

The Mismatch between Human Rights Policies and Contract Law: Improving Contractual Mechanisms to Advance Human Rights Compliance in Supply Chains

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Forthcoming in: L.F.H. Enneking et al. (eds.), *Accountability and International Business Operations: Providing Justice for Corporate Violations of Human Rights and Environmental Standards*, London: Routledge (to be published 2018)

1. Introduction

Trade has globalized in the last decades. This has resulted, amongst other things, in considerable internationalization of sourcing. Numerous and large supply chains are the result. Globalization has been beneficial, for example it has allowed companies to produce at a lower cost and has resulted in a decrease of prices for western consumers. However, the pressure on supply chains to produce in a timely and cost effective manner also has its disadvantages. For example, human rights compliance by suppliers remains a challenge.² Furthermore, the price reduction for the global north connected with globalization has led to a shift of cost induced by negative externalities connected to the production to the global south. Many globally operating companies recognize this issue. Therefore, many of them, especially the large and internationally operating ones, have implemented a Corporate Social Responsibility (CSR)/Business Human Rights (BHR) policy.³ These policies often refer to (international) frameworks in this area such as the United Nations Guiding Principles on Business and Human Rights (UNGP) or the OECD Guidelines for Multinational Enterprises (OECD Guidelines), for example by prescribing human rights due diligence as required by these frameworks.⁴ These policies often include suppliers and prescribe responsible business conduct throughout the company's supply chains.⁵

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² See e.g. SOMO, *The Myanmar Dilemma, Can the garment industry deliver decent jobs for workers in Myanmar?*, 2017, to be found at <https://www.somo.nl/wp-content/uploads/2017/02/170731-The-Myanmar-Dilemma-update-web-1.pdf> and on tea production in India <http://www.indianet.nl/pdf/CertifiedUnileverTea-ACupHalfEmpty.pdf>.

³ 84% of these large companies (340 companies) has implemented a CSR/BHR policy. See SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 13, to be found at https://www.businessrespecthumanrights.org/image/2016/10/24/business_respect_human_rights_full.pdf.

⁴ See for these frameworks http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf and <https://www.oecd.org/corporate/mne/48004323.pdf>. In these policies other topics might be addressed too. These might, for example in the agricultural sector, include food safety, the prevention of (the diffusion of) animal related disease and animal welfare. See OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, p. 58, 59, 60 and 64, to be found at <http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>.

⁵ 51% of the internationally operating companies utilizes such a code of conduct (in which human rights are also specifically addressed). See *Legal 500 Human Rights Report 2016*, p. 9. Cf. Louise Vytopil, *Contractual control in the supply chain*, Ph.D. Thesis Utrecht 2015, Eleven:Den Haag 2015, p. 137. See for the supplier code of conduct of Unilever (which prescribes continuous improvement of CSR/BHR performance) https://www.unilever.com/images/rsp-english-v2_tcm244-483166_en.pdf. For example ABN AMRO and Total have not implemented a specific supplier code of conduct, instead they have implemented a general code of conduct for their own operations as well as those of suppliers. See for ABN AMRO https://www.abnamro.com/en/images/Documents/010_About_ABN_AMRO/Our_strategy_and_core_values/ABN

Therefore, they oftentimes contain more issues than human and workers' rights only. They see to environmental rules, for example by prescribing management systems, sustainability, corruption and anti-trust issues.⁶ Another feature in some policies connected with supply chains is procurement. These policies might render supplier human rights performance a part of the procurement assessments.⁷

That said, contractual management of supply chains is oftentimes considered to be a subordinate feature in these policies. Moreover, contractual management is not even mentioned in these policies. Thus, a mismatch between policy and contract law seems to exist in the business human rights field. This may, amongst other things, be caused by ineffective collaboration between the legal and CSR-departments within companies. As contractual mechanisms might have the advantage of (better) enforcement than a human rights policy in itself,⁸ they may contribute to improved human rights compliance by suppliers. Moreover, human rights policies in themselves are oftentimes considered to be rather ineffective by non-governmental organizations (NGOs). It is conceivable that bridging the gap between human rights policies and contractual mechanisms through better aligning them may contribute to better human rights compliance by suppliers. Thus, contractual mechanisms should be considered to be an integral part of human rights policies and those policies should elaborate on the utilisation and shape of the contractual mechanisms to advance human rights compliance by suppliers.

Although companies' human rights policies oftentimes do not elaborate on the utilisation and shape of contractual mechanisms, this does not mean that they are not deployed. Therefore, I will describe the contractual mechanisms currently used to advance human and workers' rights in supply chains and explain why they need to be improved. Subsequently, I will elaborate upon ways in which human rights policies could propose and advance (legal) approaches to improve supply chain contracts.

2. The current contractual arrangements

The implementation of supplier codes of conduct varies widely.⁹ Some companies only publish them on their website without implementing them through contractual mechanisms.¹⁰ Others implement a code of conduct through general terms and conditions. These contracts, however, do not always contain a reference to these terms and conditions. An example being that such reference might not be deemed necessary in specific instances.¹¹ Another category of companies consider such codes of conduct to be a

[AMRO Code of Conduct.pdf](#) and for Total http://www.total.com/sites/default/files/atoms/files/total_code_of_conduct_va.pdf.

⁶ Cf in the agri-business OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 65 and 68.

⁷ A company might even require a supplier to participate in a training in specific risk sectors before it is eligible to solicit for a contract.

⁸ However, the argument has been made that these policies in themselves (if published) have legal effects, for example in connection with the interpretation of contracts. See Anna Beckers, Enforcing corporate social responsibility codes: on global self-regulation and national private law, PhD Thesis Maastricht 2014, p. 50-93.

⁹ Beckers 2014, p. 41 ff; Vytopil 2015, p. 121 ff, who focusses on labor related rights. See on the way this issue is addressed in supply chains in Myanmar SOMO, The Myanmar Dilemma, p. 93-115.

¹⁰ Vytopil 2015, p. 123, 124, 129 and 135-138. Cf. Beckers 2014, p. 50-71, who also discusses whether a public statement may be relevant in connection with the interpretation of a contract or become binding through other avenues.

¹¹ Vytopil 2015, p. 123, 124, 129, 130, 136 and 137.

core element of their contracts with suppliers.¹² However, they are often only implemented through ancillary documents such as general terms and conditions but also in umbrella agreements governing long-term business relationships between commercial parties.¹³ Some contractual mechanisms even create third party rights to counter non-compliance of the code of conduct, for example on behalf of workers of a supplier.¹⁴ Other companies prescribe self-evaluation by suppliers in their code of conduct or require the completion of surveys, depending on the perceived risk.¹⁵ Although the implementation of codes of conduct varies, the majority of the globally operating enterprises who have implemented a CSR/BHR policy utilizes a contractual mechanism to enhance compliance with their code of conduct.¹⁶

The content of a (supplier) code of conduct also significantly varies from company to company. Some provisions therein are relatively vague implementing an obligation to 'comply with all relevant local regulation' or using language like 'workers conditions compliant with local regulation', 'no use of child/forced labor' or 'human rights compliant production'.¹⁷ Some codes even allow suppliers to aim for these goals, yet, (at this point) do not impose an obligation to reach these goals.¹⁸ Other codes are much more specific as to the supplier obligations. Furthermore, few codes include all relevant social standards in connection with human rights. For example, very few codes of conduct require Free Prior Informed Consent (FPIC) of third parties if a supplier uses land belonging to these third parties for its operations.¹⁹

Finally, monitoring compliance with and enforcement of (supplier) codes of conduct range from virtually no action by the buyer to strict monitoring and enforcement, sometimes even implementing third party audits.²⁰ Some companies even go beyond auditing and establish a dialogue with suppliers to discuss the situation and to improve compliance with the code of conduct or collaborate with (local) NGOs to audit compliance in dialogue with the supplier.²¹ Audits by third parties (NGOs) might be more effective in instances where the company itself might not be very well informed on the (complex) local conditions

¹² Beckers 2014, p. 41-43; Vytopil 2015, p. 123, 129, 135, 136 and 137. Sometimes a supplier has to confirm in writing the receipt of the code of conduct. See Vytopil 2015, p. 137. Companies also refer to codes of conduct developed by third parties (such as NGOs) or to supporting documents such as ILO or OECD guidance (which raises the question whether these documents become binding on the supplier). See Vytopil 2015, p. 124, 136 and 137.

¹³ Beckers 2014, p. 45-50.

¹⁴ Vytopil 2015, p. 125, 126, 132 and 138. However, third party rights are explicitly rejected in other contracts. See Vytopil 2015, p. 139.

¹⁵ See e.g. Vytopil 2015, p. 130, 132 and 139. Cf. SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 56.

¹⁶ Overall 77% of these companies use a contractual mechanism. In the extractive industry this is even 100% and in the energy sector 83%. See Business and Human Rights Due Diligence Project, 2016, p. 7.

¹⁷ Vytopil 2015, p. 123, 130, 135 and 136. See for the international normative framework ILO-conventions 29, 105, 138 and 182.

¹⁸ Vytopil 2015, p. 130.

¹⁹ Cf. for agri-business OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 80. See on this issue in Myanmar also SOMO, The Myanmar Dilemma, p. 12 can be accessed at <https://www.somo.nl/wp-content/uploads/2017/02/The-Myanmar-Dilemma-Full-Report.pdf>.

²⁰ Vytopil 2015, p. 128, 135 and 139.

²¹ SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 74 and 81, can be accessed at <http://www.shiftproject.org/resources/publications/business-human-rights-sustainable-development-coherent-strategy/>.

and the measures a supplier is able to implement in practice.²² However, termination of a contract because of breach often does not solve the CSR/BHR issue. On the contrary, it might even cause the issue to worsen since termination might force a supplier to contract other buyers who might be more lenient on these issues. For example, termination based on the use of child labor hardly improves the situation as long as families need child labor to secure their livelihood.²³ Furthermore, companies are also reluctant to terminate a contractual relationship with a supplier due to fears regarding replacement of the supplier. If the companies are unable to replace the supplier in question on short notice, they might try to improve the situation through dialogue instead.²⁴

3. The need for enhancing contractual mechanisms

3.1 Introduction

One might question the need to enhance contractual mechanisms as the current supplier codes of conduct contribute to improvement of the human and labor rights conditions. One might also consider it to be an illusion to assume that drafting more thorough contractual provisions will solve human rights or labor related issues in itself. As long as such provisions are not implemented in practice or remain unenforced, their ability to achieve a shift in human or labor rights compliance might be rather dim.²⁵ Therefore, one may argue including and prescribing contractual mechanisms in (BHR) policies is not very helpful as these mechanisms hardly contribute to improvement.

That said, I feel contractual mechanisms are important to address in human rights policies for two reasons. Although these mechanisms will not solve business human rights issues in themselves they may contribute to better human rights compliance, for example by suppliers, beside other measures. Next to this and even more importantly as has been explained hereinabove, contractual language on these issues is included in contractual mechanisms such as supply chain contracts. Apparently business expects or at least desire to create the impression that these mechanisms contribute to better human rights performance. Otherwise it makes no sense to include language on these issues in contracts. From this starting point it is important to assess, for example in human rights policies and evaluations, whether the current contractual mechanisms indeed contribute to human rights performance. As will be elaborated hereunder one may identify several issues causing the current mechanisms to be rather ineffective in this respect.²⁶ From this a need seems to emerge to improve them and thus to pay more attention to this aspect in business human rights policies.

²² Cf. SHIFT, Global Compact Network Netherlands and Oxfam, *Doing Business with Respect for Human Rights*, 2016, p. 85.

²³ SHIFT, Global Compact Network Netherlands en Oxfam, *Doing Business with Respect for Human Rights*, 2016, p. 72 en 73.

²⁴ Vytopil 2015, p. 126, 137 and 139.

²⁵ Cf. SOMO, *The Myanmar Dilemma*, p. 11-15.

²⁶ I will not discuss all types of contractual language that may be improved, but will, because of word count restrictions, provide several examples of avenues for improvement.

However, some observe that the implementation of more thorough contractual provisions might create liability risks as the buyer obviously assumes a more supervisory and controlling role.²⁷ That said, cases in which such liability has been established in practice are scarce, if any.²⁸ Furthermore, the risks of not assuming such a role might be considerably higher, also in financial terms. Human or labor rights related issues might cause considerable reputational damage.²⁹ Furthermore, these issues may cause delay and high additional cost in projects as well as expensive and time consuming litigation.³⁰ Thus, the perceived liability issues should not be considered an impediment to enhance contractual mechanisms.

3.2 Legislative developments

Next to financial incentives societal expectations towards business operations in connection with human rights (due diligence) and environmental compliance have changed. This is reflected in public regulation enacted in mainly western countries. For example, section 54 UK Modern Slavery Act³¹ entails an obligation governing companies selling goods or providing services above a certain financial threshold to report on the steps taken to prevent slavery in their business and supply chains in and outside the UK. Alternatively, a company may confirm that it has refrained from implementing such measures. Section 1502 Dodd Frank Act³² implements an obligation of companies listed at the US Stock Exchange to report to the SEC the processing of conflict minerals from the DRC or adjacent countries as well as the measures taken to prevent human rights violations. Furthermore, an obligation to report on slavery, child labor and human trafficking in supply chains is incorporated in Californian legislation.³³ Beyond that, France, for example, has adopted a statutory due diligence obligation in connection with human rights and labour conditions for larger companies (also for their activities abroad).³⁴ In the Netherlands

²⁷ Authors for example point at the good Samaritan liability doctrine in US law in connection with these risks. See e.g. Joe Philips and Suk-Jun Lim, *Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees*, *Rutgers Law Review* 61, vol. 2, 2009, p. 351-363.

²⁸ This has for example been tried in the Wall Mart case, but unsuccessfully. See e.g. Beckers 2014, p. 53.

²⁹ However, this does not mean the main objective of human rights due diligence is the prevention of such damage. Human rights due diligence focusses on the risks a company inflicts to third parties. See SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 51.

³⁰ For example, SHIFT, *Global Compact Network Netherlands en Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 14; SHIFT, *Business, Human Rights and the Sustainable Development Goals*, November 2016, p. 10, 11 en 13.

³¹ See <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>. Section 54(5) entails reporting on a policy, due diligence conducted, supply chains in which issues have arisen or measures being implemented. Section 54(6)(a) requires approval by senior management (such as the board of directors). Furthermore, section 54(7) necessitates publication of the report on a website of the company.

³² The supporting documents may be found at <https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>. See on this section e.g. <https://www.globalwitness.org/en-gb/archive/dodd-frank-acts-section-1502-conflict-minerals/>.

³³ The California Transparency in Supply Chains Act 2010 to be found at <http://www.state.gov/documents/organization/164934.pdf>. This obligation which is implemented in section 1714.43 of the Civil Code governs companies with a global turnover of US\$ 100 million or more. Section 1714.43(c) entails an obligation to report on the risk assessments conducted in connection with human trafficking and slavery, audits, the gathering of information from suppliers and proof thereof, enforcement and training.

³⁴ Article L. 225-102-4 of the Trade and Industry Code provides that a company which head office is located on French territory or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries has to establish and implement an effective vigilance (due diligence) plan for itself as well as for the operations of

the Second Chamber has adopted a due diligence obligation (as of January 1 2020) to prevent the use of child labour in connection with goods sold or services provided by a Dutch company.³⁵ The European Union has, like the US and UK, implemented a non-financial reporting requirement too. In order to comply with the requirement corporations, amongst others, have to report on their CSR policy, on human rights violations which have occurred in their business and the measures taken to resolve the issue.³⁶ Furthermore, the European Union has adopted legislation regarding conflict minerals that are imported into the EU which will come into force on January 1 2021.³⁷

3.3 International frameworks

Societal expectations are not only reflected in legislation but also in authoritative instruments from the United Nations and the OECD, in particular the United Nations Guiding Principles on Business and Human Rights (UNGPR) and the OECD Guidelines for Multinational Enterprises.³⁸ Such instruments are to be found in specific industries too, such as the Equator principles and the IFC Environmental and Social Performance Standards in the financial sector and the Voluntary Principles on Security and Human Rights in the extractive industry.³⁹ Although these frameworks are of a non-binding nature, they may serve as binding standards if they are implemented in contracts such as supply chain, project finance,

all the subsidiaries or companies that it controls. The plan has to include reasonable due diligence measures for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship. Thus the due diligence plan has to (i) identify, analyze and rank risks, (ii) implement procedures to regularly assess, in accordance with the risk mapping, the performance of subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship, (iii) provide for appropriate actions to mitigate risks or prevent serious violations, (iv) provide for a warning mechanism that builds on reports on existing or actual risks, developed in collaboration with the labour union representatives of the company, and (v) implement a monitoring scheme to assess the effectiveness of the measures implemented. See for the French law <https://www.senat.fr/leg/pp14-376.html> and for an English translation of it <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains#c152577>.

³⁵ See article 4 and 5 of the Dutch law to be found in the Dutch parliamentary documents 2016/17, 34 506, A. It is currently pending in the First Chamber.

³⁶ Directive 2014/95/EU to be found at <http://eur-lex.europa.eu/legal-content/NL/TXT/PDF/?uri=CELEX:32014L0095&from=NL>. This directive is, for example, implemented through section 2:391(5) Civil Code (Stb. 2016, 352) in the Netherlands.

³⁷ Regulation EU 2017/821, which can be accessed through <https://publications.europa.eu/en/publication-detail/-/publication/8b0e378b-3c59-11e7-a08e-01aa75ed71a1/language-en/format-PDFA1A>. This legislation builds on the the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, to be found at <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>.

³⁸ See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf and www.oecd.org/dataoecd/43/29/48004323.pdf.

³⁹ See <http://www.equator-principles.com/index.php/ep3>, http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/Performance+Standards and <http://www.voluntaryprinciples.org>.

lending or export credit insurance agreements.⁴⁰ Some parties, for example in their supplier contracts, refer to these frameworks and require their suppliers to comply with the standards of these frameworks. Thus, these requirements become binding through contract. Furthermore, it is conceivable these frameworks will permeate open norms in legislation or jurisprudence such as the duty of care.⁴¹

However, if the obligations entailed in the UNGP or the OECD Guidelines for Multinational Enterprises, such as the due diligence requirement, would be transposed through contractual mechanisms in supply chains, it might still be unclear which specific obligations a supplier should meet. Thus, a contractual arrangement only implementing the obligation to meet specific requirements entailed in the UNGP is too vague to be enforced in practice. Moreover, an obligation to exert leverage on others if a supplier is directly linked to a human rights violation, might face even larger enforceability issues.⁴²

The same goes for the contractual requirement to establish an operational level grievance mechanism which meets the UNGP 31 requirements.⁴³ This might be caused by the inability of companies to meaningfully engage with local communities. Oftentimes skilled facilitators are necessary to perform this task.⁴⁴ Furthermore, operational level grievance mechanisms in many instances only provide whistle blower protection, only cover corruption and money laundering issues or only accept workers' complaints. Other stakeholders, such as local communities, often do not have the possibility to engage in these mechanisms.⁴⁵ If other stakeholders do not have access to the grievance mechanism the external consequences of the company's operations may not be addressed and remedied. Thus, no access to remedy is available for those stakeholders, although UNGP 31 requires this.

3.4 Complexity of supply chains

Beyond this, supply chains often include more suppliers than the first tier of suppliers. In principle a contract only covers the first tier. Contracts have effect between parties and do in principle do not

⁴⁰ For example, the Dutch signatories of the agreement in the garment industry have committed themselves to implement due diligence as set forward by these frameworks, thus effectively rendering them binding in that regard. See the CSR agreement of the garment industry in the Netherlands, para 1.1 and p. 41 and 45-53, to be found at <https://www.ser.nl/en/publications/publications/2016/agreement-sustainable-garment-textile.aspx>.

⁴¹ Private frameworks in other fields have already done so. See for a Dutch example in connection with a privacy framework in the insurance sector HR 18 april 2014, NJ 2015/20 (Achmea/Rijnberg) and on this Marie-Claire Menting, Industry Codes of Conduct in a Multi-Layered Dutch Private Law, Ph.D. Thesis Tilburg 2016, chapter 6.

⁴² The leverage requirement is implemented through UNGP 19(b)(ii) and section IV(3) OECD Guidelines for Multinational Enterprises. What leverage entails is not exactly clear. See on this and different ways to exert it SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, p. 64-74; SHIFT, Using Leverage in Business Relationships to Reduce Human Rights Risks 2013, to be found at <http://www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/>.

⁴³ See in general e.g. SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, p. 26, 109 and 110 and for financial institutions SOMO, Access to effective remedy at international financial institutions?, 2014, to be found at <https://www.somo.nl/access-to-effective-remedy-at-international-financial-institutions/>. See on OECD National Contact Points which provide a dispute resolution system for alleged violations of the OECD Guidelines for Multinational Enterprises OECD Watch, Remedy Remains Rare, 2015, to be found at http://www.oecdwatch.org/publications-en/Publication_4201.

⁴⁴ SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 43.

⁴⁵ See Business and Human Rights Due Diligence Project, 2016, p. 5. Cf. Legal 500 Human Rights Report 2016, p. 9.

create obligations for others. Thus, if a buyer agrees on specific human rights clauses with its supplier this does not mean a second tier supplier (or subcontractor) is bound by these clauses. In order to tackle this issue one might implement a perpetuity clause.⁴⁶ A perpetuity clause requires the first tier supplier to pass the contractual requirements agreed upon between the buyer and the first tier supplier to its (second tier) supplier or subcontractor and is often strengthened by a high penalty in case of non-compliance. However, it is questionable whether suppliers will always pass this obligation on their suppliers or subcontractors and whether the buyer is able to monitor this. Additionally, a company might impose requirements on the way in which a supplier has structured its procurement.⁴⁷ For example, it may prohibit subcontracting, limit the number of subcontractors or require the supplier to provide information about its suppliers or subcontractors. Here also it may be questionable whether (the buyer is able to monitor whether) the supplier complies with this obligation. Moreover, the question how many tiers of suppliers one should include still remains unsolved, although the UNGP and OECD Guidelines for Multinational Enterprises seem to include the full supply chain.

More generally speaking, the buyer often lacks (access to reliable) information on the human rights performance of a supplier, even if (third party) audits are implemented. This may be due to fact audits only reflect performance on a specific moment in time and may be evaded by the supplier, for example by subcontracting for (part of) the work.⁴⁸ Furthermore, audit fatigue and duplication of audits may decrease the willingness of the supplier to implement measures to improve its human rights performance. Thus, current contractual mechanisms implementing audits and monitoring of supplier performance may not provide the necessary information to the buyer in order to enable it to assess the actual human rights performance of the supplier.

3.5 Contractual arrangements are not a solution in themselves but contribute

The abovementioned topics elucidate the need for improvement of contractual mechanisms governing and implementing supplier codes of conduct. Notwithstanding this, contractual arrangements are not the silver bullet to solve all human rights or labor related issues, although they are part of the solution. Improving contractual mechanisms in connection with business human rights issues is not an easy exercise of only adapting contractual language and adding some clauses. Business human rights issues are very complex and require sophisticated and integrated solutions of which contractual mechanisms are part. For example, even if a supplier would be willing to meet the contractual requirements of the buyer, implementation in practice still poses a challenge. So next to the contractual clause training of and/or dialogue with the supplier may be necessary. Furthermore, others in the supplier's environment might consider these standards as western interference and therefore might be reluctant to comply. This might decrease the supplier's motivation to implement these standards. The same might be true if

⁴⁶ These clauses are actually implemented in some supply chain contracts. See SHIFT, Global Compact Network Netherlands and Oxfam, *Doing Business with Respect for Human Rights*, 2016, p. 27 en 30; Vytopil 2015, p. 124, 125, 131, 132 and 138.

⁴⁷ For example, does this supplier map his supply chain, does it organize training for its suppliers and is human rights compliance secured through agreements with its subcontractors?

⁴⁸ For example the SOMO Myanmar Dilemma Report (note 2), p. 72 refers to a company mentioning a Fair Wear Foundation audit being conducted and not being aware of human rights violations in a factory where the report has revealed human rights issues.

all contractual risks are geared towards the supplier. Thus a more equal spread of contractual risks and profits might incentivize a supplier to implement the contractual requirements and to comply with labor and human rights standards.⁴⁹ Broader collaboration within the company as well as external collaboration is necessary to solve human rights related issues, for example by engaging in dialogue with suppliers or in local multi-stakeholder initiatives.⁵⁰ For example, if suppliers invest in more stable labor relations and achieve higher production as a result, they might be incentivized to continue which also benefits the buyer in terms of uptake of his human rights requirements.⁵¹ More generally speaking the more trust a supplier has in the buyer, the better the uptake of the standards imposed by the buyer.⁵² For example, if a supplier feels a buyer only aims at acquiring products at the lowest price, does not care for the interests of the supplier and changes supplier after every order, the chances this supplier is intrinsically motivated to comply with (onerous) human rights requirements of the buyer are dim, especially if it has options to evade monitoring by the buyer or if the buyer does not monitor at all.

4. Ways to enhance contractual arrangements

4.1 Introduction

Hereinabove, the need for contractual arrangements to enhance human rights performance in supply chains and the need to improve existing contractual instruments (also through elaborating on this issue in human rights policies) is elaborated upon. However, the proof of the pudding is in the eating. How and to which extent could existing mechanisms be improved through elaborating on this issue in human rights policies? I will try to answer this question by discussing several topics in connection with which more effective contractual approaches in human rights policies may be developed (which have not been developed to date), amongst other things, addressing these issues through (the improvement of) contractual clauses. However, as has been elaborated hereinabove one should notice these improvements do not solve human rights issues in themselves but should be part of a broader integrated solution.

Moreover, it may not be feasible in practice to implement all suggestions for improvement done hereinafter at once. For example, suppliers may not accept contracts including highly elaborated paragraphs on human rights compliance and dispute resolution if their other buyers do not impose such requirements. Thus, the level playing field issue may hamper the implementation of highly sophisticated contractual arrangements overnight. A step by step approach implementing one smaller change at the time may be less effective but more practical. This may also enhance industry wide acceptance of these (smaller) changes especially if these improvements build on existing contractual clauses. In this regard these smaller changes are preferably first implemented in the supply chains and the type of risks which pose the largest threat to human rights.⁵³ Therefore, it may be that of the suggestions provided

⁴⁹ Cf. in the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 26 and 52.

⁵⁰ Cf. in the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 39.

⁵¹ SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 67.

⁵² SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 81.

⁵³ See UNGP 17(b) and 24 and section IV(5) OECD Guidelines for Multinational Enterprises.

hereinafter other ones could be first implemented in supply chains in different industries depending on the most salient human rights risks.

Beyond this, conducting human rights due diligence or implementing due diligence through contracts might pose a challenge for smaller companies (SMEs) because of the required experience and costs. Smaller companies not able to monitor supply chains themselves may make use of multi-stakeholder initiatives, such as UTZ, Fairtrade and Fairwear.⁵⁴ These initiatives implement certification schemes to, amongst other things, monitor human and labor rights compliance.⁵⁵ A company might then impose the contractual requirement to acquire a certificate from one of these multi-stakeholder initiatives.

I will hereinafter provide suggestions for improvement of different nature which may contribute to improvement of contractual mechanisms. It will depend on the supply chain and most salient human rights risks which suggestion may be worthwhile to implement first. Most suggestions are derived from my experience in practice, discussions with business, NGO and government representatives as well as my work in the business and human rights project of the American Bar Association on the most salient issues in connection with human rights compliance in supply chains. The last suggestion builds on my work as a member of the arbitration and business human rights working group.⁵⁶

4.2 Defining human rights

If one desires to regulate human rights performance of suppliers through contractual mechanisms, a question might be what human rights are. Human rights cover a broad spectrum.⁵⁷ One might, not exclusively, think of discrimination, women's rights, land tenure rights for example of indigenous peoples, security issues, sexual and gender-based violence, access to water and sanitation, restrictions on workers, for example through seizure of documents, debt bondage of workers, child labor, workers health and safety, working hours, freedom of association and living wages. The contractual arrangement should make clear what is expected from the supplier and which human rights the buyer is referring to.

For example, in connection with labor conditions the contract could entail obligations on the right to unionize without any form of retaliation and the right to collective bargaining, a minimum wage that guarantees a decent living in the local circumstances (which might include remuneration for transportation costs or housing and is not, for example, based on bonuses which are connected to unrealistic or very high targets), a prohibition to require the workers to engage in excessive or unpaid

⁵⁴ See also the CSR agreement of the garment industry in the Netherlands, p. 17, 19, 26 and para. 3, to be found at <https://www.ser.nl/en/publications/publications/2016/agreement-sustainable-garment-textile.aspx>. See also OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 25, 26 and 55.

⁵⁵ Certification is also used to prevent and mitigate human rights violations in supply chains in connection with minerals originating from conflict zones. See for an elaborated framework the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, to be found at <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>.

⁵⁶ See for its work e.g. a working paper with a proposal on arbitration and human rights and a questions and answers document, to be accessed through <https://business-humanrights.org/en/pdf-an-international-arbitration-tribunal-on-business-human-rights-version-five>, and <https://business-humanrights.org/en/qas-on-proposed-intl-arbitration-tribunal-to-resolve-business-human-rights-abuse-disputes>.

⁵⁷ UNGP 12 and the commentary thereto refer to the ICCPR, ICESCR and core ILO conventions but emphasize other UN Human Rights Instruments might be important too, such as those regarding indigenous peoples or minorities.

overtime (often connected to bonuses paid for achieving very high targets) or to work while they are ill (usually caused by a clause which reduces wages if a worker cannot work due to illness or which provides a bonus for being at work all the time), provisions in connection with child and forced labor, the obligation to employ workers based on a contract which they receive, are informed of and understand (also in connection with social security contributions and claims) and safe and healthy working conditions.⁵⁸

4.3 Assessing human rights performance of a supplier and access to information

A big challenge is to measure human rights performance of a supplier. Often information on supplier performance is unavailable or insufficient. Therefore, buyers need access to this information and a contractual provision implementing a supplier obligation to provide that information is helpful. This provision might entail an obligation to provide information on the supply chains of the supplier as well as the most salient human rights risks in these supply chains.⁵⁹ Furthermore, it might also entail an obligation to implement a thorough process to engage with subcontractors and provisions on the cases in which subcontracting is permitted.⁶⁰ In connection with this it might be worthwhile to impose the human rights due diligence requirement on the supplier too.⁶¹ This creates an independent obligation for the (first tier) supplier to conduct its own human rights due diligence and to deal with its suppliers, notwithstanding the need for the buyer to monitor whether this is actually done. Moreover, implementing third party audits of which meaningful dialogue with local stakeholders is an important part, might also prove beneficial. For example, if grounds belonging to local communities are needed for production and the ownership is unclear, it might be necessary to engage in a dialogue based process involving the local community to map ownership and including a grievance mechanism to resolve disputes over ownership.⁶² However, this requires specific contractual measures and will thus not be fit for all types of contractual arrangements, especially not for those intended to be used in many

⁵⁸ Cf. in connection with existing issues on these rights and obligations in Myanmar SOMO, *The Myanmar Dilemma*, p. 11-15 and 66-92. This could also include concluding global framework agreements. See OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 26 and 101-155 to be found at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>. In connection with this provisions should be implemented when and under which conditions the engagement with third party recruitment or employment agencies is permitted and also for the use of homeworkers. Cf. OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 38 and 182-186.

⁵⁹ This included information on the intent to subcontract, a selected subcontractor, information on its performance and size of contract allocation. See OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 36 and 60. Cf. for the agricultural sector OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, p. 33 and 34. Such a provision should also apply for buying agents engaged by a company. Cf. OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 72.

⁶⁰ For example by analysing the human rights performance of the subcontractor or only engage with subcontractors on the list of the buyer. See OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 35 and 36.

⁶¹ See SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 29 and 58. One might even implement a continuous improvement model in which human rights impact assessments are first conducted and guided by the buyer, then by the supplier and eventually by e.g. local communities or in collaboration with these stakeholders.

⁶² SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 57.

contractual relations with suppliers. It will thus depend on the salience of the risk, the leverage of the buyer and the size of the order whether such an approach may be feasible in practice.⁶³ Furthermore, third party (NGO) audits might be more effective whereas the company itself might not be very well informed on the (complex) local conditions and the measures a supplier is able to implement in practice.⁶⁴ These audits are generally most effectively implemented at a point in a supply chain where only a few larger players are active.⁶⁵ Beyond that, to prevent audit fatigue they should be conducted where gaps in the information exist or the context is likely to have changed.⁶⁶ This also prevents the replication of existing audits systems.⁶⁷ It is important to notice that more general third party audits seem to be focussed on (highly) regulated topics such as worker safety and labor conditions and less on broader human rights related issues. Audits involving a focus on human rights and engaging human rights specialists seem to perform better in revealing human rights related risks. Globally operating companies which have adopted such a specific human rights audit have found human rights related risks in 74% of their supply chains whereas companies conducting a more general audit have found human rights related risks in no more than 29% of their supply chains.⁶⁸ Interestingly, companies that have adopted a more specific human rights oriented approach also appear more effective at monitoring whether agreed upon improvements with a supplier are actually implemented in practice.⁶⁹ However, these audits focus on human rights compliance and do not assess the reliability of a supplier as such in terms of its true intentions to implement the contractual obligations, although this might be relevant for the efforts the supplier is willing to make to improve the human rights situation. Such reliability might be derived from thorough management systems of the supplier, including a responsible board representative and senior officer responsible for human rights compliance, human rights on the board room agenda, remuneration of the board connected to human rights performance and mechanisms to direct human rights related information to the responsible officers. Beyond that, the supplier might be incentivized to retrieve information from his suppliers. The larger the number of suppliers and the higher the volatility of the relationships, the more difficult it will be to control human rights related risks.⁷⁰ Therefore, it might be feasible to contractually restrict the number of subcontractors or suppliers. Instead of these contractual

⁶³ That said, this role may also assumed by (local) multi-stakeholder initiatives to which a contractual provision may refer.

⁶⁴ Cf. SHIFT, Global Compact Network Netherlands and Oxfam, *Doing Business with Respect for Human Rights*, 2016, p. 85.

⁶⁵ Cf. in the agricultural sector OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, p. 38; OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 57.

⁶⁶ OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 53 and 82.

⁶⁷ Cf. in the agricultural sector OECD-FAO *Guidance for Responsible Agricultural Supply Chains*, p. 38; OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 25.

⁶⁸ See *Business and Human Rights Due Diligence Project*, 2016, p. 4. Furthermore, less references were included to the ICCPR and ILO core conventions, as are referred to in the UNGP, in these more generic audits. See *Business and Human Rights Due Diligence Project*, 2016, p. 5. Beyond that, 93% of the companies adopting a specific human rights audit engaged with human rights experts as opposed to 24% of the companies implementing more generic audits. See *Business and Human Rights Due Diligence Project*, 2016, p. 6. Finally, companies which have adopted a more specific human rights audit refer to the UNGP in 81% of the audits. See *Business and Human Rights Due Diligence Project*, 2016, p. 4.

⁶⁹ 74% of the companies which have implemented a specific human rights audit monitor implementation in practice as opposed to 34% of the companies which have not done so. See *Business and Human Rights Due Diligence Project*, 2016, p. 4.

⁷⁰ Also OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 46 and 71.

arrangements smaller companies may rely on multi-stakeholder initiatives and implement the obligation to participate in those initiatives.

Beyond this monitoring of the suppliers' performance a contractual arrangement could include the obligation of the supplier to provide information. This obligation could, for example, pertain to occupational hazards and environmental pollution. It may even be possible to implement the obligation to provide information on the working conditions, impact of a supplier on local employment, land, water and energy use, climate and if applicable biodiversity and (sustainable) food supply.⁷¹ Obviously, the contract may also include provisions on the use of (hazardous) chemicals, water use and greenhouse gas emissions.⁷² Another possibility is for the information to include payments made to the government. Obviously, the aforementioned obligation to share information should include the obligation to also provide said information in a timely and adequate manner.⁷³ Transparency might contribute to decrease human rights related risks as the buyer would be better equipped to assess human rights related risk and to adequately act upon them.⁷⁴ Finally, this obligation might necessitate the requirement to preserve documents in which the information is recorded for a certain period of time.⁷⁵ If the buyer is a smaller company or the supply chain is larger or more fragmented, it might be difficult to retrieve the aforementioned information from suppliers. Engaging in a multi-stakeholder initiative which gathers this information and uses it to monitor and improve supplier performance might be a viable alternative.

4.4 Building dialogue with a supplier

It is also important to establish a dialogue with suppliers, especially if they do not engage in multi-stakeholder initiatives in order to explain why human rights compliance is pivotal. Furthermore, dialogue is necessary to discuss how human rights compliance can be achieved in the local conditions in which the supplier operates and the challenges those conditions may pose to the supplier.⁷⁶ Top down implementation of a code of conduct might not work when the suppliers' motivation to comply is minimal or when it is difficult to implement a western code of conduct in the daily practice of a supplier. Furthermore, it is important for suppliers to engage in training on human rights related topics either organized by the buyer or by local multi-stakeholder initiatives.⁷⁷ To this end, a contractual obligation to attend and facilitate these trainings might be beneficial. The advantage of an obligation to engage in a local multi-stakeholder training being that the local challenges and possible means to overcome these challenges might be clearer to such an initiative than they are to a more remote buyer with suppliers in

⁷¹ Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 60, 61 and 66; OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 80 and 81. This might in connection with worker conditions pertain to percentage of migrant workers whose passports have been confiscated or hours worked.

⁷² OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 155-181.

⁷³ Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 66.

⁷⁴ Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 49. This of course implicates the buyer lives after its own human rights obligations and does not use the contract to evade its obligations and just shift them to the supplier.

⁷⁵ Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 32.

⁷⁶ Cf. SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 30.

⁷⁷ Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 58.

many other countries or regions. Additionally, such initiatives might be better equipped to verify compliance. Furthermore, an individual contractual arrangement between the buyer and the supplier may be more difficult if the buyer lacks leverage or uses contractual provisions intended for many supplier contracts.

Moreover, western companies should realise their contractual requirements outside the field of human rights (e.g. timeliness requirements, possibilities for last minute specification changes and the price paid for the products), might hamper the efforts of a supplier to improve the human rights conditions.⁷⁸ Therefore, contracts might also entail provisions to balance the powers of western companies vis-à-vis those of suppliers, or at least contain a mechanism through which a supplier is enabled to complain about the buyers' behaviour which allegedly impedes on compliance with human rights. This mechanism might also be of assistance in building a broader dialogue between the buyer and the supplier to enhance human rights compliance.

4.4 Enforcement

As previously mentioned, audits may expose human rights violations. Obviously, the contractual arrangement should entail provisions to deal with such violations as well as other types of non-compliance with the contractual provisions regarding human rights. Contractual arrangements usually contain a combination of liability, force majeure, termination or penalty clauses to remedy these forms of non-compliance and to enhance compliance. Nevertheless, a major challenge in the business and human rights arena remains the enforcement of these contractual provisions. Litigation in local courts might not prove to be a viable avenue for western companies because of vague and time consuming procedures, uncertainty over possible outcomes, corruption and unfamiliarity with the local procedures as well as lack of trust in local procedural laws. However, for the termination of a contract litigation in local courts is not necessary.

That said, termination might be difficult because of operational considerations and it might not contribute – or even be counterproductive – to the improvement of the human rights conditions as these issues often are quite complex. For example, if one terminates a contract with a supplier due to child labor issues, this does not necessarily mean that these children will go to school after the termination. As explained hereinabove, the income these children earn might be crucial for their family's livelihood.⁷⁹ If they are fired by one supplier they might find a job with another supplier where the labor conditions are even worse or might not be able to find a new job at all with even more dramatic consequences. Even where a supplier agrees to paying these children's wages as well as their education (e.g. work half a day and go to school for half a day), this might still not solve the issue since parents might perceive this as an increase of income and consequently may desire the child to work the whole day to earn (even) more or the parent may perceive the solution as an interference with their parental prerogative. Therefore, engagement with and training of parents might be necessary too to emphasise the benefits of education. Thus, a simple prohibition of child labor and termination of a contract because of that is highly unlikely to solve this issue in often complex environments.

⁷⁸ Cf. OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 70.

⁷⁹ SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 72 and 73. See on this issue in Myanmar SOMO, *The Myanmar Dilemma*, p. 80-84.

Therefore, other means of enforcement should be implemented. Companies might want to improve local conditions through dialogue with the supplier or by engaging in a local multi-stakeholder initiative.⁸⁰ A probation period might also be agreed upon with the supplier to implement the improvements. If these improvements are not adequately implemented after this probation period the supplier should be contractually bound to collaborate with the buyer in order to assess the causes of the inadequate implementation.⁸¹ An obligation to compensate damages because of human rights violations may also be a beneficial part of the agreement.⁸² Furthermore, one might think of an obligation to upgrade faulty facilities to prevent future harm or to strengthen management systems.⁸³

Beyond that, enforcement in this context might not only imply the termination of contracts and fines, but could implement a more positive approach too. For example, contractual advantages might be awarded if a supplier passes the thresholds of a continuous improvement approach to gradually improve the human rights and labor situation. This might also entail increasing orders or giving prospective orders.⁸⁴

Furthermore, reports from NGOs may disclose alleged human rights violations. Unlike audits conducted on behalf of the buyer these reports are public and therefore pose additional challenges of limiting reputational damage. In order to mitigate such damages it is important the buyer is enabled to prepare, direct and supervise the responses to these allegations. The contractual arrangement should entail provisions to empower the buyer to do so.

4.5 Implementing (non-judicial) dispute resolution mechanisms

Furthermore, supply chain contracts should entail an obligation to establish or participate in effective local/operational level grievance mechanisms which meet the UNGP 31 requirements.⁸⁵ Such a grievance mechanism should be trusted by its intended users. It is unlikely that trust will be generated when the grievance mechanism is designed at the buyers head office with the aim of global implementation of the same mechanism without consulting the intended users. Thus the contracts should entail the design, establishment and implementation of such mechanisms in collaboration with its intended users, preferably through local multi-stakeholder initiatives.⁸⁶ Meaningful involvement of the intended users is crucial in the process of establishing a trusted grievance mechanism. The

⁸⁰ Cf. Vytopil 2015, p. 126, 137 and 139.

⁸¹ See for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 37.

⁸² Cf. for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 36.

⁸³ OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 67.

⁸⁴ OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 72.

⁸⁵ Cf. SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 96-99, 107 and 109. Cf. especially for the agricultural sector OECD-FAO Guidance for Responsible Agricultural Supply Chains, p. 53 and 54; OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 26.

⁸⁶ SHIFT, Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights, 2016, p. 108. See also OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 23, 92 and 94. In connection with child labour and sexual assault specific mechanisms might be necessary. See OECD, Responsible Supply Chains in the Garment and Footwear Sector, p. 109.

contractual provision should allude to this inclusion.⁸⁷ It should also require sufficient measures to prevent harassment of or retaliation against human rights defenders, worker union representatives or others who lodge a complaint themselves or incentivize others to make use of the grievance mechanism. Beyond this, if an effective grievance mechanism is established, it is important to learn from processed grievances. Therefore, it is of importance to implement a contractual obligation to forward aggregate information on the number and nature of grievances throughout the supply chain. Effective local grievance mechanisms are an important source of information.⁸⁸ Furthermore, a supplier should be contractually bound to implement the agreed upon outcome of the grievance mechanism, if necessary after consultation with the buyer who has imposed the obligations. Even an obligation to implement an outcome further down the supply chain might be part of the contractual arrangement.

Supply chain contracts might also entail, either or not as an escalation mechanism to the aforementioned grievance mechanisms, an arbitral clause paving the way for arbitration as an escalation mechanism to solve human rights issues. This is not yet standing practice but proposed as a mean to solve business human rights disputes.⁸⁹ This escalation mechanism can be of assistance especially where non-judicial, for example dialogue based, mechanisms have failed.⁹⁰ Arbitration has its advantages compared to litigation in national courts.⁹¹ Therefore, arbitration may improve enforcement of (contractual) arrangements in connection with human rights and might enhance access to remedy if human rights violations occur.

5. Conclusion

I feel should no longer neglect human rights issues in their respective supply chains. The obligation to respect human rights is not only incorporated in public legislation and authoritative guiding documents, but also stems from societal expectations that are closely connected to the reputation of a company. An adverse reputation in the business and human rights arena may cause extensive (reputational) damage. Human rights issues in supply chains might also cause delays in the production of goods or the provision of services which might prove costly. Therefore, many companies have implemented a human rights policy to prevent and mitigate human rights issues. Several of those companies implement contractual arrangements regarding the supplier's human rights performance, although these contractual mechanisms are hardly ever elaborated upon in these policies. Thus, I feel companies have to recognize that contractual arrangements should be integral part of human rights policies and elaborated in these policies. Bridging the existing mismatch between policies and contractual arrangements may improve

⁸⁷ For example, local assistance in reporting a grievance might be necessary. See OECD, *Responsible Supply Chains in the Garment and Footwear Sector*, p. 92.

⁸⁸ Cf. SHIFT, *Global Compact Network Netherlands and Oxfam, Doing Business with Respect for Human Rights*, 2016, p. 104 and 107 (explaining what different outcomes of the grievance mechanism might say about the human rights situation).

⁸⁹ See note 56.

⁹⁰ The Bangladesh Accord agreed upon in the aftermath of the Rahna Plaza disaster entails such an arbitration mechanism. Many major global brands are signatories to this accord. See section 5 of the accord, which is to be found at http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf. A comparable escalation mechanism is entailed in section 1.3 of the Dutch Garment Industry Accord, to be found at <https://www.ser.nl/en/publications/publications/2016/agreement-sustainable-garment-textile.aspx>.

⁹¹ See especially the Q&A mentioned in note 56.

human rights performance by suppliers. Implementing thorough language on the utilization and shape of contractual mechanisms in human rights policies might incentivize business to implement more effective contractual mechanisms, for example because of the aforementioned legal obligation to report on their human rights policies in the EU, UK and California. As it becomes clear from those reports no thorough contractual measures are implemented, NGOs and governments might question the effectiveness of their policy. Eventually NGOs and governments might even expect these reports to be more specific on the types of contractual measures implemented. Legislation may eventually even implement a requirement to report on the implementation of contractual mechanisms. This might boost the effective use of contractual arrangements even more.

Although human rights policies oftentimes describe the utilization of contractual mechanisms in a superficial manner, contractual arrangements to enhance human rights performance are widely used in supply chains. That said, their effectiveness in terms of advancing human rights compliance by suppliers is definitely subject for improvement. Thus strengthening these instruments, amongst other things through addressing this need in human rights policies, is essential in order to improve human rights compliance in supply chains. Although these contractual arrangements do not provide the solution for human rights issues, they do constitute a necessary element of the solution. Several ways to enhance improvement have been elaborated upon. They see to a clearer description of the human rights the buyers is referring to, enhancing measurement of supplier performance including improved audits, building dialogue with suppliers, implementing effective grievance mechanisms with feedback loops to the buyer, supplier obligations to provide information and enhancing enforcement of contractual provisions including arbitration as an escalation mechanism.