

CHANGE THE PRECEDENT, CHANGE THE WORLD



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Foreword

As organisations set net zero targets, it is important that their policies, procurement documents and contracts remain fit for purpose and reflect those goals. There is a risk that standard contracts and precedents act as a barrier to those commitments being actioned and so it is essential that contracts move with the net zero agenda. Not only is that important to achieve net zero across an organisation's value chain, but it helps signpost change to staff, stakeholders and suppliers.

For some organisations this is about future-proofing documents, but many are already working closely with their wider value chain to identify and reduce emissions. Increasingly, interests are aligned and landlords, tenants, suppliers and business owners are seeing the value in collaborative approaches to share relevant data and help achieve collective targets.

The Chancery Lane Project (TCLP) is an independent organisation that has brought together lawyers from around the world to develop contractual drafting to address climate change. TCLP ran a series of hackathons and group sessions involving more than 1,300 lawyers to develop precedent clauses, checklists and glossaries across a range of practice areas. In 2021, TCLP launched their Net Zero Toolkit which is a collection of clauses and tools to enable lawyers to align their work with a decarbonised economy.

As a firm, we've been involved with the project since the beginning, and our cross-departmental working group brings together lawyers from across the business to review the TCLP drafting and provide practical insight and proportional application to climate related clauses for contracts and documents.

In this collection of articles, we consider a range of TCLP clauses from green lease provisions, energy efficiency provisions in a construction contracts and renewable energy procurement, to navigating climate related financial disclosures and placing obligations on supply chain to report and reduce their Scope 3 emissions – and give our expert views on how they may be applied to active projects and transactions.



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Aatmay, Rosie and Hannah's clauses and bolstering green leases

The decarbonisation of buildings is essential if the UK is to meet its 2050 Net Zero target – with figures from the Department for Business and Industrial Strategy putting emissions from buildings at 30% of the total UK emissions.

Against this backdrop, and in the context of clients setting their own net zero goals and wider ESG drivers, we are increasingly seeing landlords and tenants seeking provisions in leases that reduce the environmental impact of the premises. For our institutional investor clients in particular, focus is moving to the impact on investment of inefficient buildings – and how such issues may be able to be addressed or mitigated in their lease arrangements.

The term “green lease” is used to describe commercial leases that include provisions to encourage, incentivise or require the landlord and the tenant to improve the energy efficiency of a property and reduce its environmental impact.

The concept is not new – the first suite of UK commercially focused green lease clauses were published in 2013 by the Better Buildings Partnership (BBP) and was designed to foster a collaborative approach between owners and occupiers to reduce the environmental impact of their use and occupation of buildings. More recently, The Chancery Lane Project (TCLP) has taken the approach to green lease drafting further and published a suite of clauses (as part of its Net Zero Toolkit) to help address climate change.

As a firm, we are proactively adapting and incorporating elements of TCLP drafting into our documents to build on our existing green lease drafting and in order to meet clients' needs. Our top 3 TCLP “green lease” provisions are:

- Aatmay's clause picks up a recurring theme from the BBP toolkit and the RICS' guidance that there should not be automatic reinstatement of tenant alterations. That addresses the concern that standard lease provisions require tenants to remove all of their fit-out even where it does not have an adverse impact on landlords and where it is in working order. Aatmay's clause provides a framework to allow landlords and tenants to minimise waste and to re-use materials as part of their alterations, repair and yielding up obligations. This wording can be incorporated into leases to a greater or lesser extent – for example, if required further amendments could be made to allow the landlord greater control over the circumstances when full reinstatement should be required. This shift in approach to yielding up potentially has cost savings for both landlords and tenants and a significant impact on the carbon footprint of the building.

- Rosie's clause goes further to provide that the tenant may (with the Landlord's consent) carry out works to the premises which will improve the environmental performance of the premises, the building, or the wider estate. There is a corresponding clause that provides the tenant will not be required to remove the relevant improvement unless the landlord requires the tenant to do so. The landlord can refuse consent to such alterations if the landlord reasonably considers that the works would have a detrimental impact on the reversionary interest. This provision follows the path that BBP started, which is to encourage a collaborative approach between landlord and tenant to reduce the environmental impact of the building. In our view, it is sufficiently widely drafted to include in leases without specific environmental improvement works in mind at the outset – providing flexibility for the future.
- Hannah's clause comprises 'green' service charge wording enabling a landlord to provide and charge for services linked to the improvement of the environmental performance of the building. This includes some specific suggestions - the introduction of energy efficient lighting, biodiversity to communal gardens and facilities to capture and recycle rainwater – and provisions to enable the landlord to perform any such services in such a manner or by such methods as are reasonably required to improve environmental performance (as defined) or to avoid adverse impact on the environmental performance of the property. These provisions provide a comprehensive starting point to future proof leases to address compliance with environmental legislation and enable the provision of services that are likely to become increasingly valuable to tenants in the future.

Overall, there is no “one size fits all” approach to green leases and net zero drafting, and all landlords need to develop wording that meets their goals and achieves the particular “shade of green” which is commercially acceptable to them and their tenants. Green lease clauses based on TCLP drafting are likely to be increasingly used going forward and landlords who have not yet considered them in any detail are soon likely to find themselves lagging behind their competitors.



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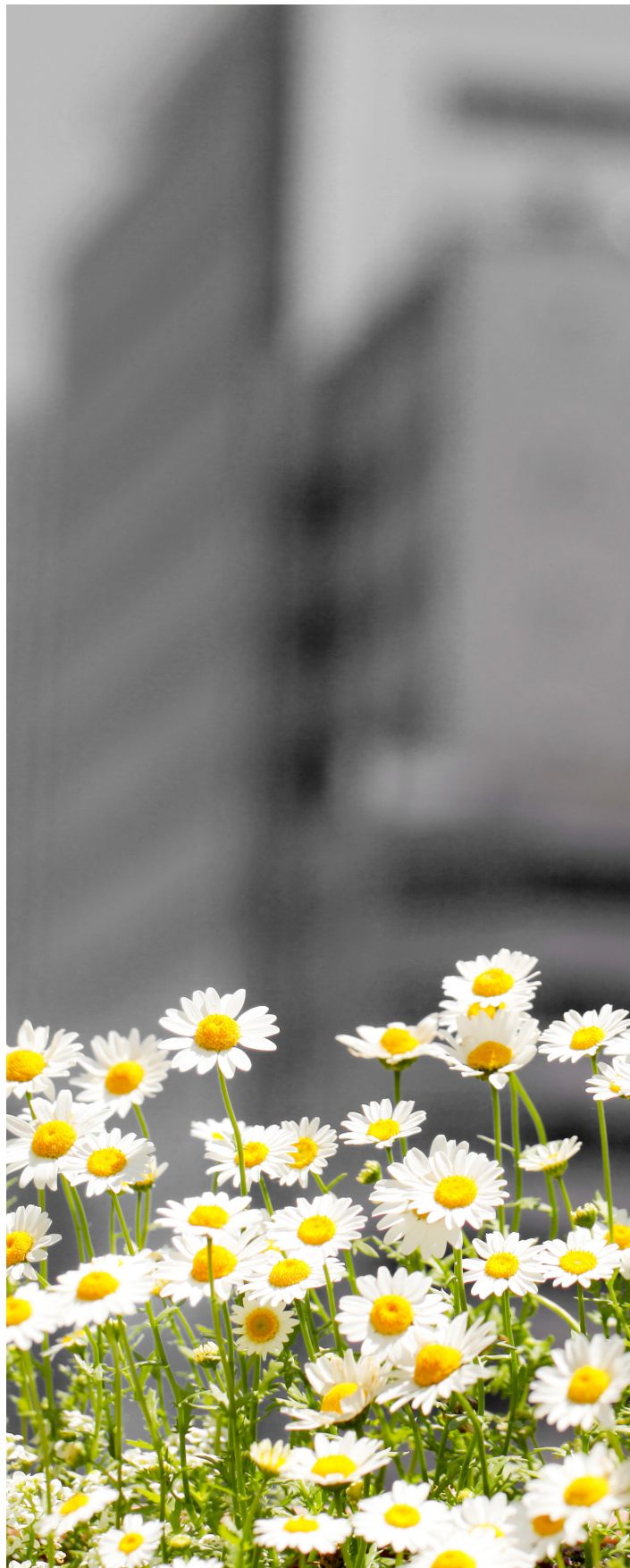
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Anna's Clause and navigating climate related financial disclosures

Climate hazards present significant physical risks both to tangible assets and business supply chains. It is accepted that the financial markets and investors need clear information on how exposed businesses in the UK are to climate risk.

However, historically there has been a lack of clear and comparable data in this area. To assist with this The Task Force for Climate Related Disclosures (TCFD) was set up in 2015 by the Financial Stability Board with the aim of improving climate related engagement between investors and the financial markets. The hope was that if investors understood how exposed the companies they lend to are to climate risk it would help those investors to channel funding to sustainable opportunities and business models.

While TCFD was initially voluntary it has become part of the regulatory framework in many countries. In the UK the government has adopted TCFD as part of its roadmap to getting to net zero by 2050. From 6 April of this year it became mandatory for certain organisations (including banks, insurance companies and companies/LLPs with over 500 employees and a turnover of more than £500 million) to provide climate related financial disclosures in line with TCFD recommendations on an annual basis. TCFD provides UK companies with a uniform way to assess how a changing climate may impact their business model and strategy. Companies have to disclose against 4 key areas -governance, strategy, risk management and metrics & targets. The goal of TCFD is to ensure that climate change is at the heart of any company's strategy and operations.

Understandably, climate related financial disclosures have become a great area of topical interest. While the reach of TCFD does not yet apply to a great many companies many organisations are choosing to voluntarily make climate related financial disclosures. However, it is accepted that there are some significant challenges to implementation in terms of cost and lack of internal expertise in companies.

So, if you are a company keen on making climate related financial disclosures how can The Chancery Lane Project help you? The Chancery Lane Project features crowd sourced clauses drafted by lawyers in the UK who are committed to providing net zero drafting. We are proud to be involved in this initiative. One clause which can assist with climate related financial disclosures is Anna's Clause.

Anna's Clause is a generic reporting/disclosure clause that can be included in the Loan Market Association information and undertakings provisions of any corporate loan. It addresses reporting requirements in relation to climate related risks and is intended to be used in conjunction with other clauses made available via The Chancery Lane Project which cover reporting on Scope 1, 2 and 3 emissions (a methodology to calculate direct and indirect greenhouse gas emissions produced by a company and its supply chain) and clauses pursuant to which the company will contractually agree to reduce such emissions.

Anna's Clause broadly states that on an annual basis a company will provide its lender with a report containing various information. This annual report will include details of the processes and procedures implemented by the company to identify, assess and manage climate-related risks impacting the business, strategy and financial planning of the company. The clause also requires the company to provide details of any actual or potential impact of climate-related risks on the company including an assessment of the physical risks of climate change on the business operations and the value of the assets of the company (including any transition risks associated with the transition to a Net Zero economy and any step(s) being taken to address or mitigate such risks). The suggested wording stipulates that any report should also include details of any processes, procedures and targets implemented by the company to contribute to or mitigate any harm to a number of environmental objectives including climate change mitigation/adaption, sustainable water and marine resource use, the transition to a Circular Economy (being one which decouples economic activity from the consumption of finite resources), pollution prevention and control and biodiversity protection. The clause also includes detailed definitions for each of these environmental objectives.

Arguably, Anna's Clause is too far reaching. Realistically a company at the beginning of its ESG journey considering how it should move towards the goal of annual TCFD reporting is simply not going to be in a position to comprehensively report on every aspect that Anna's Clause recommends on day one. However, Anna's Clause provides an incredibly helpful starting point for a company considering enshrining climate related financial disclosures wording in their loan documentation. Companies are being challenged by their stakeholders to go further in terms of their net zero goals and voluntarily including climate related financial disclosure wording in a company's loan arrangements is a way to focus a company's attentions on its climate strategy. Understandably there may be some hesitancy from organisations about including such a comprehensive clause in loan arrangements from a risk perspective. However, while Anna's Clause is comprehensive the excellent thing about The Chancery Lane Project clauses is that they are completely adaptable meaning that organisations can choose to adapt the clauses to their own needs. Perhaps a company won't need or want to report on every aspect Anna's Clause recommends straight away but it provides them with the wording they would need to start moving towards that goal. Anna's Clause and other similar clauses produced by The Chancery Lane Project are a helpful first step to gently transitioning companies to a net zero future.



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Tristan's Clause and procuring greener materials

Lawyers across the world have collaborated to create The Chancery Lane Project (TCLP) – a hive mind effort to rework a variety of contracts to address climate change risks and assist in achieving the UK's 2050 net zero target. TCLP publishes template clauses to plug in to a wide variety of contracts, such as Tristan's Clause which was drafted for use in the JCT Design & Build Contract 2016.

Tristan's Clause was born of contractors and developers inclining to procure cheaper materials, rather than sustainable materials, in order to pitch more competitively priced tenders in an increasingly difficult market. Tristan's Clause aims to address procurement of materials in the following ways:

Introduction of a carbon budget

The carbon budget under Tristan's Clause works similarly to, and alongside, the traditional financial budget of a project.

The building contract will set out the total amount of greenhouse gas emissions permitted for carrying out the works (the carbon budget), and liquidated damages are imposed on the contractor if this carbon budget is exceeded. The rate of damages will theoretically be based on the cost of offsetting the excess carbon emissions or remedying the employer's breach of any development agreement further up the contractual chain.

TCLP acknowledges that this form of damages may not be enforceable. As an alternative, they have suggested the use of a target mechanism, with the amounts in an incentive pot increasing the further the contractor goes below the carbon budget. Whether this works to motivate contractors in practice will depend on the size of the incentive and the achievability of the target.

TCLP conducted a case study of the Environment Agency drafting in incentives in supplier contracts to reduce their carbon emissions. It showed that the Environment Agency were able to tailor the drafting and incentives to suit the capacity of each supplier, which in turn led to the suppliers engaging with the sustainability requirements at the start of the process with the aim to agree on the right reduction goal.

Another suggested alternative is to increase the retention amount, with a proportion held against achievement of the carbon budget, and for such retention to be used by the employer to offset the carbon emissions if the carbon budget is still not met by the end of the rectification period. Widening the scope of cash retentions in a building contract will be controversial given the resistance to retentions in the construction industry lately. Change must be driven while treating contractors fairly and avoiding remedies which could dis-incentivise contractors who may already be high sustainability performers.

In terms of the carbon budget itself, the size of it will be crucial to the contractor's compliance with the building contract and the financial return it achieves. It is questionable whether many contractors are technically able to predict carbon budgets for proposed projects and negotiate them on a commercial basis and may require appointing so-called "carbon consultants" for guidance which will only add to project costs.

Prohibited Materials definition

Tristan's Clause also extends the definition of Prohibited Materials to include materials that:

- would unnecessarily cause the carbon budget to be exceeded (either because the emissions cannot be mitigated by carbon offsetting or there is an alternative material that would have met the required standards); and
- are generally considered harmful to the environment within the building profession.

The catch-all in the second addition above is unlikely to sit well with contractors. In this relatively new age of procuring and working with greener materials, there may not yet be an established sense of what might be considered harmful to the environment in the same way as what might be deleterious to structural integrity or health and safety. Equally this may be difficult for an employer to prove until the building profession develops the right consensus of know-how on materials harmful to the environment. Like with most green drafting, this provision will need to strike a balance between having teeth (i.e. free from any sense of greenwashing), and recognising new provisions are being introduced into an industry where climate-transition clauses are not yet common.

Physical proximity of materials

A “best endeavours” obligation is imposed on the contractor to source material as close to the project site as reasonably practical. Whilst an interesting method to reduce the carbon footprint incurred in transport of materials, this may restrict contractors in embracing more innovative materials that may be found further afield which could offset the emissions in transport. This provision may also fall foul of public procurement rules in the UK and is worth a closer look at.

Tristan's Clause is currently being redrafted to widen its effect.

Tristan's Clause is a good starting point to inspire a greener approach to procurement in construction contracts – but it remains a starting point. The carbon budget and overall measurement of emissions could go further to consider the impact of the selected materials throughout the life cycle of the development, rather than just in its procurement and use in the construction process. What may be considered sustainable and in compliance with the carbon budget during construction of the works might appear less so when it comes to any future replacements, refurbishment or operation of the development in time. TCLP's case studies have shown that the clause is flexible enough to, and should, be adapted to contractors' abilities to perform whilst still setting challenging targets.



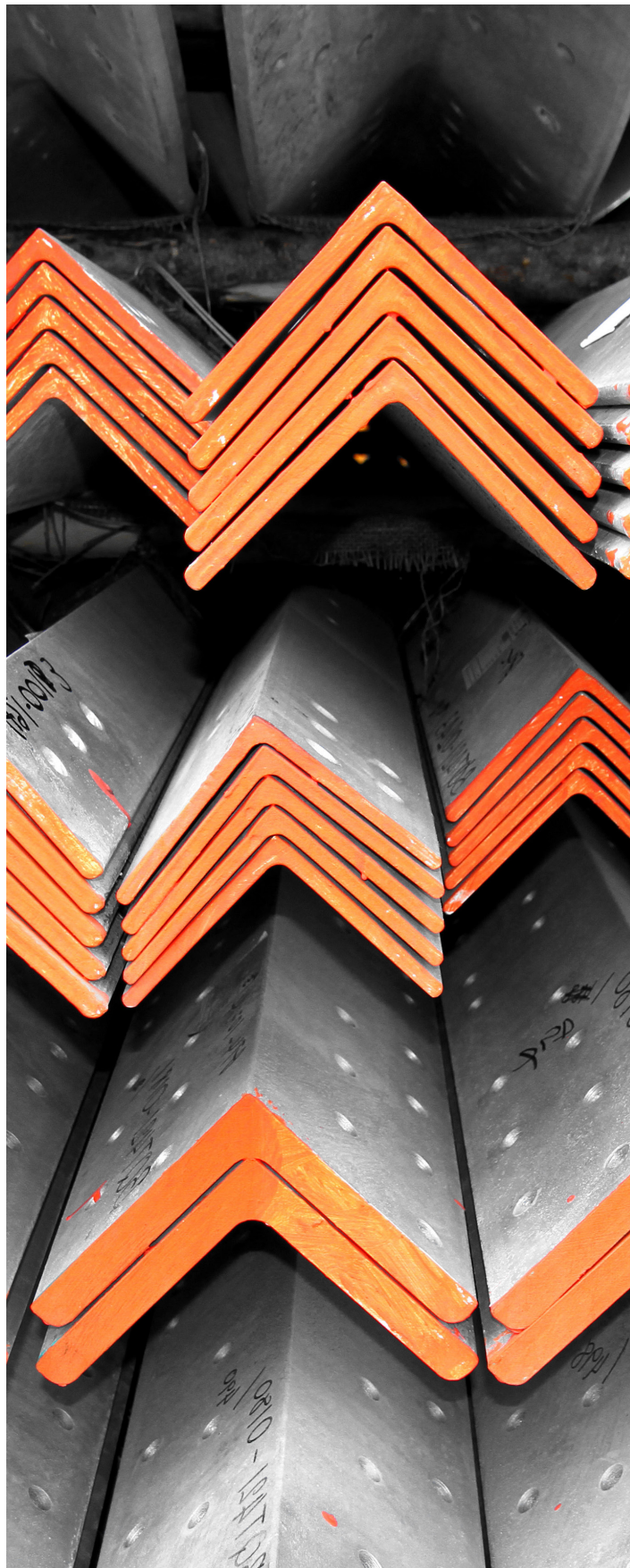
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Tackling Scope 3 emissions and drafting for commercial contracts

Whilst taking an internal examination of your own business practices is important to meet sustainable objectives, true success cannot be accomplished without considering the indirect emissions of such business activities, widely known as ‘Scope 3 emissions’.

Scope 3 emissions include not only emissions arising from business travel, employee commuting and waste disposal, but also, importantly, emissions arising from the supply chain. Specific examples of supply chain emissions arising are through:

- the purchase of goods and services; and
- transportation and distribution (up and downstream).

According to the [CDP 2020 Global Supply Chain Report](#), supply chain emissions are, on average, 11.4 times higher than operational emissions, which equates to approximately 92% of an organization's total greenhouse gas (GHG) emissions. Therefore, Scope 3 emissions are arguably the most important aspect of an organisation's green endeavours which should be addressed to make a real environmental impact.

The Chancery Lane Project (TCLP) has identified the supply chain to be a real opportunity to drive change, and in our opinion rightly so. To date 26 separate draft clauses have been provided across a variety of sectors to tackle this problem from a contractual perspective. Commercial lawyers are in a unique position to influence practical outcomes and assist clients from the outset of any relationship, using contracts to provide parameters, incentives and punitive measures.

Some supply chain clauses which TCLP has produced include:

- **Matilda's annex** – cascading GHG reporting and reduction obligations throughout the supply chain;
- **Viola's clause** – requiring the supplier/ contractor to procure energy from renewable sources; and
- **Agatha or Annie's clauses** – allowing a right of termination for a customer so that they can pivot to a greener supplier to meet their sustainability, climate or other environmental objectives.

These provisions primarily focus on a supplier's reporting obligations as well as the consequences arising for non-compliance.

The Trowers commercial team has found that currently the most effective use of the TCLP clauses is as a starting point, using them to create ‘lighter green’ provisions. In

our experience this approach meets the growing desire and need of clients to be environmentally friendly and disseminate sustainability requirements throughout the supply chain whilst ensuring that, as these clauses bring a new set of obligations, they are realistic in a commercial context and accepted by other parties.

For example, termination rights arising from a failure to comply with GHG reporting can be difficult currently to negotiate, but obligations to report on environmental matters and work collaboratively to reduce environmental impact are generally easier to agree. We anticipate that over time, as environmental obligations become a normal part of contracts, these ‘lighter green’ provisions will become ‘darker’.

Clients are increasingly conscious of their environmental impact, not least due to consumer and employee demand, and commercial contracts must reflect this reality without compromising the key principles of a business relationship. Encouraging clients to begin with small ‘green’ contractual successes, will encourage the reduction of Scope 3 emissions, in addition to assisting private sector clients to meet the growing requirements set by the public sector.

A prime example highlighted by TCLP is Vodafone using TCLP provisions and blending them with its existing environmental compliance provisions in its supplier agreements. We believe this approach to be effective. Creating flexible options is the key to unlocking supply chain receptibility to Scope 3 emission reducing clauses and the use of these clauses will, in our view, increase over time as they start to become industry standard.

The use of contracts to meet climate objectives is likely to increase going forward, and any business failing to look at its own supply chain as a source of emissions will find itself at a disadvantage when pitching for work. This is particularly the case when a business has clients in the public sector.



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Madhavi's clause and how MMC can help meet your sustainability objectives

The use of modern methods of construction (MMC) has a key role to play in a number of environmental, social and governance (ESG) issues: from the construction of more energy efficient homes and buildings to cutting waste in construction, and even presenting an opportunity for diversification of the workforce by moving construction activities off site into local factories (and thereby adding to the overall social value of developments).

At Trowers, we have written extensively on the subject of MMC, in particular on the challenges to its wider adoption and issues around the funding of such projects. As the construction sector grapples with how to reduce emissions, the question of whether existing contract forms are fit for purpose to maximise the benefits of MMC is one that we are often asked.

In this context, it is unsurprising that The Chancery Lane Project (TCLP), whose aim is to “create new, practical contractual clauses ready to incorporate into law firm precedents and commercial agreements to deliver climate solutions” has now published a clause dealing with MMC: Madhavi's clause.

Madhavi's clause adapts a number of existing TCLP clauses and has amalgamated them for use specifically for projects using MMC; with the objective of promoting sustainable practices and achieving net zero aligned provisions. The intention of the TCLP clauses is that they can be easily incorporated into existing contract forms.

As with most of the TCLP clauses, the obligations are a mixture of high level aspirations (e.g. “to carry out the Works... responsibly, sustainably [and] ethically”) and more detailed, science-based targets (e.g. “to ensure that the Works... on practical completion has GHG Emissions per m2 (Carbon Intensity) which... (A) is Net Zero (by Offsetting only Residual Emissions); or (B) meets the [1.5 degree aligned Carbon Risk Real Estate Monitor (CRREM) decarbonisation pathway for that asset class/ Paris Aligned decarbonisation pathway]”).

It is these latter obligations where, in my view, the true value of including green drafting in the legal terms and conditions lies. Without objective and measurable standards linked to contractual sanctions or incentives, we risk such clauses being mere window dressing. Historically, where the parties had thought about such obligations at all, they were often buried in policy documents or technical specifications. The benefit of including these in the contractual terms and conditions means that all parties can be held to account for failure to implement real change to their construction methods.

Another example of real practical solutions in Madhavi's clause is the use of a Site Waste Management Plan; a hangover from the now defunct Site Waste Management Plan Regulations 2008, albeit one which most developers continued to use notwithstanding that this is no longer a legal requirement. Whilst the extent of waste reduction varies depending on the type and scale of MMC used; it is widely acknowledged that the precision design and off-site factory production common to most forms of MMC leads to significant raw material waste reduction. Some estimates suggest that volumetric MMC building systems can reduce waste to 50-60% compared with traditional building methods.

Madhavi's clause also recognises a key element to the success of using MMC; early collaboration with the contractor to assess buildability (and propose carbon reduction solutions) and to fix the design prior to production. In our experience, clients who have recognised and adopted this approach have been most successful in implementing MMC, especially for projects 'at-scale'.

The TCLP clauses provide an excellent starting point for those looking at how to ensure their use of MMC is translated into binding and meaningful obligations for achieving overarching net zero and sustainability objectives. As with all standard drafting, the important thing is to examine these in the context of the specific targets of your business and how you want to get there; often a mix of carrot and stick.

This will involve a detailed conversation with the experts within development teams; again recognising that in order to effect real change, it is not enough simply to put meaningless “we must try harder” statements into contracts. Only real practical obligations will drive real practical change.



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Considerations when procuring public contracts

Achieving Net Zero has never been more prominent across the public sector, with many local authorities having declared climate emergencies and with numerous public sector bodies seeking to ensure that sustainability targets and initiatives are delivered through their contract portfolios.

For the housing sector in particular, the issue of energy efficiency housing is at the forefront of many housing providers' minds (both in the retrofit of existing housing stock, and in the design and construction of new build units).

Against that background, Trowers & Hamlins are proud to be working alongside the Chancery Lane Project to promote the incorporation of "green" contract clauses to ensure that contracts are fit for purpose and delivering on Net Zero objectives.

For public contracts, if contracting authorities are to achieve Net Zero by 2050 (as set out in the Government's "Net Zero Strategy: Build Back Greener"), then it is imperative that public contracts procured now set out clear and measurable outcomes to deliver on this strategy. So, what can contracting authorities do as part of their procurement activity to help achieve this goal?

Pre-market engagement and prior planning

A key stage in the successful procurement of public contracts is prior planning to ensure that a contracting authority is procuring the "right" solution for its requirements.

Contracting authorities are encouraged to spend time at the outset scoping their requirements in order to ensure that the tendered solutions secure the outcomes needed for the duration of the relevant contract. This includes the delivery of Net Zero initiatives and outcomes, and contracting authorities should have these in mind when setting their specification and service requirements.

A key tool in scoping appropriate green requirements is the effective use of pre-market engagement (both with service users/residents and with potential bidders). By engaging on a regular basis, contracting authorities will be able to identify specific requirements for their public contracts. In the context of Net Zero initiatives, regular engagement is key to ensuring that the requirements adapt to this constantly evolving area.

Not only will this prior planning help shape a specification, but it can also be useful in giving a contracting authority an indication of likely costs for the delivery of certain outcomes/initiatives (which can help with budgetary decisions), as well as the availability of certain products / services in the current market.

Supplier Due Diligence

Following on from an effective pre-market engagement strategy, contracting authorities need to establish supplier approaches to climate-related risks, and how well a potential supplier aligns with the contracting authority's climate strategy and targets. The Chancery Lane Project has produced "Raphael's Procurement DDQ" – a Climate Change Due Diligence Questionnaire for suppliers (the DDQ), for this purpose.

The DDQ is an invaluable fact-finding tool for contracting authorities to better understand the approach that their supply chains take to climate change related issues and is a particularly useful way for a contracting authority to identify and record their Scope 3 Emissions.

If a contracting authority is minded to include the DDQ as part of its procurement process, it will need to carefully consider what status it will give the DDQ under the procurement documents, and how it will use the information that it receives from potential suppliers (for example, whether it is being used for information only, or if it forms part of the evaluation – either of SQ Responses in a two-stage procurement, or as an evaluation criteria under a single stage procurement).

The DDQ guidance note does not contain detailed instruction as to how a contracting authority might build this into the procurement process, so this requires additional thought in order to ensure that it delivers a meaningful outcome.

PPN 06/21: Taking account of Carbon Reduction Plans in the procurement of major government contracts

Alongside using the DDQ, contracting authorities may also consider implementing the recommendations of PPN 06/21 and evaluating Carbon Reduction Plans as part of the selection stage in a two-stage procurement.

PPN 06/21 came into effect for Central Government Departments, their Executive Agencies, and Non-Departmental Public Bodies on 30 September 2021. The provisions of PPN 06/21 apply to the procurement of goods, services and/or works by those in-scope contracting authorities with a value exceeding £5m per annum (excluding VAT).

Broadly speaking, PPN 06/21 introduces a new requirement within the selection stage of the procurement process for in-scope contracts, and in assessing the technical and professional ability of interested parties, in-scope contracting authorities must include a requirement for bidders to provide a Carbon Reduction Plan, confirming the bidder's commitment to achieving Net Zero by 2050 in the UK. The Carbon Reduction Plan must also set out what environmental management measures the bidder has in place and which will be used during the performance of the contract.

Whilst this is compulsory for the central government contracting authorities identified above, it is open to the wider public sector to adopt this approach in their procurement activity to ensure that they have a measurable selection criterion relating to their potential suppliers' carbon reduction plans.

Contracting authorities may want to consider whether the approach to evaluating Carbon Reduction Plans under PPN 06/21 could be adopted in the use of the DDQ, and whether there are identifiable minimum requirements under the DDQ that could be evaluated on an objective basis.

It is clear that the first steps of any procurement are key to ensuring a supply chain which reflects a contracting authority's "green" objectives. The DDQ and PPN 06/21, coupled with an effective pre-market engagement strategy, are useful tools in ensuring that contracting authorities engage suppliers who are able and willing to deliver sustainable and "green" outcomes through public contracts.



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Navigating the rise in climate change disputes and utilising TCLP's dispute resolution tools

Climate change litigation is no longer on the margins and it's certainly here to stay. This is the overriding message of the 'Global trends in climate change litigation: 2022 snapshot' recently published by The Grantham Research Institute on Climate Change and the Environment.

Recognised by the Intergovernmental Panel on Climate Change this year as a growing phenomenon which has, in some cases, "influenced the outcome of and ambition of climate governance", climate change litigation is something which all major commercial players must increasingly consider.

The need for businesses to not only appear to be engaging with the climate crisis but actually taking business transitional steps to achieve stated aims is real, and coupled with the broader focus on ESG, these matters are now at the top of the corporate agenda. Consumers now expect businesses to be environmentally positive and so real climate change mitigation is essential in avoiding the risk of being the target of action (not to mention avoiding being societally 'cancelled'). The big picture aim is that businesses implementing climate change mitigation will have a measurable impact on the environment, being at the forefront of this constitutes an opportunity for businesses both in terms of making them more appealing than rivals and also in reducing the risk of facing climate change litigation. Engaging on these matters now is therefore a win-win for businesses (and the Earth alike).

Incorporating climate positive practices in day-to-day running is one key way that an organisation can therefore demonstrate its environmental and sustainability commitments. This is no different for law firms. Indeed, tracking this idea through into an organisation's dispute resolution and litigation policies and practices is now crucial. The Chancery Lane Project (TCLP) assists with this in a practical way and Trowers & Hamlin is proud to be involved in the project.

TCLP provides model clauses, drafted by international legal and industry experts, which provide commercially viable, climate positive and ready-to-use solutions. There are four TCLP tools which relate directly to dispute resolution and litigation.

First up, is 'Emilia's Protocols'. This constitutes two protocols, one relating to litigation and one relating to arbitration, which contain modules that the parties can opt into at the beginning of these processes to ensure climate positive alignment. The various modules focus on actions such as paper use reduction in relation to documents and bundles, travel reduction by way of increasing virtual communication and environmentally friendly travel and accommodation selection for hearings. Using these protocols, the parties would agree to measure and ultimately reduce their greenhouse gas emissions throughout the litigation or arbitration processes.

Next, we have 'Toby's Clause'. Reducing the use of paper during a dispute is the aim of this clause. Where paper is necessary, this clause obligates the parties to use recycled paper, non-solvent based printer ink and non-plastic tabs and dividers. Interestingly, this clause also includes a commitment towards climate change mitigation by way of the parties purchasing carbon offsets or planting native trees to offset their greenhouse gas emissions post-dispute.

Thirdly, there's 'Mia's Clause'. This is a condensed, arbitration focused, version of Emilia's Protocols, outlining in a short and sharp form the steps that parties agree to take to reduce their greenhouse gas emissions in relation to arbitration hearings. Travel and use of paper reduction are at the heart of this clause, with the parties committing to calculate and, importantly, disclose their greenhouse gas emissions resulting from air travel in relation to the arbitration hearings.

Lastly, is the big picture orientated 'Leo & Molly's Clause'. Contracts and agreements can incorporate this clause so that the governing law chosen to resolve disputes aligns with global climate objectives. This means that the governing law incorporates the ultimate objectives of the United Nations Framework Convention on Climate Change, the Paris Agreement, and limiting the increase in global temperatures and achieving net zero emissions by 2050 or earlier.

TCLP clauses can be amended and adapted as the parties see fit, carefully selecting applicable elements is entirely reasonable. Parties can adopt these clauses at the point of entering into contracts or agreements, or at the start of a dispute or litigation process. Considering how these clauses may work in practice is crucial; the common theme of reducing use of paper and travel poses practical and logistical questions and complexities.

All actors in litigation and arbitration must share this aim while also ensuring that the standards and rigour of our legal systems are maintained. By way of example, whether or not a Court hearing can be held virtually is currently a decision for the judge based on the interests of justice. The unofficial policy of the Commercial Court of the High Court of Justice is to allow a virtual hearing if it is expected to take half a day or less, anything longer than half a day requires an in-person hearing (and not hybrid). Nevertheless, we have experience of in-person hearings being insisted upon by the Court despite parties' requests for hybrid hearings (due to the location of the parties). This juncture presents an opportunity for TCLP clauses to effect real change and to nudge all parties involved to adapt their travel behaviours in other ways.

Trowers & Hamlins can adeptly assist businesses with incorporating these clauses into real documents and implementing them moving forwards. Participation in TCLP is only one example of the ways in which we act for clients in a climate conscious manner and incorporates climate positive tools into its dispute resolution and litigation work.

The 2022 snapshot tells us that the rise of climate change litigation is something for all professionals to think about. Demonstrating active climate positivity feeds into every element of a business, including the handling of disputes and litigation. Tools, such as TCLP clauses, being utilised sensibly by legal experts is one step in the right direction. It is critical for organisations to ensure that they appreciate the growing risks that climate change litigation poses and engage with the tools and support which is available, for their own benefit and that of the wider environment.

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Climate related drafting for agricultural and rural land

Lawyers across the world have collaborated to create The Chancery Lane Project (TCLP) – a hive mind effort to rework a variety of contracts to address climate change risks and assist in achieving the UK's 2050 net zero target.

Nicola Janus-Harris, Partner and head of our Agriculture & Rural Estates team and Charlotte Brasher, Associate in the team, consider two TCLP template clauses, which focus on lettings of rural and agricultural land.

Georgie's Clause

The focus of Georgie's Clause is the promotion of Carbon Sinks and Ecological Restoration, as a way of encouraging landowners to derive the most value from land which is let on short term arrangements. Georgie's Clause aims to do this by encouraging the land to be used for enhancing biodiversity, offsetting projects and in accordance with the Environmental Land Management Schemes (ELMS).

Tenancy agreements will typically make provision for the land to be protected and maintained in its current state, with tenants being required to comply with statutory legislation as well as good husbandry principles. However, whilst a tenant's obligations do not typically extend beyond that to require them to enhance the environment, there are often restrictions preventing a tenant, even if they want to, from entering into agri-environment schemes at all, or without consent from the landlord.

Additionally, certain environmentally focussed practices, such as re-wilding, could be viewed by some as inconsistent with traditional agricultural good husbandry principles. A tenant could therefore find itself in breach of covenant and at risk of receiving a notice to quit (i.e. a termination notice) if certain environmentally focussed practices are adopted, unless the landlord and tenant are in agreement.

Georgie's Clause therefore seeks to promote climate aligned market practices, such as improving soil condition and increasing the population of insects and pollinators, to improve the environmental value of the land.

This is achieved by the introduction of 2 key documents:

- A Nutrient Management Plan – i.e. a management plan for managing the nutrient inputs to the property; and
- An Environmental Management Plan – i.e. a farm management plan to achieve climate benefits and reduce or mitigate GHG emissions, which will take into account biodiversity objectives so that the property is managed in a way that maintains, and where possible, improves the ecological health

The intention is for each of these documents to be agreed between the landlord and tenant and documented before the tenancy agreement is entered into, giving each party certainty. The drafting can be bespoke to the particular land / property or simply by adopting an industry standard version.

The introduction of Georgie's Clause could be of particular benefit to landowners, with potential increases in natural capital in the land and biodiversity enhancement, which could in turn benefit any tourism activities. Improved soil and water quality could potentially also enable the landowner to enter into and benefit from future ELMS, and protect the value and marketability of the land.

Helen's clause

Helen's Clause deals with grazing land and promotes regenerative farming methods through 'Profit of Pasturage' agreements.

The purpose of Helen's Clause is to allow landowners to generate income via a grazing agreement whilst at the same time being able to ensure the long-term soil value of their land. On the other hand, the grazier (i.e. the individual being given the grazing rights) gets the benefit of well-maintained grazing land, but without having to sign up to a full tenancy and its accompanying obligations and formalities.

Traditional farm business tenancy agreements are drafted so that the landlord has a 'hands off' approach, with the tenant being given control and responsibility for any land management. That land management must be carried out in accordance with statutory legislation, good husbandry principles and any other contractual requirements agreed between the landlord and tenant.

This can be contrasted to a Profit of Pasturage agreement, where a landowner:

- Remains in occupation of the land;
- Grants a grazier the right to take the herbage (i.e. the edible parts of grass which are grazed by livestock); and
- Retains all rights and control of the land, including decisions on farming practices, stock density and organic fertiliser application

We predict that Helen's Clause could be used to promote more joint venture arrangements and could be particularly popular given the recent significant changes to the farming subsidy schemes by giving increased flexibility.

Helen's Clause brings potential benefits to both landowners and graziers. For landowners, this could include potential eligibility for ELMS or local Nature Recovery or Landscape Recovery projects, whilst for graziers, income can be generated by taking a crop for food production and longer term investments in agro-ecological systems might be more viable if landowners are paying the costs of inputs.

Overall, there is no "one size fits all" approach to net zero drafting, and wording will need to be considered and developed which both meets a party's goals and takes into account any context specific requirements.



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There's Something About Mary's Clause

Mary's Clause incentivises contractors to hit desired energy targets in JCT Design and Build Contracts, and is one of the easiest Chancery Lane clauses to implement as its requirements relate closely to current practices.

Reducing energy and waste to produce a more efficient development is at the core of the clause. This is important - the UK Green Building Council has stated that the building industry contributes to approximately 40% of the United Kingdom's carbon emissions.

Mary's Clause focuses on two main requirements for the contractor to achieve:

Environmental Requirements

The contractor has a duty to use "all reasonable endeavours" to ensure they fulfil environmental requirements. These requirements, ranging from using sustainable materials to promoting green travel to and from the site, are set out in an annex. These requirements are not specific and this therefore allows the contractor some freedom to approach each objective with their own specifications. This may be a more appealing route compared to setting strict guidelines on contractors. The list of requirements can also be adapted by the parties to suit the particular project.

The question of freedom can be a double-edged sword. The environmental requirements ask the contractor to use "all reasonable endeavours." In *Brooke Homes (Bicester) vs Portfolio Property Partners* [2021] EWHC 3015 (Ch), all reasonable endeavours put a standard of care on the contractor to exhaust reasonable actions. What all reasonable endeavours might be in these circumstances remains vague and in practice, hanging a recycling sign could fulfil the requirement without active involvement in the recycling process.

As with several other Chancery Lane Project clauses (such as *Tristan's Clause* on procuring greener materials), public procurement rules may be an issue. An objective under the clause is to utilise local suppliers, but this may be contradictory to the UK's public procurement laws. A contractor has the right to freely enter the market to purchase goods of both "quality and effectiveness". To limit access to the market to local suppliers may work against public procurement policies and may set an unrealistic objective for the contractor to meet.

EPC Obligations – Absolute Obligations

A key component of Mary's Clause is the requirement to make energy efficiency part of Practical Completion (PC). The employer will only issue a PC certificate when the EPC obligations have been met. The completed building must achieve an EPC "A" rating.

Mary's Clause imposes a "specific" or absolute obligation on the contractor to achieve this. This is beyond a level of reasonable care and skill, and a result may be unacceptable to contractors and their insurers. However, there is evidence that the adoption of absolute environmental drafting such as this is being pushed by development funders, including requirements under funding agreements for the employer to ensure environmental initiatives.

Mary's Clause can be incorporated into a building contract where environmental considerations coincide with a funder's requirement. The specifications can be drafted similarly to BREEAM requirements. BREEAM clauses have been proven successful in construction contracts requiring the contractor to achieve a specific rating (i.e. Very Good). Mary's Clause can be easily implemented using BREEAM drafting as a guideline to successfully accomplish climate change clauses. If the EPC obligation is not met, the parties may agree for the contractor to carry out work, at the contractor's cost, during the Rectification Period, to meet the EPC obligation. There is a caveat that such works must not exceed a percentage of the contract sum, with the suggested percentage being 10%.

Mary's Clause is a good foundation to promote and implement energy efficiency into building contracts. EPC ratings are uniformly used across the United Kingdom acting as a standard measure for all developments. The environmental obligations are a concise and simple way of listing the standard of care required from the contractor. The clause is flexible and can be adapted to suit the particular project and make the obligations more or less onerous, for example by changing the list of environmental obligations or using different energy efficiency targets.

Using Mary's clause may not give Mary and Ted their happy ending or win entertainment awards but it will help reduce energy consumption and encourage good environmental practices.



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Procuring renewable energy and drafting for supply chain contracts

In this series, we have explored a number of climate-related clauses published by The Chancery Lane Project. These range from climate-related drafting for commercial leases, construction contracts and commercial agreements, through to navigating the complex landscapes of climate related disputes, climate related financial disclosures and green procurement.

In this final instalment, we focus on the impact of the wider value chain and consider renewable energy requirements in supply contracts and the transparent sourcing of renewable energy.

Reducing emissions from electricity generation and using low-carbon electricity to power the UK economy is a key part to the Government's strategy to reach Net Zero - and the Government has made a commitment to have a fully decarbonised power system by 2035.

Against this backdrop and as organisations turn to evaluate and reduce their own carbon footprints, the need to be able to require suppliers and service providers to deliver energy from renewable sources is a key piece of the puzzle. Often clients find they are locked into existing supply or services contracts or have few contractual levers to ensure the energy they are receiving is from renewable sources. In other contexts, clients that are investing in or undertaking the development of renewable energy assets (including solar and wind farms or battery storage projects) are increasingly at risk of projects not delivering on carbon reduction requirements because of a lack of a robust approach to supply chain obligations.

The Chancery Lane Project has developed two clauses which seek to address these issues.

Viola's Clause requires the counterparty (whether that is a supplier or contractor) to procure all (or an agreed proportion) of its energy from wholly renewable sources during the term of its appointment. The clause aims to future proof contracts, meet funder, business or Government procurement requirements and promote alignment of Net Zero objectives across its value chain. The drafting is relatively straightforward and includes optional wording where the supplier/contractor needs to run a procurement process. Importantly, it also covers audit provisions and reporting obligations in order to promote transparency and accountability and paves the way for greater oversight of a business' energy supply chain.

In our view, the key benefits of the clause are simplicity and potential flexibility. For many organisations, the current objective is to gather emissions data from across their various suppliers. This isn't always simple, particularly when dealing with smaller suppliers and cross-border organisations. This clause introduces that concept of transparency through the audit and reporting provisions which means requirements can be passed down the supply chain. The clause could also be expanded to cover other aspects of an organisation's indirect emissions – eg to require its supply chain to adopt sustainable waste strategies or commit to targets for the transition to zero-emission fleet vehicles.

Ayshe's clause goes further and draws together drafting from other TCLP precedent clauses (including the Green Supplier Agreement and Due Diligence Questionnaire) to tackle concerns around the carbon footprint and environmental impact of stakeholders involved in renewable energy technology supply chains.

The clause obliges developers, manufacturers, installers and contractors to reduce greenhouse gas emissions – and requires stakeholders to minimise environmental impact and safeguard against modern slavery.

The concepts of the drafting are useful – particularly in terms of issues to raise as part of a project due diligence process (e.g. on an acquisition). The clause also includes useful drafting which obliges developers to reduce the greenhouse gas emissions of the manufacturing, installation and construction of renewable energy assets. These general obligations could be adapted for use across a range of construction and infrastructure projects. The link to modern slavery is self-explanatory and is likely to be already covered separately in construction and operational contracts – but is helpful to highlight the wider ESG commitments.

In general terms, both clauses seek to address a gap in the existing legal framework around these issues, promote greater transparency and encourage the take up of renewable energy.

Well advised organisations are already looking at their supply chain contracts and building in suitable drafting to future-proof contracts and promote alignment of wider objectives such as Net Zero and achievement of ESG criteria. As highlighted throughout this series, the clauses published by The Chancery Lane Project provide a useful starting point, but need careful review and adaptation for use in a project-specific context.

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