



HUMAN RIGHTS AND JUST TRANSITION
WHY WE NEED TO DO MORE WORK AROUND CONTRACTS IN GLOBAL FOOD VALUE CHAINS

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Outline of Talk

- Broad brush overview of role of contracts in agri-food supply chains.
- Draw from my practice and research.
- Implications for human rights and just transition.
- Mission: using law to trigger an ethical mindset to legal practice and action research.

Why contracts?

- Despite much international work on human rights in GVCs and proliferation of corporate policies, there have been continuing instances of human rights concerns in supply contracts e.g. coffee, chocolate.
- Most operational governance and regulation is implemented at the private level through private legal structures.
- Domestic laws exist - UK modern slavery, French 'duty of care' law, German supply chain act, draft EU supply chain act – they are implemented by the private sector through contracts – deeper than policy. **What is the correct course of action?**
- Contracts, compliance policies & processes, board culture, power of in-house lawyers are part of legal network for the implementation of human rights and just transition in agri-food supply chains.
- Private lawyers can use their influence by drafting for more visibility of HR within contracts and writing terms with context and equity at the forefront. Advocate for time & resources at board level.
- Contracts are not static: can be adapted; used to identify, price & budget for fairer GVC outcomes, one part of larger structural solutions.

Contracts in Private Regulation for Agri-Food: four broad situational 'buckets'

Company Sale and Purchase agreements.

Features: Often standardised into templates and implemented by generalist lawyers not subject experts. This process makes HR implications go out of sight – legal risk.

Legal and compliance processes in multinational companies.

They can amend standard contracts – important! Who is doing this? In house lawyers? **Provenance:** How far into the supply chain provenance are they looking? Context/ history within an intensive due diligence process? What power and resources do they have within the firm to do this?

Corporate policies and corporate values.

Often separate. Are there any? Are they reflected within the contracts?

Financing contracts.

Agri-food co's need corporate financing. Lenders due diligence : KYC: customer and sectoral DD. How much will the bank ask? How much info can a company provide (back to bucket 2). Growth of private ESG opinion providers. EU could do much more to help this process.

Contract features which are relevant to human rights

- Complex topic – focus on few issues relevant to agri-food & more broadly.
- Standard Ts&Cs: private law rationale: sets terms of exchange at arm's length, regulate business to business behaviour, price risk and push it away. For rights this means the context is quickly lost!
- Two issues: Do standard term contracts contain human rights related clauses? If so, what do the terms state? Are they sensitive to the context or are they standardised with typically company/buyer biased one clauses for strict payments/delivery, default interest, termination, subcontractor approval, force majeure, remedies.

Example: Cargill standard terms

- Contracts are involved from pod to port



Source: <https://www.cargill.com/food-beverage/cocoa-chocolate/responsible-supply-chain>

Cargill standard terms for Malaysia

- Cargill corporate policy on human rights states..

promote & respect human rights in the Universal Declaration of Human Rights and the UN Sustainable Development Goals. Part of UN Global Company. Take guidance from the UN Guiding Principles on Business and Human Rights and the International Labour Organisation Fundamental Principles and Rights at Work. Engage in due diligence and take action to remedy issues where identified in our workplaces, supply chains and extended communities.

- Then, incorporated within sale and purchase contract is supplier codes of conduct requiring suppliers to uphold Cargill's standards.
- Ts&Cs : read like any other commercial contract: warranties e.g. on quality/ IP rights vesting with buyer/ termination/indemnification/prohibitions on subcontracting without consent/dispute resolution subject to Dutch commercial arbitration.
- Other than incorporation of supplier code they are silent on human rights specifics. Infact not even clear if breach of code would entitle termination. A lot we don't know! What rights? How monitored/reported/what assistance? What are the legal consequences for breaching? What would be a suitable remedy? e.g. is it limited to a pre-agreed amount so equitable/ given to worker's fund for victims etc. As drafted, if Cargill enforces such a clause, damages could be consequential in nature (Dutch laws and commercial arbitration).

Networks in which standard terms are nested

- Who within a company is doing the human rights supply chain work?
- In house legal and compliance become important. Do they have full provenance of the supply chain? How much time and resources do they have? Are they trained? What are power relations like with the board? Is it just pro forma compliance with no sight into local context.
- Do they have ability to amend standard terms to include express human rights provisions and consequences for breach which fit local contexts?
- If they did, what could they do to make contracts fairer and redistributive: a lot!

Example: implementing human rights within GVC contracts (1)

- *Company based in [Belgium] enters a long-term supply contract for delivery of cocoa. Buyer later discovers that the seller's small supplier, located in Ethiopia, is employing children to package. The buyer faces media coverage, lost sales and damage to reputation due to the media coverage. Supplier may assert that views are different about age of workers locally and difficulty in sourcing local labour, but the buyer may still want to cancel the contract and claim damages.*
- What meaningful and permissible clauses which suit local context could help to redress power and bias imbalances within global food systems?
- Health warning – just transition and human rights tensions could arise.
- First draft typically done by large company (privileged position), using standard forms which are repeated down the value chain. We need better first draft models– **this is powerful.**

Example

- Good due diligence can identify risks at early contract formation & bring corporate policy & values in. Specific rights expressly defined in contracts – many standard terms do not do this. See the risk (not out of sight) and provide for context in contract.
- Support budgets built into the contract: early design for budgets to train locally on specific human rights risks. Imposing ethical standards on SMEs w/o assistance is impracticable for mitigating own legal risks.
- Look again at IP rights if for instance provenance contains linkages with traditional knowledge or processes – contractual carve outs.
- Termination: What does breach of human rights by supplier legally mean? Context matters. Buyer default remedies: cancel & damages (Cargill ex) – usually market-based remedies. Provisions around basic unfairness in contractual terms (nothing new!) – no overcompensation so buyer does not benefit from abuses: menu of market remedies reduced – no consequential losses, damages liquidated. Work with breaching supplier. Contract provision for damages to be placed in funds for victims.
- Availability of non compensatory remedies e.g, adequate assurances, injunctive relief, terminate sub-contracts, suspend payments pending investigation
- Rethink restrictions on sub-contractors without buyer consent – costs could be prohibitive for seller – predetermined list of agreed sub-contractors.
- Rethink default interest provisions.
- Rethink what constitutes force majeure –express inclusion of Pandemics and Climate Change, what compensation should be payable, if any, by the supplier.

Some thought pieces, detailed studies and active projects in this space – more needed

- Cotula: Renegotiating control in global food governance: <https://tinyurl.com/mupmbukt> and Tan, The law of global value chains as transmission nodes for global inequality, <https://tinyurl.com/y25qgz7q>.
- Detailed studies: contract in context of indigenous rights Bhatt : *Concessionaires, Financiers and Communities, Implementing Indigenous Peoples Rights to Land in Transnational Dev Projects*: <https://tinyurl.com/2a3h3k5t> and chapter on *contractual remedies with indigenous peoples* : <https://tinyurl.com/2pgxyafe>.
- Martin, Private Law Remedies, Human Rights, and Supply Contracts, <https://tinyurl.com/3wdth9pp>.
- Bhatt – forthcoming action research project with ClientEarth Asia '*Power Purchase Agreements and Sustainable Energy Systems in the Global South*'.
- Work on *stabilisation of law* clauses.
- *Chancery Lane Project* focused on weaving climate and net zero considerations into contracts.
- *London Climate Action Week June 2022* –much of the world supply chains are contracted for by organisations in the global north. How to ensure the needs of the global south in the net zero transition are properly met.

THANK YOU FOR LISTENING

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