# **[Jessica’s Clause]**

# **Carbon Contract Clauses for Environmental Performance, and Associated Incentives and Remedies**

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| --- | --- |
|  | **How to use this clause** |
| **Child’s Name** | Jessica’s Clause |
| **Full Name** | Carbon Contract Clauses for Environmental Performance, and Associated Incentives and Remedies |
| **Why use this?** | This enables a customer to incentivise the supplier’s continuous, Paris-aligned emissions reduction targets with remedies tiered according to the level of breach. By making a plan to achieve the targets and report on progress, and with remediation opportunities, the supplier will be supported to achieve its own net zero targets. |
| **Practice Area / Sector** | Practice Area(s):   * Commercial * Universal   GICS Sector (Industry Group/ Industry):   * Universal   Other:   * Supply chain |
| **Climate Issue** | While the climate and environmental impact of goods or services is increasingly important to business customers (including to meet their own greenhouse gas (GHG) targets), this is not being captured in their supply agreements. If a breach of contract causes (or contributes to) the Buyer missing its greenhouse gas (GHG) targets, this has negative climate impacts and it may be hard to quantify and evidence the loss caused to the Buyer. So, in effect, there may be no remedy available to the Buyer.  Additionally, most contractual remedies (other than those triggering termination and suspension rights) are pecuniary in nature - there is no standard practice of alternative remedies or consideration given to options which are not designed to improve the financial position of the injured party. |
| **Drafting Solution** | 1. Include climate considerations in standard contract drafting.  2. Include climate metrics for performance in all contracts.  3. Provide a mechanism akin to liquidated damages for breaches with negative climate impacts, in the form of a mandatory donation to appropriate non-profit organisations. This provides an alternative to pure cash compensation. |
| **Impact: How this drafting promotes a net zero future** | Cascading environmental clauses which provide a remedy for breaches that impact a Buyer’s GHG targets and therefore that cause negative climate impacts should increase the speed of transition to net zero. |
| **Legal Context** | Currently the carbon costs of producing goods or delivering services are not usually specified in contracts and, therefore, there is no incentive to reduce carbon emissions. |
| **Environmental Context** | *This information is needed. Contact TCLP to help us update this section to reflect recent events or newly available information.* |
| **Stakeholders** | 1. Public sector procurers  2. Trade (standards) bodies  3. Contractors  4. Investors  5. Precedent and know how providers  6. Professional Support lawyers  7. Law firms |
| **Potential barriers or challenges to integration / implementation & mitigation** | *This information is needed. Contact TCLP to help us update this section to reflect recent events or newly available information.* |
| **Notes for users** | This clause is intended to be used by buyers who are large corporations.  The supplier warrants it will meet certain targets for the climate and environmental impacts of delivering the goods or services under the agreement. If breached, the supplier must pay a climate remediation fee or emissions payment to a selected environmental charity.  Users of this clause should consider the legitimate interest of the Supplier to ensure that the Climate Remediation Fee/Emissions Payment is not unenforceable as a penalty.  Users of the clause may wish to use a bid document clause format to address the issue of incentivising higher estimates, e.g. ‘Climate Part 36 offer’ ‘Green Part 36 Offer’. Clause users may wish to use softer incentives instead such as rights of first refusal. An example would be a ‘climate option’, where the Buyer has the option to pay the Supplier to enact carbon reducing changes in systems, at the Supplier’s cost, or at a discount. The Buyer is then able to lower its own emissions profile and incentivised not to deviate from climate behaviour standards; if it does, then the Supplier can still reduce its carbon footprint with what amounts to financial assistance from the Buyer. The climate warranties may be used in M&A transaction documents. |

**Additional Recital[[1]](#footnote-2)**

1. The parties acknowledge that the performance of this Agreement will result in certain climate [and ecological] impacts, including the emission of greenhouse gases.
2. The parties [have signed up to the [Race to Zero](https://racetozero.unfccc.int/join-the-race/) and] acknowledge their common intention to achieve their respective [net zero targets and] align with the objectives of the Paris Agreement, in particular pursuing efforts to limit global temperature increase to 1.5 degrees Celsius above pre-industrial levels and achieve net zero or net negative emissions by 2050 or sooner, in a manner that promotes a just transition to a low carbon economy and that results in at least a 7%[[2]](#footnote-3) reduction of greenhouse gas emissions year on year.
3. The parties recognise and acknowledge that they will need to reduce greenhouse gas emissions relating to the performance of this Agreement continuously so that they can meet their respective interim targets for immediate emissions reduction.

**Additional Definitions**

**Annual Emissions Report** means a written report setting out the Total Emissions for the relevant Emissions Reporting Period;

**Appointed Beneficiary** means the beneficiary of the [Climate Remediation Fee/Emissions Payment], to be chosen from the Beneficiary List by the Buyer and nominated in writing in the relevant Climate Remediation Notice;[[3]](#footnote-4)

**Beneficiary List** means the [ideal position – a list of reputable NGOs supporting environmental improvement UK and globally managed by reputable independent third party; in the absence of such a list, the parties may wish to choose a shortlist of their preferred charitable partners / NGO beneficiaries];

**Business Day** means any day other than a Saturday, Sunday or any other day which is a public holiday in England;

**Carbon Dioxide Equivalent (CO2e or CO2eq)** means the standard metric measure used by [the UN’s Intergovernmental Panel on Climate Change (IPCC)] to compare the emissions from various Greenhouse Gases (GHGs) on the basis of their global warming potential over a specified timescale [to express a Carbon Footprint that consists of different GHGs as a single number];[[4]](#footnote-5)

*EITHER*

**[Climate Remediation Fee** means:

(i) in clause (i) of the definition of Climate Breach, an amount equal to the cost of carbon credits that must be purchased to offset each metric ton of CO2e that Total Emissions exceed the Emissions Target; and

(ii) in respect of clause (ii) [or (iii)] of the definition of Climate Breach, [[£[X]] [and an additional sum of £[x] for each [day] that the breach continues [up to a maximum of £[x]]] *OR* [[X%] of the aggregate amount paid by Supplier to Buyer over the prior twelve (12) months]; ]

*OR*

**[Emissions Payment** means a payment of the amount set out in Schedule [ ];]

**Emissions Reporting Period** means[, firstly, a period of twelve months commencing on the start date of this Agreement and ending on the first anniversary of that date, and then consecutive 12 month periods ending on the day before the next anniversary of that date];[[5]](#footnote-6)

**Emissions Report Date** means, in relation to an Emissions Reporting Period, the first day of the next Emissions Reporting Period;

**Emissions Target** means zero Total Emissions or at least [7][[6]](#footnote-7)% less than the Total Emissions of the previous Emissions Reporting Period /[percentage reduction required by the [Supplier] to meet [its] Net Zero Target(s)];

**GHG Emissions** means [a party’s] emissions of GHGs from all sources [related to this Agreement], categorised as scope 1, 2 and 3 emissions by [*The Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, Revised Edition 2015*](https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf)*,* as updated from time to time;[[7]](#footnote-8)

**GHG Reporting Standard** means [(i) the Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, Revised Edition 2015, (ii) Greenhouse Gas Protocol, GHG Protocol Scope 2 Guidance, An Amendment to the GHG Protocol Corporate Standard, 2015, and (iii) Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard, Supplement to the GHG Protocol Corporate Accounting and Reporting Standard, 2011] as amended from time to time;[[8]](#footnote-9)

**Greenhouse Gases (GHGs)** means the natural and anthropogenic gases which trap thermal radiation in the earth’s atmosphere and are specified in Annex A to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) [or otherwise specified by the UNFCCC at the date of this Agreement], as may be amended from time to time[, which include carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF6), and nitrogen trifluoride (NF3),] each expressed as a total in units of Carbon Dioxide Equivalent (CO2e);[[9]](#footnote-10)

**Independent Third Party** means an impartial organisation not affiliated with either party providing climate impact assessment and emissions reporting services, of a standard at least equal to the Carbon Disclosure Project or the Carbon Trust;

**[Net Zero Target** means both a reduction of GHG Emissions overall and a removal of GHG Emissions associated with Offsets acquired to address Residual Emissions by [INSERT DATE/ 2050 or sooner] to achieve a balance between the [party’s] sources and sinks of GHG Emissions in a calendar year and for each subsequent year thereafter and to achieve the goals of the Paris Agreement;][[10]](#footnote-11)

**[Offset** means the purchase of carbon credits from a project:

(i) that has been verified in accordance with [insert name of voluntary standard] or under the United Nations Framework Convention on Climate Change (UNFCCC) clean development mechanism (CDM) [or [successor/ equivalent] UNFCCC mechanism];

(ii) where the emissions of GHG avoided, reduced or removed by the project are additional;

(iii) that, in relation to GHG removals, employs long-lived storage methods that have a low risk of reversal over millennia;

(iv) that prioritises the removal of GHG from the atmosphere rather than avoids or reduces third party emissions of GHG; and

(v) that takes account of a just transition and addresses wider social and ecological goals;]

**Residual Emissions** means GHG Emissions that are emitted after all reasonable efforts have been made [by a [party] to reduce GHG Emissions;]

**Total Emissions** means the sum of the Supplier’s GHG Emissions, in a given Emissions Reporting Period [as verified by an Independent Third Party];

**Additional Clauses**

1. **Climate Reporting and Warranties**

*[Note: The parties should agree a mechanism for measuring their climate and environmental impacts under this Agreement. The warranties below should be adjusted accordingly. These could also be used as warranties in M&A transaction documents.]*

1.1 The Supplier shall:

1.1.1 set an Emissions Target;

1.1.2 provide the first Annual Emissions Report within [twelve (12)] months after the start date of this Agreement and each other Annual Emissions Report no later than forty (40) Business Days after the applicable Emissions Report Date; [and]

1.1.3 measure and calculate its Total Emissions in accordance with the GHG Reporting Standard[, and ensure that they are verified each year by an Independent Third Party before being provided to the Buyer][[11]](#footnote-12);

1.1.4 ensure that the Total Emissions for any Emissions Reporting Period shall be equal to or below the Emissions Target;

1.1.5 develop and regularly review a plan, approved by [a director/committee of the directors/its board of directors], including short, medium and long term interim targets, to meet the Emissions Target for each Emissions Reporting Period; [and]

1.1.6 [achieve certification under [insert relevant sustainability / climate / carbon industry standard] within [twelve (12)] months of the start date of this Agreement and afterwards maintain that certification during the term of this Agreement; and]

1.1.7 [insert other climate performance metric as relevant to the performance of this Agreement],

and the Supplier represents and warrants that all Annual Emissions Reports provided to the Buyer are in all material respects complete, accurate and not misleading.

1.2 The Buyer shall:

1.2.1 provide any information reasonably requested by the Supplier that is necessary for the Supplier to prepare the Annual Emissions Report(s); and

1.2.2 *[Any other dependencies on the Buyer for the Supplier to meet its target and provide the reports to be set out here.]*

and the Supplier shall promptly notify the Buyer upon becoming aware of any failure or anticipated failure by the Buyer to perform any of its obligations set out in this clause 1.2

1.3 [The parties agree to set respective organisational Net Zero Targets that align with either the criteria of the [Race to Zero](https://racetozero.unfccc.int/join-the-race/) or the [Science Based Targets initiative](https://sciencebasedtargets.org/set-a-target) within [*insert time period*] of entering into this Agreement.]

1.4 [The Buyer may, in its sole discretion, refer any Annual Emissions Report to an Independent Third Party for verification [and the Supplier agrees to be liable for, and shall reimburse the Buyer on demand for, 50% of the Independent Third Party's costs of such verification in the event that the verification exercise shows that the Annual Emissions Report is materially inaccurate].][[12]](#footnote-13)

1. **Notification of Climate Breach**

2.1 The Supplier shall notify the Buyer in writing on each Annual Emissions Reporting Date (or sooner, if it becomes aware) if there has been or is likely to be:

2.1.1 a breach of clause 1.1.4 in the immediately preceding (or, where relevant, current) Emissions Reporting Period[; or

2.1.2 any other [material] breach of clause 1.1]

([together or each] a **Climate Breach**).

2.2 The Supplier's notification of a Climate Breach to the Buyer (**Climate Breach Report**)shall set out:

2.1.1 the amount by which the Total Emissions for the relevant Emissions Reporting Period are greater than the Emissions Target [or details of any other breach of clause 1.1];

2.1.2 the cause(s) of the Climate Breach and any steps taken by the Supplier to mitigate such cause(s);

2.1.3 a remedial plan for how the Supplier will:

(a) mitigate the impact of the Climate Breach; and

(b) reduce its Total Emissions in future Emissions Reporting Periods to achieve the Emissions Target in respect of future Emissions Targets; and

2.1.4 if the Supplier reasonably believes that the cause of the Climate Breach is in whole or in part:

(a) a failure by the Buyer to comply with any of its obligations under clause 1.2; or

(b) a requirement by the Supplier to comply with [Applicable Law] which conflicts with the Supplier's obligation under clause 1.1, in which case the Supplier's notice shall also:

(i) identify the relevant obligation(s) and/or requirement(s) and the impact each has had on the Supplier's obligation under clause 1.1 and refer specifically to the same as being contributing matters for the purposes of this clause 2.1.4 (the **Contributing Matters**); and

(ii) the amount by which the Supplier reasonably believes its Total Emissions would have been greater than the Emissions Target but for the Contributing Matters.

2.2. If clause 2.1.4 applies, the parties shall meet [within [ ] Business Days] (remotely, if reasonably practicable) to discuss the Climate Breach to agree the extent to which (if any) the Contributing Matters have caused or contributed to the Climate Breach and the applicable [Climate Remediation Fee/Emissions Payment] for which the Supplier should be liable.

2.3 Following receipt of a Climate Breach Report (or, if clause 2.1.4 applies, following agreement on the matters to be discussed pursuant to clause 2.2) or upon the Buyer otherwise becoming aware of a Climate Breach, the Buyer shall be entitled to serve a written notice on the Supplier (a **Climate Remediation Notice**)which shall:

2.3.1 nominate an Appointed Beneficiary and require the Supplier to pay the relevant Emissions Payment to such Appointed Beneficiary in accordance with clause 3;

2.3.2 detail the actions the Supplier will take to ensure the Climate Breach is corrected before the next Annual Emissions Reporting Date;

2.3.3 where a Climate Breach Report was not notified by the Supplier, set out the details of any identified or suspected Climate Breach(es); and

2.3.4 if required by the Buyer, summon the Supplier's [Sustainability Director / Chief Executive Officer] to present the Climate Breach Report to the Buyer at a location of the Buyer's choosing (including remotely, if required by the Buyer) and/or discuss the Climate Breach.

1. **[Climate Remediation Fee/Emissions Payment][[13]](#footnote-14)**

3.1 Within 20 Business Days of receipt of a Climate Remediation Notice in respect of a Climate Breach where a Climate Breach Report has been delivered, the Supplier shall pay the applicable [Climate Remediation Fee/Emissions Payment] to the Appointed Beneficiary.

3.2 When Supplier receives a Climate Remediation Notice absent a Climate Breach Report, the Supplier will promptly investigate.

3.3 If the Supplier is unable to mitigate the Climate Breach to the Buyer’s reasonable satisfaction within thirty (30) Business Days of receipt of the notice, the Supplier will pay the [Climate Remediation Fee/Emissions Payment] to the Appointed Beneficiary within fifteen (15) Business Days of the Supplier’s failure to mitigate the Climate Breach.

3.4 Without prejudice to any other claims, rights or remedies under this Agreement, the parties agree that, in respect of any Climate Breach, damages payable by the Supplier to the Buyer would not be an appropriate remedy in the wider context of damage to the climate, the environment and the Buyer’s reputation (all of which the Supplier accepts for the purpose of this Agreement as being losses incurred by the Buyer).

3.5 The parties agree that any [Climate Remediation Fee/Emissions Payment] shall be reasonable and proportionate to the legitimate interests of the Buyer in mitigating, setting off, counteracting, and repairing the damage (and preventing future damage), including to its public commitments to [reduce Buyer’s GHG Emissions].

3.6 Each Party agrees that it has been properly advised regarding the negotiation of this Agreement, and in particular regarding the inclusion of the [Climate Remediation Fee/Emissions Payment] as a remedy for Climate Breaches.

**[Schedule [ ]][[14]](#footnote-15)**

**Emissions Payments**

In the event that the Supplier's Total Emissions do not meet the Emissions Target, the Emissions Payments shall be paid by the Supplier to the Appointed Beneficiary at the following rates:

|  |  |
| --- | --- |
| **Amount by which the Total Emissions exceeds the Emissions Target in an Emissions Reporting Period** | **Emissions Payment payable** |
| Less than [♦] | £[♦] |
| [♦] or more but less than [♦] | £[♦] |
| [♦] or more but less than [♦] | £[♦] |
| [♦] or more but less than [♦] | £[♦] |
| [♦] or more but less than [♦] | £[♦] |
| [♦] or more | £[♦] |

[*Drafting note: Tiered Emissions Payment to be included, so that a greater failure against the target incurs a larger Emissions Payment liability for the Supplier.*]

1. Drafting note: The Agreement could include this recital in addition to other recitals relevant to the Agreement. The recital should be viewed as a starting point for a sustainability recital. Users of this clause might like to consider expanding the recital to address and memorialise sustainability commitments. [↑](#footnote-ref-2)
2. The [‘Carbon Law’](https://exponentialroadmap.org/wp-content/uploads/2020/11/1.5C-Business-Playbook-v1.1.1pdf.pdf); and J. Rockström et al., [A roadmap for rapid decarbonisation](https://science.sciencemag.org/content/355/6331/1269), Science 355.6331, 1269-1271 (2017) [↑](#footnote-ref-3)
3. Drafting note: Issues to consider in selecting the Appointed Beneficiary from the Beneficiary List may include proximity to the environmental harm caused under the performance of this Agreement and other issues relevant to achieving direct remediation of the relevant harm. [↑](#footnote-ref-4)
4. See TCLP Glossary - [Carbon Dioxide Equivalent](https://chancerylaneproject.org/glossary/hgv/) [↑](#footnote-ref-5)
5. To be adapted if required to align with any existing emissions reporting periods of the business. [↑](#footnote-ref-6)
6. This percentage should be no lower than 7% and if possible, higher than 7%, to meet the target of halving absolute emissions every decade. It may be much higher if necessary to meet the interim targets required by their respective net zero targets. [↑](#footnote-ref-7)
7. Scope 1, 2 and 3 emissions are defined on page 27 of the GHG Protocol. [↑](#footnote-ref-8)
8. Please consider using one of the [GHG Protocol reporting standards](https://ghgprotocol.org/standards) as appropriate to the organisation / activity under the Agreement. [↑](#footnote-ref-9)
9. See TCLP Glossary - Greenhouse Gases (GHGs) [↑](#footnote-ref-10)
10. See TCLP Glossary - [Net Zero Target](https://chancerylaneproject.org/glossary/net-zero-target/) [↑](#footnote-ref-11)
11. Before including third party verification requirement, determine if appropriate for the supplier in question in light of the supplier’s size. [↑](#footnote-ref-12)
12. To be included only if verification requirements are not included in clause 1.1.2. [↑](#footnote-ref-13)
13. Delete as applicable according to whether the definition Climate Remediation Fee or Emissions Payment is chosen, and apply consistently wherever this definition occurs throughout. [↑](#footnote-ref-14)
14. Use this Schedule if using the definition of Emissions Payment. Delete this Schedule if using the alternative definition of Climate Remediation Fee. [↑](#footnote-ref-15)