

How ESG Is Rewriting Commercial Contracts

Across finance, supply chains, infrastructure, and carbon markets, sustainability obligations are moving from policy statements into enforceable contractual duties.

Across finance, supply chains, infrastructure, and carbon markets, sustainability obligations are increasingly being written into commercial contracts, fundamentally changing how corporate risk is allocated, how compliance is monitored, and how business relationships are managed.

The shift into contract law

In the previous article, we examined how ESG is influencing economic activity across key sectors of the Kenyan economy, including finance, agriculture, energy, and carbon markets. The common thread across these sectors was the growing role of sustainability considerations in investment decisions, market access, infrastructure development, and resource management.

"ESG is no longer operating solely as a business strategy. It is increasingly being written into the legal mechanics of commerce."

That evolution is now becoming visible in commercial practice. As sustainability expectations become more integrated into business operations, they are being translated into legal obligations through contracts. Financing agreements now incorporate sustainability-linked covenants and reporting requirements. Supply chain arrangements increasingly contain provisions on traceability, labour standards, and environmental compliance. Infrastructure projects are allocating environmental and regulatory risks through contractual mechanisms, while carbon market transactions are becoming subject to increasingly sophisticated verification and compliance requirements.

WHERE ESG APPEARS IN CONTRACTS

- **Finance:** Sustainable use of funds via green bond use-of-proceeds clauses.
- **Supply Chains:** Traceability and labor standards via supplier compliance undertakings.
- **Infrastructure:** Environmental compliance via robust warranties or indemnities.
- **Carbon Markets:** Strict verification and monitoring obligations.

This shift matters because contracts sit at the centre of commercial relationships. They determine who bears risk, what information must be disclosed, how performance is measured, and what happens when there is non-compliance. ESG considerations are therefore influencing not only how businesses operate, but also how obligations are negotiated, documented, and enforced.

Sector	Typical ESG Obligation	Example Clause Type
Finance	Sustainable use of funds	Green bond use-of-proceeds clause
Supply Chains	Traceability and labour standards	Supplier compliance undertaking
Infrastructure	Environmental compliance	Environmental warranty or indemnity
Carbon Markets	Verification and monitoring	Carbon verification obligation

Finance and sustainable funding

One of the clearest signs that ESG is becoming part of mainstream business is its influence on financial transactions. Lenders, investors, and insurers are looking beyond financial performance and paying closer attention to how businesses manage environmental, social, and governance risks.

This trend is visible in the growing market for green bonds, sustainability-linked loans, and other forms of sustainable finance. These products are no longer niche. They are becoming part of the broader financial landscape.

A recent example is the Kenya Mortgage Refinance Company (KMRC) green bond, which attracted investor demand far above the amount initially offered. The proceeds are intended to support green and social housing projects, demonstrating growing investor interest in financing projects with clear sustainability outcomes. Similarly, Safaricom’s sustainability-linked bond showed that investors are increasingly willing to support financing structures that incorporate sustainability commitments.

“The Issuer shall apply the proceeds of the Bonds exclusively toward Eligible Green Projects.”

As sustainability becomes more important to investors and lenders, it is also appearing in the legal documents that govern financing arrangements. A green bond, for example, may contain a clause requiring funds to be used only for specific environmental projects. That kind of provision turns a sustainability commitment into a contractual obligation. It allows investors to monitor how funds are used and creates accountability if proceeds are applied outside the agreed framework.

ESG is also influencing the insurance sector. Climate-related events such as floods are becoming more frequent and more costly, and flood-related insurance claims in Kenya have highlighted how environmental risk is affecting underwriting decisions, policy terms, and pricing.

Supply chains and supplier duties

ESG obligations are increasingly being extended beyond individual businesses into entire supply chains. Companies are no longer expected to focus only on their own operations. They are increasingly expected to understand where their products come from, how they are produced, and whether suppliers meet environmental, labour, and human rights standards.

This is especially visible in export markets. Kenyan exporters of flowers, avocados, and other agricultural goods are facing growing demands from international buyers to demonstrate compliance with sustainability standards. Buyers want assurance that products have been sourced responsibly, workers have been treated fairly, and environmental requirements have been observed throughout the production process.

The importance of these requirements is also reflected in developments such as the proposed Geographical Indications Bill and the growing global focus on traceability and origin certification. Regulations such as the European Union Deforestation Regulation (EUDR) are requiring businesses to demonstrate where products originate and whether they have been produced in compliance with environmental standards.

As a result, many commercial agreements now include clauses requiring suppliers to comply with specified sustainability standards. A typical provision might state:

“The Supplier shall comply with all applicable environmental, labour and human rights standards and shall maintain adequate systems to ensure traceability within its supply chain.”

Clauses like this allow buyers to monitor compliance and verify information provided by suppliers. They are often supported by audit rights, reporting requirements, and, in some cases, the right to terminate the contract for serious breaches.

The practical effect is clear: ESG obligations are no longer confined to the contracting parties. They increasingly extend across the supply chain, making sustainability a commercial requirement rather than simply a corporate aspiration.

Infrastructure and project risk

Infrastructure projects often involve significant environmental and social impacts. As a result, ESG considerations are increasingly shaping how large projects are planned, financed, and operated, particularly in energy, transport, and public infrastructure.

This is visible in projects such as the proposed LNG power plant and ongoing geothermal developments, many of which are being structured through Public-Private Partnerships. Before such projects proceed, developers are increasingly required to obtain environmental approvals, conduct impact assessments, and demonstrate compliance with applicable environmental standards.

These obligations are then reflected in the contracts governing the project. Parties may agree that the developer will be responsible for complying with environmental laws and addressing any environmental harm arising from the project.

“The Contractor shall comply with all applicable environmental laws, permits and regulatory requirements and shall promptly remediate any environmental damage arising from its activities.”

Clauses of this nature allocate responsibility for environmental compliance and help manage risks that may arise during the life of the project. Other provisions may include warranties, remediation obligations, reporting requirements, and indemnities for environmental damage.

As sustainability becomes more important in infrastructure development, contracts are being used to define who bears environmental risk, who is responsible for compliance, and how potential impacts will be managed. ESG is therefore becoming part of project planning and risk allocation, not an afterthought after construction begins.

Carbon markets and verification

Carbon markets are creating some of the most detailed and compliance-focused contracts in the sustainability space. As carbon credits become more valuable, buyers, investors, and regulators are placing greater emphasis on accuracy, transparency, and verification.

Recent developments in global carbon markets show this shift clearly. Reforms under Article 6.4 of the Paris Agreement are introducing stricter requirements around monitoring, verification, and accounting. At the same time, the establishment of Kenya's Carbon Registry and increasing scrutiny by international bodies such as the Integrity Council for the Voluntary Carbon Market (ICVCM) are raising expectations around the quality and credibility of carbon projects.

As a result, carbon market agreements increasingly contain detailed provisions governing how credits are generated, measured, and verified. A typical clause might provide: *"The Project Developer shall maintain verifiable records demonstrating compliance with approved carbon accounting methodologies and shall make such records available for audit upon request."*

"The Project Developer shall maintain verifiable records... and shall make such records available for audit upon request."

The purpose of these provisions is to ensure that carbon credits are supported by reliable data and can withstand independent scrutiny. Many agreements also include requirements relating to monitoring, verification, benefit-sharing, ownership of credits, and compliance with applicable regulatory requirements.

Technology is also playing a growing role. Remote sensing, satellite monitoring, and other verification tools are making it easier to measure and track carbon outcomes, while increasing expectations around data quality, transparency, and accountability.

What it means now

Across these examples, a clear pattern is emerging. ESG obligations are increasingly being written into the contracts that govern commercial relationships.

In financial transactions, they appear through green bonds, sustainability-linked financing, and reporting obligations. In supply chains, they appear through traceability, supplier standards, audit

rights, and termination provisions. In infrastructure projects, they appear through environmental compliance clauses, warranties, and indemnities. In carbon markets, they appear through verification, data integrity, and benefit-sharing provisions.

This means commercial contracts are becoming one of the main tools through which ESG obligations are implemented, monitored, and enforced. They define what parties must do, what information must be provided, who bears risk, and what happens if obligations are not met.

This shift is also visible beyond commercial drafting. Recent disputes concerning groundwater abstraction in Nairobi show how sustainability obligations can operate through measurable limits and enforceable regulatory controls. In one case, a domestic water permit holder was found to have exceeded authorised abstraction levels by more than twelve times the permitted limit, highlighting the legal and commercial consequences that can follow when environmental authorisations are not observed.

“The Operator shall comply with all environmental permits, abstraction limits and applicable water resource regulations.”

“The Company warrants that its operations comply with all applicable environmental authorisations and resource-use permits.”

These clauses show the direction of travel. Sustainability obligations are becoming more precise, more measurable, and more enforceable. For businesses, the real question is no longer whether ESG will affect commercial relationships, but whether their contracts are clear enough to manage those obligations when they arise.

In Conclusion

Sustainability obligations are becoming more precise, more measurable, and more enforceable.