

Consultation European Model Clauses for Supply Chains Project

INTRODUCTION

20 December 2023

Contracts matter for human rights and environmental risk management

- **Legal links** of the supply chain
- Operational **manual** for supplier-buyer relationship
- Make human rights and environmental (HRE) policies **binding** across supply chain
- Vehicles for **implementing** human rights and environmental due diligence (HREDD) across supply chains

Contracts matter for human rights and environmental risk management

- Critical tool for managing supply chain risks but often ***mis-used*** to manage human rights and environmental (HRE) risk
- Designed to manage company risk, not human rights risk → **risk shifting**

Risk-shifting is not the same thing as risk management

Contracting-as-usual doesn't work

1. Rely on one-sided **supplier** promises of compliance (**tick-box**):
unrealistic and dangerous
2. Ignore **buyers' responsibility** to avoid “**contributing**” to HRE risks, inc.
via purchasing practices: low prices, short lead times, last minute
changes to design or quantity, cost-shifting, no assistance
“gold standards and not even bronze prices”
3. Prioritize traditional remedies between the parties over **remediation for
victims → the people actually harmed by breach**

Traditional contracting is not effective and effectiveness is now a legal requirement

Not just a nice-to-have, but a *must* have

Until now effectiveness of HRE policies has been **voluntary**

but it's **becoming mandatory**

→ new **HREDD** and **trade sanctions** laws

We need a new approach rooted in **shared-responsibility** as indicated in UNGPs and OECD Guidelines and Guidance

3 core principles of responsible contracting

- 1) Shared commitment to **cooperating on HREDD** (v. guaranties)
- 2) Buyer commitment to **responsible purchasing practices** that support effective HREDD + supplier's human rights performance
- 3) **Prioritize human rights remediation** over traditional remedies, e.g., suspension of payment, termination, and damages

Conventional Contracts

Static, Supplier-only Reps & Warranties of compliance

Supplier is solely responsible for human rights:

- only Supplier can be in “social breach”
- Supplier has no right to cure
- Buyer can terminate immediately

Remedies for social breach flow from Supplier to Buyer + neither party has obligation to provide remedy to victims

HRDD-Aligned Contracts (MCCs)

Joint obligation to carry out on-going, risk-based HREDD

Shared responsibility for human rights:

- Buyer commits to responsible purchasing practices as part of its HREDD, including:
 - Responsible pricing
 - Providing reasonable assistance to supplier
 - Responsible change orders & modifications
 - Responsible exit (COVID)

HRE remediation *before or in conjunction with* traditional contract remedies -- provided *jointly* if Buyer contributed to the adverse impact

European Model Clauses (EMC) Timeline

- Jan 15, 2024: Electronic consultations close

<https://www.eur.nl/en/esl/events/consultation-european-model-clauses-supply-chains-project-2023-10-23>

- March 2024: Publication of Zero Draft of EMCs
- March-July 2024: Broader consultations via online and in person events
- Autumn 2024: Anticipated finalization of EMCs 1.0

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Organization Links

- Erasmus University: <https://www.eur.nl/en/esl/events/consultation-european-model-clauses-supply-chains-project-2023-10-23>
- Responsible Contracting Project:
<https://www.responsiblecontracting.org/>