contracts: *“Compliance with the provisions of the present Code of Ethics constitutes part of*

⁹⁵ Michael B. Lopez, 2010, p. 152.

⁹⁶ See Doreen Mc Barnet and Marina Kurkchian, 2007, p.65.

⁹⁷ See Chapter 2 par. 1 of this thesis.

*the contractual obligations undertaken by collaborators, by consultants and by other entities in business relations with the companies of the Group. The eventual infringement of the provisions contained in the same can constitute breach of the contractual obligations undertaken, with all the legal consequences as regards the termination of the contract or appointment assigned and the compensation of the deriving damages”.*⁹⁸

1. 2 Alternative ways to incorporate CSR Codes of Conduct under the CISG.

Article 9 (1), (2) CISG

The case is different when a company does not have a code or, it even if does have one, it didn't incorporate it into the agreement with its business partner.

It must be noted that not all the companies exercise the same leverage on their suppliers and they may not be able to impose their CSR standards of production. Furthermore depending on the character and duration of the business relationship, but also on structure of subcontracting, the purchase agreement can be more or less elaborated and often it can consist in an e-mail exchange where HR provisions are not mentioned.

However, even in this case, HR standards can still be incorporated into the contract under certain conditions that I will illustrate here.

According to Article 9(1) CISG in fact, *the parties are bound by any usage to which they have agreed and by any practice which they have established between themselves.*

Therefore, if the parties have repeatedly contracted on express terms establishing certain HR standards a reasonable expectation might arise that the parties will continue to respect these standards also in the future. So, although an express term is lacking, the contract may be supplemented in accordance with the previous conduct of the parties.⁹⁹

⁹⁸ PRADA Group, Code of Ethics, adopted on 2007.

⁹⁹ Ingeborg Schwenzer & Benjamin Leisinger, 2007, p. 264.

Another solution to incorporate HR standards is offered by article 9 (2) CISG that provides: *“The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”*.

Therefore Human Rights standards included in CSR codes can still become part of the contract if they can be considered as international trade usages according to the conditions defined by art. 9 (2) CISG.

The requirement that the usage must be widely known in international trade has to be referred to the particular branch of trade involved and to the parties who form contracts like the one concerned in a particular case.¹⁰⁰

On the formation of a usage P. Bout states: *“ When a branch-organization issues rules of conduct for its members, these members will act in conformity to these rules. If other parties also start following these rules of conduct, the rules might develop into usages”*.¹⁰¹

In the clothing industry several initiatives, schemes and standards for workplace conditions in the supply chain have been developed worldwide¹⁰² and suppliers are well aware of these standards, because nowadays they work with more than one retailer and they are required to comply with more than one code.

Moreover all of these codes of conduct and standards of the apparel sector contain at least the international workplace norms outlined in the ILO conventions.¹⁰³

Therefore via Article 9(2) CISG, at least minimum HR standards (such as prohibition of forced and child labour) may form in the clothing industry, as implied terms, part of every international sale contract.¹⁰⁴

¹⁰⁰See *Peter Schlechtriem*, 1986, p. 40.

¹⁰¹Patrick X. Bout, 1998.

¹⁰² Cf. footnote n. 30 and see Michiel van Yperen, 2006, p. 20.

¹⁰³ Cf. footnote 54 of this dissertation, See Michiel van Yperen, 2006, p. 20.

1.3 Remedies under the CISG for item of clothing produced in violation of CSR norms

When CSR norms protecting HR become part of the contract in one of the different ways described above it has to be determined what kind of remedies the buyer may resort to under the CISG.

Conformity under article 35 CISG

To answer this question it is functional to determine if a supply of clothes produced in violation of HR standards is to be considered in conformity with the contract according to the criteria outlined in art. 35 CISG.

Article 35(1) CISG states: “*The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract*”.

In case HR requirements are incorporated into the contract and the seller does not respect them non-conformity of the goods derives from Article 35(1).

Peter Schlechtriem remarks that “*a prospective buyer troubled by the prospect that the production of the goods, which he intends to order, will violate his or her ethical convictions, can and should try to stipulate that certain standards of production have to be observed. Such standards then become requirements of quality, i.e. conformity under Article 35(1) of the CISG. Goods produced in violation of these standards are non-conforming*”.¹⁰⁵

¹⁰⁴ See Ingeborg Schwenzer & Benjamin Leisinger, *Ethical Values and International Sales Contracts*, 2007, p. 264: “*Fundamental ethical standards -- such as the prohibition of forced or child labor -- are incorporated into the contract in any case. Such standards can be considered as being applicable to the contract by implication according to Article 9(2) CISG as a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*”

¹⁰⁵ See Peter Schlechtriem, 1986, p. 99.

In fact, if the clothes are produced in violation of the agreed standards, they are not of the quality required by the contract notwithstanding that their physical features are in accordance with the requirements of the buyer.

The quality of goods does not refer only to their tangible characteristics, but also to their intangible characteristics such as reputation.¹⁰⁶ In order to determine the seller's obligation the prime consideration is the intention of the parties according to art. 8 (1) CISG and if the buyer consider fundamental for the reputation of its own brand that the goods are produced in accordance with certain standards the seller has to conform with them. The principal problem then will be the evaluation of the damages connected to the loss of reputation.

In respect of the relationship between tangible and intangible characteristics of goods K. Maley notes that *“It is common for the quality or description of the goods to incorporate some elements that are not part of the physical goods, and such requirements should not be seen as novel. The prime consideration in determining the seller's obligation under the CISG is the intention of the parties. Article 35 is structured to create rules of interpretation rather than of binding force. Therefore, where the parties have made it an express term, the contract may indeed require goods that have brand equity or reputation of a certain description”*.¹⁰⁷

To understand the importance of the circumstances under which items of clothing are produced for a European Company operating in the apparel sector, it may be interesting to take into consideration the Consumer Sales Directive 1999/44/EC where minimum standards for member states' consumer sales laws are set.

In fact in this Directive the concept of conformity does not stop at physical quality of the goods but it includes *“conformity with public statements on the specific characteristics made about them not only by the seller but also by the*

¹⁰⁶ See Kristian Maley, 2009, p.88.

¹⁰⁷ See Kristian Maley, 2009, p. 120.

producer or his representative, particularly in advertising or on labeling".¹⁰⁸

Therefore whenever a European company of the clothing industry makes public its own code of conduct or adheres to a major standard for workplace conditions in supply chains like the SA8000, the WRAP or the Fair Labour Association it becomes essential that the clothes are produced in conformity with these standards.

In case the contract contains insufficient details in order to determine the requirements to be satisfied for the production of the goods, recourse is to be had to the subsidiary determination of conformity set forth in Article 35(2) CISG.

Article 35(2)(b) contains good faith elements¹⁰⁹ and obligates the seller to supply goods which are fit for a particular purpose expressly made known to the seller except where the buyer could not have reasonably relied upon the seller's skill.

An example in the clothing industry can be when the buyer is part of a multi-stakeholder initiative such as the Fair Wear Foundation or the Ethical Trade Initiative or in case the buyer purchases the clothes in order to sell them in a specific market, such as one specialized in fair trade. *However, this particular purpose must be made known to the seller at the time of the conclusion of the contract.*¹¹⁰

A problematic issue concerns notification of non-conformity. The buyer is supposed to give notice to the seller *within a reasonable time* (Art. 39, 1) or in any case within a period of two years from the date on which the goods were actually handed over to the buyer (Art. 39, 2).

In case of violation of HR standards probably monitoring is the only resource that the buyer has to discover the non-conformity. Corporations in the clothing industry are already carrying out extensive monitoring with the help of NGOs or in the framework of multi-stakeholder initiatives.

¹⁰⁸ See Carola Glinski, 2007, p. 125.

¹⁰⁹ See Honorable Ulrich Magnus, 1998 p. 93

¹¹⁰ See Ingeborg Schwenzer & Benjamin Leisinger, 2007, p. 252

Once it is established that the clothes can be considered as non-conforming goods, the buyer is entitled under the CISG to avoid the contract, claim damages, or obtain a price reduction. However these remedies present peculiar issues when are the results of the violation of CSR code requirements and especially in case of the violation of basic HR standards.

Artt. 49 (1, a) and 25 of the CISG. Avoidance of the contract

Avoidance is the one-sided right of a party to terminate the contract and it is the strongest weapon that a party to a sale contract can use if the other party has breached the contract.¹¹¹

According to article 49 (1, a) the buyer may avoid the contract *if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach*. According to article 25 a breach of contract is fundamental *if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract*.

Therefore if the parties agree in the contract that certain CSR requirements for the production are of a serious importance for the buyer, their violation will be considered a fundamental breach.

In this regard *Peter Schlechtriem* notes that, in order to achieve the respect of ethical standards in an international sale contract regulated by the CISG: *“the threshold for avoidance can be lowered by qualifying the standards of ethical production methods as being “of the essence,” a violation constituting a fundamental breach allowing immediate avoidance under Article 49(1)(a) of the CISG”*.¹¹²

In case of a violation of a basic HR standard (like the prohibition of forced or child labour), avoidance of the contract seems to be more appropriate than any other remedy. In fact a multinational corporation can hardly be adequately compensated for the loss for reputation by claiming damages or by obtaining a

¹¹¹ See Ulrich Magnus, Hamburg, The remedy of avoidance of contract under the CISG, available at <http://www.uncitral.org/pdf/english/CISG25/Magnus.pdf>.

¹¹² See Peter Schlechtriem, 2007, p. 99.

price reduction on the clothes. Furthermore, in case the contract is not avoided, it may be even more dangerous for the reputation of a company to be associated with the supplier misconduct and therefore being considered a “partner in crime”. However the situation is not so clear and pursuing avoidance is not always in the best interest of a buyer. In fact NGOs consider termination¹¹³ as non-compatible with an effective protection of Human Rights especially when it is not preceded by an attempt to remedy the violation through a plan of action.

The Clean Clothes Campaign answering at the question “is the simple termination of the agreement enough and is it compatible with an effective HR protection?” replied: “*Termination is of course not an efficient way of protecting Human Rights, it is rather an example of running away from issues. We normally argue that the buyer should try to improve the situation in a factory using the leverage it has. If it doesn’t work, a last resource should be terminating the contract*”.¹¹⁴

Therefore at least according to civil society activism avoidance should be considered as the *ultima ratio* remedy in case of violation of HR standards.

Artt. 45 (1, b) and 74 of the CISG. Damages.

According to the majority of commentators non-pecuniary damages or immaterial damages cannot be compensated under the CISG.¹¹⁵

In fact under this Convention the compensation for damages is limited to material damages.¹¹⁶ Therefore in order to claim damages the buyer has to prove a loss of profit and this can be sometimes difficult in case of clothes produced in violation of HR standards. The aforementioned violation in fact is often discovered only after that the clothes have already been sold.

In this case damages can be claimed in the form of loss of reputation that the company has suffered. According to article 74 an infringement of goodwill is a

¹¹³ Termination of the contract is one of the effects of avoidance under the CISG.

¹¹⁴ E-mail from Clean clothes campaign Jeroen Merk. research coordinator at *Clean Clothes Campaign*. Location: Amsterdam Area, Netherlands sent on the 14-3-2011 11:44.

¹¹⁵ See Peter Schlechtriem, 2007, p. 90.

¹¹⁶ See Art. 74 limits damages to a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.

pecuniary loss and has to be compensated if it was foreseen or it ought to be foreseen. Nevertheless the financial quantification of this loss can be difficult and probably inadequate.

Furthermore a special problem is present in case the clothes have been sold by the buyer and the violation of HR standards by the seller has never become public knowledge. In this case in fact the buyer didn't suffer any loss and the loss of goodwill could only possibly materialize in the future. An adequate solution under the CISG for this type of situation is not easy.

Schwenzer & Leisigner propose that the buyer should “*claim damages in the amount by which the actual value of the goods is reduced. This amount equals the amount by which the seller reduced its production costs by producing the goods in an unethical way -- for example, by using forced labour*”.¹¹⁷

However this solution is very difficult to implement in the clothing industry where margin of profit for suppliers is already very low and it would be complicated to determine the difference in price between “ethical” and “unethical” production. Furthermore how do you calculate the reduction of production cost in case of child labour or in case of the prohibition to form trade unions?

But even if we follow the approach proposed by Schwenzer & Leisigner the results can still be considered unethical.

In fact, when a violation of human rights occurs but does not become of public knowledge, a compensation obtained without any loss of goodwill is neither adequate nor ethical if the economic sanction remains at the disposal of the buyer.¹¹⁸ In this way, by receiving the agreed sum, a company will increase its profit as a result of a HR violation. This counter-indication can be overcome for example by investing the money of the fine for the purpose of increasing labour standards in the supply chain or by donating the sum to an independent foundation created under the umbrella of a multi-stakeholder initiative.¹¹⁹

¹¹⁷ See Ingeborg Schwenzer & Benjamin Leisinger, 2007 , p. 274.

¹¹⁸ See Massimo Caiazza, 2008, pp. 207.

¹¹⁹ See Massimo Caiazza, 2008, pp. 207.

Artt. 45 (1, a) and 50 of the CISG. Reduction of the price.

Considering that the reduction of the production costs consequential to a violation of HR standards can be considered as causing a decrease in the value of the goods, using this remedy the buyer may reduce the purchase price in proportion to the lower value that the goods actually delivered had at the time of the delivery.¹²⁰

However if the violation didn't become of public knowledge also this remedy presents the same ethical concerns of the latter because the retailer is likely to sell the clothes at the normal price but it will be able to increase its profit as a result of a HR violation.

Other remedies

Since claims for damages may be complicated because of a lack of losses a more effective solution for the buyer is to agree upon liquidated damages clauses or penalties, if these remedies are valid and enforceable under the law applicable to the contract, besides the CISG.¹²¹

This type of solution represents an incentive for the supplier to comply with the code of conduct and it can operate as both a compensatory remedy as well as a deterrent.

However every time a MNCs receive sum of money but the HR violation does not become public the moral problems that I described above are involved.

1.4 Purchasing practices in international contracts in the clothing industry and the validity of the contract.

Often the purchasing policies of MNCs do not allow suppliers to comply with standards of labour practices outlined in national labour laws and voluntary codes of conduct.¹²² In fact MNCs require tight schedules for production and delivery

¹²⁰ See Ingeborg Schwenzer & Benjamin Leisinger, 2007, p. 270.

¹²¹ In fact according to Art. 6 CISG the parties may derogate from the provisions on damages contained in Art. 45(1)(b) CISG including a liquidated damages/ penalty clause.

¹²² SOMO Bulletin on Garments & textile, 2003, p. 1.

of the products and provide only a very low remuneration. According to preeminent studies and to influential NGOs like the Ethical Trade Initiative (ETI) or the Clean Clothes Campaign “*companies need to change their purchasing practices, if their commitments to be socially responsible are to be more than empty word*”.¹²³

Can the CISG and Human Rights Law play a role in this respect?

The question that should be asked is the following: if the buyer, using his leverage, imposes an unfair purchasing practice and fixes a price that is so low that compliance with its standards is reasonably impossible to achieve for the seller, in case of non compliance would the buyer be entitled to resort to the remedies provided under the CISG?

In case the performance of a contract is likely to lead to a violation of HR of third parties the contract should be void because, according to the circumstances, it can be considered illegal, immoral or against public policy.

According to article 4 the CISG is not concerned with: *the validity of the contract or of any of its provisions or of any usage*. Domestic law will be applicable to determine the validity of a contract.¹²⁴

Therefore the court where the legal proceeding has been instituted can declare the contract invalid for immorality of its object.¹²⁵

The wide ratification of the Human Rights treaties, of the ILO Declaration on Fundamental Principles and Rights at Work¹²⁶, and the fact that several Human Rights acquired the status of customary international law(i.e. ban of forced and child labour);¹²⁷ all these elements together can help the national courts in the assessment of the validity of an international contract.

¹²³ Trading our rights, Oxfam international 2004.

¹²⁴ “The applicable domestic law may require that certain standards of production and manufacturing of goods must be observed, and may prohibit the marketing of goods manufactured in contravention of such standards. A violation of such regulations, therefore, may render a contract void, domestic law superseding the CISG.” Peter Schlechtriem, 2007, p. 99.

¹²⁵ Under some European legal systems, contracts whose performance will foreseeably lead to an immoral result are invalid for immorality.

¹²⁶ See Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work.

¹²⁷ Ehrenberg Daniel S., pp.365-366 ,1995.

1.5 Conclusions regarding the CISG

In this Chapter we analyzed the different ways in which, through the interpretation of the CISG, it is possible to incorporate Human Rights provisions of CSR codes of conduct into international contracts. Particularly interesting is the opportunity provided by this Convention to include at least basic Human Rights standards into an international contract when they can be considered international trade usages according to art. 9 (2).

On the other hand the remedies available to the buyer under the CISG are probably not adequate to provide an answer to the peculiar questions that are raised in connection with the violation of Human Rights standards in the apparel industry. In the next chapter we will analyze how a multi-stakeholder partnership can make these remedies more efficient and trustworthy.

Moreover it must be noted that, if interpreted in accordance with International Human Rights Law, the applicable domestic laws that enter into play when the validity of a contract is at stake have the means to declare invalid certain unfair purchasing practices adopted by MNCs of the clothing industry.

Chapter 5

In this chapter I will describe the importance of multi-stakeholder partnerships in order to make the contractual control exercised on suppliers by MNCs of the clothing industry more efficient and transparent.

I will illustrate what are the best practices among the existing social standards and multi-stakeholders initiatives of the textile sector and what could be a “new” role for them in order to enhance their effectiveness.

In particular, I will explain how a MSI can solve the problems and contradictions presented by the sanctions included in contracts¹²⁸ for violation of Codes of conduct and/or at the remedies provided by the CISG.¹²⁹

1. The role of multi-stakeholder partnership for the clothing industry.

Many good CSR practices in the clothing industry, as well as in other sectors, cannot be achieved by companies working alone, but a strategic alliance with other enterprises, NGOs and governments is proven to be very useful. An initiative that involves different parties including companies can be defined a multi-stakeholder initiative or a multi-stakeholder partnership. A multi-stakeholder initiative (MSI) brings together various stakeholders to address specific issues, in this context these initiatives are taking up the issues of monitoring and verifying compliance with a code of conduct.¹³⁰

These partnerships are created because a single company cannot face the complexities of the protection of HR in foreign countries where suppliers are located and therefore cooperation between different actors is needed in order to promote good CSR practices and enhance credibility.

¹²⁸ See Chapter 3 par. 1.2.

¹²⁹ See Chapter 4 par. 1.3.

¹³⁰ <http://www.cleanclothes.org/resources/ccc/corporate-accountability/code-implementation-a-verification/487>

In fact voluntary codes of conduct are often considered to be weak in the area of monitoring and enforcement, which may lead suppliers and mostly customers to question their seriousness.¹³¹

With regard to the clothing industry a multi-stakeholder initiative can provide a number of advantages for CSR norms implementation, particularly in respect of monitoring code compliance and the drafting of a remedial plan of action. Through this approach it is possible to provide greater credibility to the commitment of a company and to address specific issues (e.g. a case of child labour) more efficiently. A multi-stakeholders partnership is also valuable to avoid conflicting requirements between different CSR codes of conduct and to inform consumers about observance of the code.¹³² Moreover a MSI is able to provide adequate answers for the specific legal and moral issues posed by the sanctions provided in contracts in case of HR violations by the supplier.

An excellent illustration of what civil society groups and costumers expect from a socially responsible buyer is represented by the Code of Labour Practices for the Apparel Industry Including Sportswear, created by the Clean Clothes Campaign (CCC).

In fact, the CCC's code identifies the role of a multi-stakeholder initiative in:

- 1) “conducting, directly or indirectly through other organisations, the independent monitoring of compliance with the code;
- 2) assisting companies in implementing the code;
- 3) and providing a means to inform consumers about observance of the code and more generally about labour conditions in the industry.¹³³

In respect of monitoring a multi-stakeholder initiative can help a company to reduce costs and to enhance transparency and independency.

¹³¹ “A 1999 study by Ans Kolk, Rob van Tulder, and Carlijn Welters of 132 codes of conduct drawn up by four different groups of actors (social interest groups, business support groups, international organizations, and firms) surprisingly suggests that voluntary transnational corporations codes show more potential than others—at least as long as the other actors are involved in creating, monitoring, and supporting the code.” Thomas Donaldson, p.3.

¹³² Human Rights standards contained in codes of conduct are equivalent. However specific provisions may be more or less detailed according to the different source of the code. For example the FLA Code presents more detailed provisions regarding non discrimination than the ETI Code.

¹³³ Code of Labour Practices for the Apparel Industry Including Sportswear, 1998.

A frequent complaint made by suppliers is that they have a number of different standards to which they have to adhere depending on the number of different MNCs they work with. The outcome of this lack of coordination among different retailers leads to a situation where some suppliers are constantly audited (certain factories reported more than 50 audits per year)¹³⁴ while on the other hand others are rarely inspected.

This lack of organization obviously creates higher costs for the suppliers and for buyers, and it generates confusion and lack of transparency.

On the other hand it is possible to rationalize the activity of monitoring and reduce costs when a company operates through a social standard like the WRAP (for apparel) or as a member of an initiative like the Business Social Compliance Initiative (BSCI), Fair Labour Association (FLA, for apparel) or Ethical Trading Initiative (ETI).

According to the different organizations, in fact, the inspections of supplier's factories are carried out by independent third parties or by the organization itself. When violations are found these organizations (i.e. the FLA or the BSCI) are entitled to publish their reports on their website and to recommend the defaulting supplier a plan for a corrective action.¹³⁵ This *modus operandi* enhances the credibility and transparency of these initiatives and in the eyes of consumers strengthens the company's commitment to human rights.

In order to avoid conflicting requirements between different CSR codes of conduct, there is the possibility for several companies to adopt a uniform code of conduct created under the umbrella of a multi-stakeholder initiative with the cooperation of several enterprises, NGOs and trade unions. In fact when a code of conduct is agreed by different stakeholders and is included in all future contracts with suppliers its effectiveness is likely to increase.¹³⁶

¹³⁴ Michiel van Yperen, 2006, p. 59

¹³⁵ It must be noted that not all standards and initiatives list the audited supplier factories on their websites.

¹³⁶ "A follow-up study of Kolk, van Tulder, and Welter's analysis of 132 codes focused on the sporting goods industry... confirmed the earlier study's finding that the compliance likelihood of codes depends heavily on interaction of various stakeholders in the formulation and implementation of the code. Do employees, NGOs, and local government leaders, play a role in shaping the code?⁴ The answer may well spell a code's success or failure. And for codes that focus on employee standards, the participation by employees in the design of those standards exists not only as a success factor, but a moral mandate.

With the purpose of addressing specific issues like child labour, we saw that some corporations in accordance with international social standards like the SA 8000 are willing to take direct remedial action in order to protect their reputation and they are willing to contribute to the education of the child.¹³⁷ In this respect the cooperation with an NGO that has consolidated experience in helping children in a given country is recommended for the success of the remedial action.

2. Best practices among the existing social standards and multi-stakeholders initiatives of the textile sector.¹³⁸

The major standards for workplace conditions in supply chains are the SA8000 standards (from Social Accountability International and for use in any manufacturing sector), WRAP (for apparel) and a number of initiatives based on a membership model such as the Business Social Compliance Initiative (BSCI), Fair Labour Association (FLA, for apparel), Ethical Trading Initiative (ETI, based in UK and with member companies across a number of sectors, particularly retailers), Worker Rights Consortium (WRC, with membership based on US colleges and universities in a range of manufacturing sectors but mainly apparel), the Clean Clothes Campaign (CCC, a European NGO based on apparel production), and the Fair Wear Foundation (FWF, based in the Netherlands and targeting apparel). WRAP, CCC, FLA, WRC and FWF are created only for the textile sector while the others apply also to other industries.

In order to improve co-ordination and cooperation between the different standards, the Joint Initiative (Jo-In) was created in 2003.¹³⁹

Protection without voice devolves to mere paternalism.” This follow up study was conducted in the year 2000, one year after the study I refer in chapter 3.

Thomas Donaldson, p.4.

¹³⁷ See Chapter 3 par. 1.3.

¹³⁸ It should be noted that I sent e-mails to most of these MSI (i.e. FLA, ETI, BSCI, CCC, WRAP) I received an answer via e-mail only by one of them. I also contacted some of them by phone but it was not possible to talk directly with anyone willing to answer my questions. In all these occasions I made clear that I was writing a dissertation on the subject but still I received no answer. Moreover I am a customer of some of the brand that are members of these initiatives. So, much has to be done in respect of transparency, accountability and especially informing consumers about compliance with the code.

The main differences between these social standards and multi-stakeholders initiatives concern procedural issues such as their implementation and verification, their independency and transparency, and the possibility to provide certification.¹⁴⁰

According to preeminent studies¹⁴¹ the positive effects of multi-stakeholders initiatives are strongly related with the independency of the institution created to enforce and monitor the code and particularly by the existence of effective sanctions capable of excluding non complying members.

In fact without effective sanctions there is the risk that a multi-stakeholders initiative will attract mostly poor performing retailers for pure marketing purpose.

In this respect Lenox and Nash write: *“In particular, industry self-regulation is subject to adverse selection; i.e. lower quality firms will seek to participate. Without mechanism for measuring and enforcing compliance with program objectives, poor performing firms will seek to join to gain the signalling and insurance benefits of membership without putting forth the required effort. Left unchecked, adverse selection will undermine self-regulatory programs as low quality firms join and reduce the differentiation benefits membership may provide”*.¹⁴²

The Clean Clothes Campaign in its Code of Labour Practices for the Apparel Industry¹⁴³ gives detailed instructions concerning the main features that an independent foundation established under the umbrella of a multi-stakeholder initiative should have. This Code never entered into force and up to now there is no MSI that adopt all the principles stated contained therein.

The CCC Code envisages the creation of an independent foundation for monitoring the code implementation and, in order to prevent adverse selection includes an effective system of severe sanctions for members and suppliers. This foundation should be an

¹³⁹ SA8000, FLA, ETI, CCC, FWF and WRC are part of the Jo-In.

¹⁴⁰ Only SA 8000 and WRAP provide certification.

¹⁴¹ See inter alia Michael J. Lenox and Jennifer Nash, 2003, p.343-356 and Kolk, A., van Tulder, R., & van Leeuwen, 2000.

¹⁴² Michael J. Lenox and Jennifer Nash, 2003, p. 344.

¹⁴³ Code of Labour Practices for the Apparel Industry Including Sportswear, 1998.

independent body consisting of trade union organizations, trade associations, employers' organizations and NGOs.¹⁴⁴

Moreover the CCC Code combines the creation of an independent foundation with contractual control and the sanction of termination for non compliant suppliers¹⁴⁵ and therefore is very relevant.¹⁴⁶

The criteria laid out in the CCC code for the purpose of creating a Multi-Stakeholders Initiative (here called “the Foundation”) and establishing an independent institution are very significant for the clothing industry in terms of legitimacy, transparency and economic efficiency of a MSI. **Therefore I will indicate here the main features of the structure and powers of a MSI for the apparel sector and the basic principles of monitoring that should be adopted according to the CCC code:**

- **The structure of the MSI (Foundation)**

The purpose of the Foundation shall be to:

- *conduct, directly or indirectly through other organisations, the independent monitoring of compliance with the code; assist companies in implementing the code; and provide a means to inform consumers about observance of the code and more generally about labour conditions in the industry.*
- ***provide means by which workers and any others can report on a confidential basis observance of the code;***
- *establish, based on independent monitoring, a system of certification concerning labour practices which can be used by consumers;*
- *collect information from any source on working conditions in the apparel and sportswear industry and make this information available to consumers;*
- *promote the code of labour practice and encourage all companies operating in the industry to adopt it; and*
- *establish a mechanism that can make effective recommendations with respect to any disputes arising out of the implementation or the certification process.*

¹⁴⁴ Kolk Ans, 2001, pp. 267-283

¹⁴⁵ See footnote n. 63.

¹⁴⁶ Because of its peculiar characteristics the CCC Code is also very relevant for the model clause that is included in the conclusions of my thesis.

The Foundation shall be governed by a board consisting of equal representatives of appropriate trade union organisations and NGOs on one hand and of appropriate representatives of retailers and manufactures on the other hand. The Foundation shall be financed by contributions from participating organisations and by payments for services from contracting companies.

Companies adopting this code shall enter into an agreement with the Foundation. This agreement shall provide for the following:

- the time-frame in which the production in the different facilities should comply with all the standards in the code;*
- the information the company has to give to the Monitoring Foundation; the payments the company should make to the Monitoring Foundation; the procedures for the actual monitoring and the obligations of the different parties; and the use of the Foundation contract by the company in its public relations.*

With respect to the information that the company has to give to the Monitoring Foundation, the company assumes the following obligations:

- to maintain full and up-to-date information on all contractors, sub-contractors, suppliers and licensees obliged to observe this code, including the nature and location of all workplaces, and to provide this information to the Foundation or its accredited monitors in a timely manner upon request.*
- to require contractors, sub-contractors, suppliers and licensees to maintain records of the names, ages, hours worked, and wages paid for each worker, and make these records available for inspection by accredited monitors, and to allow the Foundation or its accredited monitors to conduct confidential interviews with workers.*
- to ensure that the code is clearly displayed in all places where apparel and sportswear are produced and/or distributed by or under agreement with or for the company and provide authorised texts of the code to contractors and suppliers for their use, and the use by any contractors, sub-contractors and suppliers obliged to observe this code. In all cases the text of the code so displayed shall be in languages so that the workers concerned are able to*

understand it. The text of the code shall be provided to each worker covered by its provisions and all workers so covered shall be orally informed in a language that they can understand of the provisions of the code.

- *the code so displayed must provide information to assist workers in reporting violations of the code to the Foundation or its agents taking into account the difficulties that workers will face in doing this and the need for confidentiality in order to protect workers.*
- *to allow for the necessary access to independent monitors and provide them with any and all relevant information upon demand.*
- *to ensure and clearly demonstrate that the code is being observed by all parties obliged to observe the code, the company must allow the Foundation and its agents access to all information pertaining to the implementation of the code, and ensure that its contractors, sub-contractors and suppliers give similar access to the Foundation and its agents.*

- Monitoring: basic principles

- *monitoring must be by the actual observance of working conditions through unannounced inspection visits ("spot checks") to all workplaces covered by the code;*
- *the frequency of inspections must be established;*
- *accredited monitors must be permitted to interview workers on a confidential basis;*
- *in addition to regular or routine inspections, inspections shall be undertaken at specific locations following substantiated complaints, where there is sufficient reason to believe that the code is not being observed;*
- *inspections shall be conducted in a way which does not cause undue disruption to the performance of work in the premises being inspected; written reports shall be provided by accredited monitors to all parties and to the participating company concerned following each visit.¹⁴⁷*

¹⁴⁷ *The Foundation may seek other sources of information concerning compliance with the code including consulting appropriate trade union organisations, human rights organisations, religious and other*

If violations of the code are found, the company must agree to accept the recommendation of the Foundation. This recommendation shall in the first instance be aimed at improving the existing situation. Where such improvement is not possible or satisfactory, then the Foundation can oblige companies to re-negotiate, terminate or refuse to renew their contracts with certain contractors, subcontractors and/or suppliers.

Where companies fail to observe their agreement with the Foundation it is understood that the Foundation may release any relevant information to the public and may terminate the contract between the company and the Foundation.

*The independent monitoring process shall form the basis for any public claims by the Foundation or by participating companies as to the operation of the code or concerning the actual labour practices covered by the code”.*¹⁴⁸

The crucial features of the CCC’ code for the creation of a MSI (Foundation) are:

- 1) the one concerning the composition of the governing board of the MSI;**
- 2) the possibility for the MSI to oblige companies to re-negotiate and terminate contracts with non compliant suppliers ;**
- 3) the possibility for the MSI to terminate the agreement with its member in case of non compliance.**

Unfortunately so far no multi-stakeholder initiative contains all these characteristics together. In fact, the existing MSI presents only some of these characteristics that can be defined as best practices.

1) The composition of the governing board envisaged by the Code is important for the independency of a multi-stakeholder initiative. The FLA and the ETI are governed by a board that presents similar characteristics to those envisaged in the CCC code.

similar institutions in order to obtain additional information on a certain company or in order to investigate a certain complaint.

¹⁴⁸ Code of Labour Practices for the Apparel Industry Including Sportswear,1998.

2) The power conferred to a MSI to terminate a contract with a supplier that does not comply with the code is of fundamental importance. This shift in decision-making from the single company to the MSI is capable to remove the risk that contractual control and in particular termination of the agreement for non compliance with the code is used only for opportunistic reasons.¹⁴⁹ This approach in fact prevents a company from increasing its profit as a result of a HR violation and reduce the discretionary power of the retailer. The same argument can be applied for the contractually agreed monetary fines that should be conferred directly to the MSI and can be designated to improve working conditions in supply chains.

Therefore a MSI with this power is able to give credibility to sanctions for violation of the code of conduct provided into contracts with suppliers.

Also J. Ruggie in his Guiding Principles states that it should be evaluated “*whether terminating the relationship with the entity itself would have adverse human rights consequences*” and that “*the more complex the situation and its implication for HR, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond*”.¹⁵⁰ An independent MSI can provide that expert advice recommended by the Special Representative.

3) The possibility for a MSI to terminate the membership of a non compliant company is also of fundamental importance in order to prevent adverse selection and enhance the credibility of the entire initiative. Some MSI like the BSCI provide this possibility but it is rarely used. Moreover according to the CCC the BSCI fails on key criteria such as transparency and involvement of workers and trade unions.

An independent MSI with this decisional power will acquire the authority to interact with all the various stakeholders and to respond directly to criticisms with significant benefits for its members especially in terms of brand reputation.

¹⁴⁹ See chapter 3 par. 1.2, f) termination of the contract.

¹⁵⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 2011, pp. 18-19.

Noteworthy is also the provision that enables *workers to report on a confidential basis observance of the code*. It is not clear from the wording if workers of suppliers' factories should be able to address the retailer or also the MSI directly. I believe that in order to make the MSI more credible and efficient workers of the supply chain should be entitled to contact directly the MSI without contacting the retailers first. However it should be noted that this possibility for the workers to address directly the MSI without contacting first their employer may conflict with national labour law where the factory is located.

Some existing MSI usually require members to have a whistleblowers procedure.¹⁵¹

What is not clearly stated in the CCC code is a direct provision concerning unfair purchasing practices.

Other existing MSI try to provide some kind of solution. The ETI, for example, in its Principles of Implementation provides that *the retailer should ensure that the terms of agreements with its suppliers such as prices, lead times and quantities are consistent with the ability of the supplier to observe the provisions of the Base Code*.¹⁵²

In order to implement properly this kind of provisions a specific power should be conferred to the MSI. I believe that also in this respect a shift in decision-making in favour of a MSI should be done otherwise the provision will remain dead letter.

Therefore a MSI should be able to judge if the purchasing practices of a corporation are allowing the supplier to comply with the Code and to recommend changes under penalty of membership termination.

Furthermore, suppliers should be able to dialogue freely and directly with the MSI in order to assess any problem that may arise concerning purchasing practices.

¹⁵¹ The ETI for example in its Principles of Implementation art. 4.3, requires “*each member to ensures that mechanisms exist to enable workers in its supply chain to report confidentially and without detriment any failure to observe the Base Code and to deal with such complaints.*”

¹⁵² ETI, Principles of Implementation, art. 2.3, Final Text 19 February 2009.

3. Conclusions: The new role of a MSI

As I remarked in chapter 3 and 4 of this dissertation the remedies and sanctions for violations of the code of conduct provided into contracts between retailers and suppliers are not adequate to provide an answer to the peculiar questions that are raised in connection with the violation of Human Rights standards.¹⁵³ In consideration of their broad wording¹⁵⁴ these types of contractual clauses leave too much discretionary power to the retailer and either they can be used for opportunistic reasons or they may remain dead letter.

In order to render these instruments compatible with an effective protection of HR, the final decision to adopt one of these remedies or sanctions for violations of the code should be entirely left to an independent MSI.¹⁵⁵

This shift in decision-making from the single company to the MSI should be capable to transform contractual control into an “ethical instrument” essential for the implementation of a voluntary CSR code.

Furthermore the actual possibility for a company to be excluded by the MSI in case of non-compliance is likely to increase the credibility of its commitment to HR protection.

¹⁵³ See chapter 3 par 1.2 and 4 par 1.3.

¹⁵⁴ See chapter 3 of this dissertation.

¹⁵⁵ For the composition of the board see the previous paragraph.

Conclusions:

1. Criteria for the new model clause

According to the analysis and the conclusions carried out in the previous chapters I will draft a model contract clause for the clothing industry to be included in an hypothetical contract between a retailer (hereafter **Venice Clothes**) and its supplier (hereafter **the Supplier**).

This model clause should work in connection with a code of conduct (hereafter **Venice Code**) created with the agreement of all the relevant stakeholders.¹⁵⁶ The Venice Code should be composed by two parts. The first part should contain general provisions created to address environmental issues and other provisions not directly linked with basic HR standards. The second part should contain only the Human Rights provisions that the supplier should adhere to.

The clause is intended to combine the benefits of contractual control and the related sanctions along with the supervision of an independent MSI presenting the characteristics I illustrated in chapter 5.¹⁵⁷

In fact, in order to be fully operative, the model clause should be associated with a Multi-Stakeholder Initiative that I will here call the **VMSI**.

The VMSI should be created with the purpose of conducting the independent monitoring of compliance with the Venice Code, to assist Venice Clothes and the other participating companies in the implementation of the Venice Code and to inform consumers about observance of the Venice Code. The VMSI shall be governed by a board consisting of equal representatives of appropriate trade union organisations and NGOs on one hand, and of appropriate representatives of retailers and manufactures on the other hand.

The VMSI shall have the authority to recommend to one of its members (like Venice Clothes) whether it should re-negotiate or terminate a contract with a non-compliant supplier.

¹⁵⁶ The FLA Workplace Code of Conduct and Compliance Benchmarks is good example of how this Code would look like.

¹⁵⁷ See Chapter 5 par. 1.2 and 1.3.

The MSI shall have the authority to analyse if the purchasing practices of one of its members are allowing the Supplier to comply with the Venice Code and otherwise to recommend an action plan for the retailer.

In addition VMSI shall have the authority to terminate the membership agreement with a member in case of non compliance with its obligations.¹⁵⁸

This contractual clause, that can be also formulated as a letter of agreement, aims to provide a satisfying protection of HR standards for workers in the supply chain.

These are the main objectives that the clause pursues:

- 1) to make clear to the supplier (the Supplier) that the respect of the code (Venice Code) is a condition for doing business with the retailer;
- 2) to grant the retailer and the Multi-Stakeholder Initiative (VMSI) the right to monitor compliance through *in loco* inspections;
- 3) to extend its control beyond the first-tier of suppliers;
- 4) to impose monetary fines only for minor violations of the Code, and to indicate VMSI as the only recipient of the monetary sum;
- 5) to require a corrective action plan drawn by the VMSI in case of violation of the Code;
- 6) to link the termination of the contract to a decision of the VMSI and to provide this kind of sanction only for established Human Rights violations;
- 7) to set up a whistle blowers procedure that enables the employees of the Supplier to contact directly and freely the VMSI;
- 8) to enable the Supplier to address directly the VMSI in case the purchasing practices on the part of the retailer (Venice Clothes) will materially undermine the capacity of the supplier to comply with the Venice Code of Conduct.

¹⁵⁸ In case disregarding the recommendation of VMSI, a retailer does not terminate its agreement with a non-compliant supplier, VMSI shall always terminate the membership agreement with it. The same outcome should apply whether, without consulting VMSI, a retailer decide to terminate its agreement with a supplier on the ground of a violation of the Venice Code.

2. Model Contract Clause (Venice Clause)

1.1 The undersigned Supplier acknowledges that he/she has read the Venice Code of Conduct and understands that Supplier's business relationship with Venice Clothes is based on Supplier's full compliance with the Venice Code and that compliance will be monitored both by Venice Clothes and by VMSI.

1.2 The Supplier agrees to post the Venice Code in local language(s) throughout the workplace's common areas.

1.3 The Supplier authorizes Venice Clothes and/or VMSI to send a representative or an agent to its premises from time to time and without previous notice to perform such work as is necessary to verify that it is in compliance with the provisions of the Venice Code. The Supplier agrees to cooperate fully and to provide Venice Clothes/VMSI representatives or agents with any and all information requested which are necessary to prove its compliance with the applicable laws or other matters reviewed.

To this end the Supplier shall maintain on file all documentation needed to demonstrate compliance with the Venice Code of Conduct and mandatory laws and to make these documents available to Venice Clothes and VMSI representatives.

2.1 If the Supplier proposes to utilize any suppliers of component parts, subcontractors or agents in connection with the manufacturer or assembly of products for Venice Clothes, the Supplier agrees to provide Venice Clothes with:

(a) a statement (on the form supplied by Venice Clothes) disclosing the company name, plant address, telephone and fax numbers and contact names of any such suppliers, subcontractors or agents, all of whom shall be subject to review and prior written approval or disapproval by Venice Clothes, and

(b) a Venice Code of Conduct signed by each such person or entity that in turn also undertakes to require observance of the Venice Code in all agreements that it makes with its respective subcontractors and suppliers in fulfilling their agreement with the Supplier.

3.1 The possible infringement of any provision contained in the Venice Code of conduct constitutes a breach of the contractual obligations undertaken and accordingly:

- a) In case a violation concerning one of the provisions contained in part 1 of the Venice Code of Conduct¹⁵⁹ occurs, the Supplier agrees to pay VMSI a fee of Euro_____. In addition or in alternative to the fee, Venice Clothes may require the Supplier to implement within a specified reasonable time period a corrective action plan recommended by VMSI. If the Supplier fails to meet the corrective action plan commitment, Venice Clothes in accordance with the recommendation of VMSI shall be entitled to terminate this agreement with compensation of the ensuing damages.
- b) In case a violation concerning one of the provisions contained in part 2 of the Venice Code of Conduct¹⁶⁰ occurs, Venice Clothes in accordance with the recommendation of VMSI may either terminate the contract with the Supplier with compensation of the deriving damages or require the supplier to implement within a specified reasonable time period a corrective action plan recommended by VMSI. If the Supplier fails to meet the corrective action plan commitment, Venice Clothes in accordance with the recommendation of VMSI shall be entitled to terminate this agreement with compensation of the ensuing damages.

4.1 The Supplier ensures to establish within __ days from the effective date of this agreement a mechanism to enable its workers to report confidentially and without personal repercussions any failure to observe the Venice Code directly to VMSI. This provision shall be operative only if and to the extent it does not conflict with mandatory applicable labour law.

5.1 The Supplier may directly contact VMSI and request its advisory opinion in case it considers that the current purchasing practices on the part of Venice Clothes will materially undermine its capacity to comply with the Venice Code. In any case this claim shall not exempt the Supplier from liability for not complying with part 2 of the Venice Code.

¹⁵⁹ The first part should contain general provisions created to address environmental issues and other provisions not directly link with basic HR standards.

¹⁶⁰ The second part should contain only the HR provisions.

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E-mail:

Clean clothes campaign *Jeroen Merk*. research coordinator at *Clean Clothes Campaign*.
 Location: Amsterdam Area, Netherlands sent on the 14-3-2011 11:44