

How Can Lawyers Support Human Rights Due Diligence?

- Through Introduction of CSR Clauses in Supplier Contracts and Extension of Anti Corruption Compliance

Daisuke Takahashi

Partner, Shinwa Sohgo Law Offices

Vice Chair, CSR Project Team, JFBA

Human Rights Due Diligence –Preparing for a Legal Obligation
CSR Committee and Anti Corruption Committee
IBA Annual Conference 2016, Washington DC

Lawyers can encourage companies to conduct human rights due diligence (HRDD) through an introduction of CSR clauses in supplier contracts.

- What is a “CSR Clause”?
 - A clause which obligates a supplier to comply with buyer’s CSR procurement guidelines, codes of conduct and any other relevant standards.
- The Commentary of Principle 19 of the UNGPs on Business & Human Rights encourages a company to exercise its “leverage” through its supply chains as part of their HRDD.
 - “*Leverage is considered to exist where the enterprise has the ability to affect change in the wrongful practices of an entity that causes a harm.*”
- A introduction of CSR clauses can provide legal grounds for a company to exercise its leverage on its suppliers by:
 - Obligating suppliers to cease or prevent human rights violations;
 - Obligating suppliers to report their HRDD status; and
 - Providing buyers with their rights of auditing and inspecting suppliers.

Chapter 5 of JFBA's Guidance on HRDD proposes a model CSR clause in a supplier's contract.

- JFBA published a “Guidance on Human Rights Due Diligence”, on January 2015. It is a practical guidance for Japanese companies to conduct HRDD.
- An English translation was completed this week and now available for download on the JFBA's website!
(<http://www.nichibenren.or.jp/en/document/opinionpapers/20150107.html>)
- JFBA's CSR Project Team (Chair: Attorney Makoto Saito) drafted the Guidance in consultation with various stakeholders, including corporations, human rights NGOs, and the government.
- The Guidance is comprised of 5 chapters.
 - I : Endorsement of the Guiding Principles and Need for Business Enterprises to Respect Human Rights
 - II: Corporate Responsibility to Respect Human Rights and Legal Compliance
 - III: Practical Advice for Human Rights Due Diligence
 - IV: Example Corporate Responsibility to Respect Human Rights
 - V: Integrating a CSR Clause in Supplier Contracts

©Daisuke Takahashi / Attorney at Law



Session at Japan Business Federation



Seminar Series with UNICEF Japan



Session at UN Annual Forum on BHR

JFBA's Guidance on HRDD uniquely compares CSR clauses with “Yakuza” elimination clauses, which many Japanese have integrated in their business contracts.

- **“Yakuza” Elimination Clause**

- makes each party guarantee that the party is not affiliated with “Yakuza”, Japanese criminal syndicate.
- enables one party to immediately cancel the contract upon the breach of warranty.
- JFBA and Japanese lawyers have successfully proposed that Japanese corporations introduce “Yakuza Elimination Clauses” into their business contracts in order to eliminate Yakuza from their business transactions.



- **Comparison with Supply Chain CSR Clause**

- **Similarity:**
 - Both clauses require representations and warranties of CSR commitments, a breach of which may lead to the cancellation of the contract.
- **Differences:**
 - CSR Clause should not enable buyers to immediately cancel the contract upon the breach of warranty.
 - CSR Clause should ensure CSR and HRDD engagements through multiple levels of supply chains.

Yakuza's main characteristics:



JFBA's model CSR clause enables companies to exercise its leverage through supply chains in line with recommendations of the UNGPs as well Japanese supply chain cultures.

Characteristics of JFBA's Model CSR Clause	Background
<u>Clarifies</u> that the purpose of the clause is to promote joint efforts between suppliers and buyers towards respecting human rights, prohibiting buyers from imposing excessive obligations on suppliers	<ul style="list-style-type: none"> - Fits with Japanese supply chain cultures, which emphasize long-term trust relationship between buyers and suppliers - To prevent violations of anti monopoly act and subcontract act.
<u>Allows</u> only gradual measures (request of remedial actions -> cancellation of the contract) upon the breach of warranty	<ul style="list-style-type: none"> - The UNGPs recommend buyer corporations to primarily demand suppliers to mitigate their human rights violations before considering the termination of the business relationship.
<u>Provides</u> information exchange tools (supplier's reporting obligations / buyer's audit and inspect rights / buyer's obligations of information sharing)	<ul style="list-style-type: none"> - To facilitate information exchange between buyers and sellers in order to promote joint efforts between them.
<u>Imposes</u> first level supplier's obligation to make the lower levels of supply chain comply with the buyer's CSR codes of conduct	<ul style="list-style-type: none"> - To use leverages through multiple levels of supply chains

Overviews of JFBA's Model CSR Clause

Paragraph	Contents
1	Purpose of CSR Clause as promoting Buyer and Supplier's joint efforts in fulfilling their CSR and human rights engagement through supply chains.
2	Supplier's obligation to ensure the compliance with Buyer's CSR Code of Conduct through its multiple levels of supply chains subject to its level of influence.
3	Supplier's obligation to ensure that implementation of HRDD through its multiple levels of supply chains subject to its level of influence.
4	Buyer's obligation to provide information regarding Buyer's CSR Code of Conduct and HRDD.
5	Supplier's obligation to report the status of compliance with Buyer's CSR Code of Conduct and implementation of HRDD.
6	Supplier's obligation to notify in cases of a breach of Buyer's CSR Code of Conduct and human rights violation.
7	Buyer's right to audit and inspect Supplier.
8	Buyer's right to request that Supplier take corrective action in case of a breach of Paragraph 2 and 3.
9	Buyer's right to terminate the contract when request for corrective action is not met.
10	Buyer shall be held harmless from any damages in case of terminations.
11	Buyer's rights to revision of CSR Code of Conduct when socially appropriate.

Japanese corporate group at the Global Compact Network Japan (GCNJ) has been also engaging with and welcoming the publication of JFBA's model CSR clause.

- *“The JFBA published, in 2015, the Guidance on Human Rights Due Diligence (“Guidance”) as an extension of the CSR Guidelines. Global Compact Network, Japan’s Working Group on Human Rights Due Diligence, held a dialogue with the JFBA throughout the drafting process, providing input in particular in respect of the content addressing the introduction of a CSR clause. Guaranteeing the protection of human rights in the supply chain. As a result, the objective of introducing a CSR clause was clearly defined within the Guidance, as the promotion of continuous cooperation and healthy relationships between buyers and suppliers. This clarified the importance of creating mutually beneficial relationships within the Japanese business scene. Based on this input, **the Guidance clearly sets out the objective of such a CSR clause – namely, to promote cooperation and joint improvement efforts between both buyer and supplier. This highlights that at the core of these efforts are Japanese companies’ traditional strengths in the creation of a spirit of cooperation and coexistence.***
- **The Working Group is currently making use of the Guidance in collaboration with the JFBA to develop case studies including issues related to migrant workers and land expropriation.”**



GCNJ's Report (2016)
“Business and
Human Rights:
Corporate Japan
Rises to the Challenge”

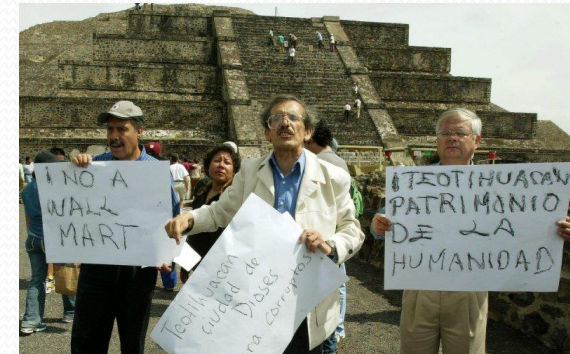
Lawyers can encourage companies to conduct HRDD also as an extension of anti corruption compliance.

- Close connections between human rights risks and corruption risks.
 - Bribery in emerging and developing economies, where rule of law is weak, may hinder the local governments from properly enforcing regulations, which causes materially negative impacts on environment, labor, and human rights issues.
 - Preventing bribery is essential for companies in order to fulfill their responsibility to respect human rights under the UNGPs.
- Similarities between anti corruption compliance and HRDD.
 - Necessity of establishing adequate internal control systems for managing risks.
 - Importance of adopting a risk based approach.
 - Necessity of conducting third party due diligence.
 - Effectiveness of integrating anti corruption and CSR clauses into business contracts.
 - Importance of documentation of the process for increasing transparency.
 - Importance of disclosures for increasing accountability (required by EU non financial reporting directive).
 - Effectiveness of collective actions and stakeholder dialogues for increasing leverage.

©Daisuke Takahashi / Attorney at Law



Rana Plaza Incident ©AP



Walmart Mexico Bribery Case
©Daily Beast

JFBA published the Anti Corruption Guidance, following the publication of the Guidance on HRDD.

- JFBA published a “Guidance on Prevention of Foreign Bribery” a practical guidance for Japanese companies to prevent foreign bribery, in July 2016 (An English translation will be available soon!).
- JFBA’s CSR Project Team drafted the Guidance in consultation with various key stakeholders, including Japanese corporations and governmental agencies.
- The preface of the Guidance clarifies close connections between human rights risks and corruption risks.
- The Guidance comprises of 4 chapters and 18 articles.
 - **Chapter 1:** Internal Control Systems for Preventing Foreign Bribery.
 - **Chapter 2:** Crisis Management in cases of Unreasonable Demand of Bribes and Finding of Bribery.
 - **Chapter 3:** Subsidiary Management and M&A Due Diligence.
 - **Chapter 4:** Disclosures.
- The Guidance emphasizes following five viewpoints, which may be also applicable to HRDD.
 - Assessing bribery risks and adopting a risk based approach.
 - Establishing an adequate internal control system and documenting its process.
 - Managing unreasonable demand of bribes from foreign governmental officials and etc.
 - Preventing bribery through third parties and subsidiaries.
 - Engaging with stakeholders and disclosing the engagement.

Thank You for Listening.

For further information and questions, please feel free to contact me at:

Daisuke TAKAHASHI

Shinwa Sohgo Law Offices

1-1-1, Kyobashi, Chuo-ku, Tokyo 104-0031, Japan

Tel: +81-3-3517-5499

Email: takahashi@shinwa-law.jp

Web: www.dtakahashi.com