

Comparative Law
and Global English for Legal Studies
A Law-Linguistic Journey

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ELISA DE BELVIS
CONTRACT LAW
AND SUSTAINABILITY CONTRACTUAL CLAUSES (SCCs).
FROM THEORY TO PRACTICE

SUMMARY: 1. Introduction. – 2. The role of private regulation. – 3. The role of Contract Law. Focusing on supply chain contracts. – 3.1. The recourse to sustainability clauses. – 4. Enforcing mechanisms and remedies. – 5. Conclusion.

1. *Introduction*

Promoting sustainability has become a leading factor in multiple companies, and even when this does not represent one of their core values, many companies try to show their commitment to this model. Therefore, the contemporary jurist cannot neglect the role that sustainability has acquired in the current world.

This paper aims to provide some insights into the relationship between sustainability and contract law, with a specific focus on international supply chain contracts.

As a first, broad definition, we may qualify “sustainability” as “*meeting the needs of the present without compromising the ability of future generations to meet their own needs*”¹.

Despite the existence of a genuine commitment to the fate of future generations, companies are aware that paying attention to sustainability may represent a significant marketing stimulus, considering the shift that is happening towards society.

Marketing observers noticed a rise of socially and environmentally conscious consumers and investors: therefore, a lack of consideration for sustainability may bring negative effects to the company².

¹ UN BRUNTLAND COMMISSION, *Report of the World Commission on Environment and Development: Our Common Future*, 1987.

² K. ELLIOTT, *Is My Fair Trade Coffee Really Fair? Trends and Challenges in Fair Trade Certification*, in *Center for Global Development Policy Paper*, n. 17/2012, pp. 11-13.

In particular, reputational damage risks may occur³: we shall consider that a good reputation is inseparably connected to the so-called “social licence to operate” (SLO)⁴, which typically includes expectations of transparency, respect for human rights, environmental protection, business integrity, and attention to the local communities⁵.

Considering also the digital world we live and operate in, the consequences of public shaming in the media shall not be underestimated, as it may cause a fast drop in the demand for products and the exponential outflow of financing for environmentally responsible investors.

The attention that companies shall pay to sustainability issues deserves a greater meditation if we also consider the multiple fields that may fall under the umbrella: even if environmental standards could be considered the key aspect of sustainability, we shall not underestimate employment conditions, health, and safety standards, as well as human rights and business ethics issues.

At the same time, any reflection of sustainability that may aspire to start from a solid ground shall maintain perspective on the two main obstacles that the pursuit of such an honourable objective faces. On one hand, developed and developing countries may encounter different, even clashing social and economic interests; on the other, the implementation of solely domestic measures may indirectly create incentives to outsource environmentally heavy activities to countries with weaker environmental laws.

2. *The role of private regulation*

While we agree that both international policies and a more informed consumers class may help to reduce the compression that the two aforementioned obstacles cause in promoting sustainability, we shall move our focus on how private regulation, and in particular Contract Law as the leading actor of it, may implement sustainability.

Private regulation is a kind of regulation developed by non-state actors whose legitimacy, governance, and implementation are not rooted in

³ P. VERBRUGGEN, *Regulatory governance by contract: the rise of regulatory standards in commercial contracts*, in *Recht der Werkelijkheid*, n. 3/2014, p. 86.

⁴ For an overview of the concept of Social Licence to Operate, see J. GEHMAN, L.M. LEFSRUD, S. FAST, *Social license to operate: Legitimacy by another name?*, in *Canadian Public Adm. J.*, n. 60/2017, pp. 293-317.

⁵ It is well acknowledged that stakeholders' expectations go often far beyond legal requirements.

public authority, but are based on transnational agreed standards and voluntary participation.

Many instruments of private regulation have been used to promote sustainability during the last decades.

Through the web, multiple transnational public-private initiatives spread around the world. To offer our reader a few examples, we may cite the ISO standards⁶, the EICC Carbon Reporting System⁷ or the Carbon Disclosure Project (CDP)⁸.

Industrial and corporate code of conducts⁹ are also well spread, as much as reporting¹⁰, monitoring¹¹ and auditing¹² schemes.

⁶ ISO (International Organization for Standardization) is an independent, non-governmental international organization with a membership of 167 national standards bodies that, through its members, brings together experts to share knowledge and develop voluntary, consensus-based, market-relevant International Standards that support innovation and provide solutions to global challenges. ISO has developed over 24493 International Standards that can be accessed from the standards catalogue (For example, the ISO standards in the field of environment, health protection and safety are accessible at the following link: <https://www.iso.org/ics/13/x/>). As ISO develops voluntary, consensus-based, market-relevant international standards that support innovation and provide solutions to global challenges, ISO cannot be considered a regulator in the traditional sense. However, when governments and industries choose to use ISO standards, this can have the effect of promoting co-operation between countries, facilitating trade, and creating de facto rules and best practices at the international level, which can be considered as promoting international regulatory co-operation.

⁷ Since 2009 the EICC (The Electronic Industry Citizenship Coalition, a non-profit coalition of leading electronics companies dedicated to supply chain responsibility) developed the Carbon Reporting System, a straight-forward process for directly engaging companies in the electronics supply chain to submit enterprise GHG emissions data (Global greenhouse gas) into a central online repository. Twelve companies participated in the pilot and queried 280 suppliers to disclose their 2008 GHG emissions, energy consumption, and carbon-management practices. Access controls were setup in the repository such that suppliers could share their data with their enterprise customers. As a result of the data submission and reporting process, suppliers were more aware of how to measure GHG emissions, customers have increased visibility into their suppliers' emissions, and suppliers saved time by sharing their data with multiple customers simultaneously through the tool. Armed with this information, customers have a clearer picture of risks in their supply chain and are in a better position to work with suppliers on emissions reduction activities.

⁸ CDP is a not-for-profit charity that runs the global disclosure system for investors, companies, cities, states and regions to manage their environmental impacts. There are now companies, cities, states, and regions from over 90 countries disclosing through CDP on an annual basis.

⁹ A Code of Conduct is an agreement on rules of behaviour for the members of that group or organization.

¹⁰ Reporting aims at keeping internal stakeholders "in the know" of company activities.

¹¹ Monitoring represents evaluation activities completed by individuals who may not be independent of the process on a routine or continuous basis.

¹² Auditing represents evaluation activities completed by individuals independent of the process periodically.

Private regulation, too, is characterised by some issues that risk limiting its efficacy: even those who recognise the legitimacy of the recourse to private regulation instruments, express some doubts about the real effectiveness of these tools, as the concrete experience often shows a lack of verifiable reporting and monitoring systems, especially when suppliers are self-reporting and audits are conducted by companies themselves.

Furthermore, even accepting certain effectiveness of the reporting and auditing schemes, an enforcement problem may appear insurmountable, considering that legally non-binding private regulation is not subject to judicial review.

Nevertheless, even if private regulation is not subject to judicial review, courts and tribunals may invoke it indirectly using other legal instruments such as contract law.

Therefore, the role that contract law may play regarding sustainability's promotion shall be further investigated.

3. *The role of Contract Law. Focusing on supply chain contracts*

Considering the economic implications of promoting sustainability, to verify the adequacy of Contract Law to reach this objective, we may narrow our perspective and focus our attention on a specific contractual category quite widespread in the international business sector: supply chain contracts.

A supply chain can be defined as the network of all the individuals, organizations, resources, activities, and technology involved in the creation and sale of a product: from its conception, all the way through its design, manufacture, sale, and delivery to the end user. Key participants in supply chains may include manufacturers, distributors, and providers of raw materials.

Therefore, under the umbrella of supply chain contracts, we can find all the contracts agreed between parties of a supply chain, including sale of goods contracts, distribution agreements, reseller agreements, and manufacturing agreements: a supply contract is an agreement between a buyer and a seller by which the seller promises to supply of the specified goods or services to the buyer within a certain time that states all details requirement, terms and conditions.

As we already stated, supply chain contracts seem to be the ideal field to verify the growth of the recourse to instruments to promote sustainability due to their inherent characteristics: on the supply chain, Con-

tract Law is often driven by companies' interest in reputation-building among their peers, investors, and public¹³.

Even if, generally referring, contracts are products of negotiation and agreement between parties that set the rules for their mutual relation on the background of the legal order, within international supply chain practice may appear different: the majority of contracts may not be products of negotiation, but rather unilaterally imposed rules by economically stronger parties¹⁴.

Multinational Enterprises (MNEs) frequently use contract law as a mode of ensuring better control over suppliers through Global Value Chains (GVCs)¹⁵: the contract tends to be more a unilateral initiative on the part of the MNE rather than a process of negotiation.

Another key issue that we shall not forget relies on the fact that while usually contracts are private documents whose confidentiality is often protected by a non-disclosure provision: but if the actual beneficiary under a contractual provision is a third party¹⁶, knowing about the existence of the agreement is a necessary precondition to defend its rights.

Lastly, in complex international supply chains, the focal company has a direct contractual relation only with its first-tier suppliers and, thus, has no legal rights to monitor its sub-suppliers behaviour.

¹³ A 2012 study that assessed the environmental policies and statements of the top ten firms in eight different sectors (either by the US or by global sales), found that more than half of the firms in the sample imposed environmental requirements on their domestic and foreign suppliers via supply contracts. That firms represented 78 percent of the total sales of the top firms in the sectors studied. See M. VANDENBERGH, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, in *UCLA Law Review*, n. 54⁴/2007, pp. 913-970.

¹⁴ The issue has been further analysed by P. VERBRUGGEN, *Regulatory governance by contract*, quot., pp. 92 ff.

¹⁵ A global value chain (GVC) refers to the full range of activities that economic actors engaged in to bring a product to market. The global value chain does not only involve production processes, but preproduction (such as design) and postproduction processes (such as marketing and distribution). See F. CAFAGGI, P. IAMICELI, *Regulating Contracting in Global Value Chains. Institutional Alternatives and their Implications for Transnational Contract Law*, in *European Review of Contract Law*, n. 1/2020, pp. 44-73.

¹⁶ Supply chain contracts were traditionally drafted with the sole purpose to regulate behaviour regarding the exchange of goods and money between two parties. Gradually an increasing number of provisions whose aim is to protect third parties' interests rather than the economic interests of the contracting parties have been included: those are provisions that do not directly relate to the subject matter of a contract, as the tangible quality of the delivered products, but rather, for examples, quantifiable and measurable objectives in concerning environmental requirements.

3.1. *The recourse to sustainability clauses*

But how, concretely, does Contract Law represent an instrument to promote sustainability?

International contracts are facing the growth of the introduction of “sustainability clauses”.

Sustainability clauses are contractual provisions that prescribe minimum social and/or environmental standards to be upheld by contractual parties when performing their activities.

The clauses may refer to environmental standards (e.g. ambient air, carbon emissions, noise, use of water, etc.), employment conditions (let's think about a fair wage, the obligation not to recur to underage workers, etc.), health and safety standards (as to diminish and prevent accidents and harm to people from work-related activities), human rights and business ethics issues (human trafficking, unsafe working conditions, damages to local communities)¹⁷.

Frequently, these clauses will integrate corporate codes of conduct to give the codes the form of binding commitments¹⁸.

Sustainability clauses may appear in different forms: the practice shows examples of expressed contractual provision or reference to another document, such as standard terms and conditions, codes of conduct, internal policies, separate agreements, or global CSR initiatives.

4. *Enforcing mechanisms and remedies*

The growing diffusion of sustainability clauses does not always reflect the growing effectiveness of the enforcing mechanisms.

More than hard contractual sanctions, supply chain contracts tend to link sustainability to soft relational tools.

¹⁷ Regulatory standards may be directly included in commercial contracts or by reference. F. CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts: New Architectures*, in *Fordham International Law Journal*, n. 36/2013, p. 1586; F. CAFAGGI, *Regulation through contracts: Supply-chain contracting and sustainability standards*, in *European Review of Contract Law*, 2016, p. 218; and K. PETERKOVÁ MITKIDIS, *Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements*, in *Nordic Journal of Commercial Law*, n. 1/2014, p. 13.

¹⁸ See, for example, L. VYTOPIĽ, *Contractual Control and Labour-related CSR Norms in the Supply Chain: Dutch Best Practices*, in *Utrecht Law Review*, n. 8/2012, pp. 155-169; L. VYTOPIĽ, *Contractuele controle in de handelsketen: MVO gedragscodes en algemene voorwaarden van Nederlandse bedrijven*, in *Contracteren*, n. 2/2012, p. 64-70.

Furthermore, the enforceability could be questioned based on the specificity level of a given provision; similar contractual provisions may range from a vague non-binding assertion to more precise contractual obligations. We shall remember that unspecified and generic promises are not considered contractual terms¹⁹.

Therefore, when facing a sustainability clause, the jurist shall always verify whether the model clause is sufficiently detailed and precise to create an obligation between the parties and thus enforceable²⁰.

Moving to the enforcement scenarios, we may point to two preliminary elements.

Firstly, down the chain of suppliers and sub-suppliers, a “cooperative ethics” approach is favoured: contracting parties are expected to co-operate especially in a long-term contractual relationship²¹.

Secondly, the contract may face enforcement by a third party²², as the employees of the suppliers, local communities, and consumers.

¹⁹ K. PETERKOVÁ MITKIDIS, *Sustainability Clauses in International Supply Chain Contracts*, quot., pp. 15-16.

²⁰ D. MCBARNET, M. KURKCHIYAN, *Corporate social responsibility through contractual control? Global supply chains and “other-regulation”*, in: D. MCBARNET, A. VOICULESCU, T. CAMPBELL (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press, 2007, p. 70, recalled examples of codes of conduct that such codes required that suppliers ‘must meet all the appropriate relevant industry and country standards’ or ‘must work towards higher standards’. These references appear to fail the test for specificity.

Furthermore, studies showed that firms tend to be rather hesitant to sanction non-compliance with the codes, especially when they have established long-standing contractual relations with the supplier involved. See L. VYTOPIĽ, *Contractuele controle in de handelsketen*, quot., p. 69; T. DIETZ, *Contract Law, Relational Contracts, and Reputational Networks in International Trade: An Empirical Investigation into Cross-Border Contracts in the Software Industry*, in *Law & Social Inquiry*, n. 1/2012, pp. 25-57.; F. CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts*, quot., p. 1576, and L.-W. LIN, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, in *American Journal of Comparative Law*, n. 3/2009, pp. 724-725; and D. MCBARNET, M. KURKCHIYAN, *Corporate social responsibility through contractual control?*, quot., p. 79.

²¹ Scholars here recall the “relational theory of contract”: under the relational theory of contracts, extra-legal or informal devices for the regulation of long-term contractual relations are preferred (e.g. consensual adjustment of primary contractual arrangements in light of changing circumstances, informal incentives for performance and cooperation, the tendency to abstain from relying on formal rights and duties, the frequent use of alternative dispute resolution mechanisms).

²² The recognition of third party’s rights to enforce a contract has puzzled contract law theory and practice. The principle is now generally accepted across international and European jurisdictions.

Both Unidroit’s Principles of International Contracts (artt. 5.2.1 to 5.2.6) and the Principles of European Contract Law (art. 6.110) contain express provisions on third party’s rights.

As for the single remedies, we shall distinguish informal ones from formal ones.

Informal remedies may be divided into two categories: *ex ante* strategies and *ex post* remedies.

Ex ante strategies, such as training, self-assessment, due diligence, monitoring, and audits²³ are quite widespread in the supply chain and are facing visible growth regarding sustainability promotion.

A significative example is represented by the Accord on Fire and Building Safety in Bangladesh²⁴ that provides a system of oversight, credible inspections, mandatory remediation, and transparent reporting.

As *ex post* remedies, we may cite examples of whistle-blower strategies, corrective action plans²⁵ and the so-called “name and shame” strategies.

On the other hand, formal contractual remedies remain the more effective instrument to respond to a breach of contract.

As for the right to demand damages, three requirements need to be met: proof of breach, the foreseeability of the damage, and a causal relationship between the two²⁶.

A breach can occur only where there is a binding obligation, and the causal relationship between the breach of an SCC and the relevant damage will often be a controversial matter²⁷.

Regarding sustainability clauses, non-pecuniary damage will usually occur, in the form of reputational harm: the compensation of reputational harm is still the subject of an academic discussion and contradicting court decisions under CISG²⁸.

However, the specific conditions under which a third party acquires an enforceable right under a contract to which he is not a party vary per country. See P. VERBRUGGEN, *Regulatory governance by contract*, quot., at note 61.

See also: F. CAFAGGI, *The Regulatory Functions of Transnational Commercial Contracts*, quot., pp. 1591-1593.

²³ As internal audit and audits by third parties.

²⁴ Signed by Auchan, Carrefour, Monoprix, Puma, Hugo Boss, Adidas, Lidl, Chicco, Prenatal, Oviessse, Benetton, H&M, etc, the Accord is a legally binding agreement between global brands & retailers and IndustriALL Global Union & UNI Global Union and eight of their Bangladeshi affiliated unions to work towards a safe and healthy garment and textile industry in Bangladesh. It states that the contractual obligations are enforceable through international commercial arbitration, at the suit of the signatory unions.

²⁵ If non-compliance is discovered, the buyer will usually work with the supplier to find solutions.

²⁶ See artt. 45 (1) and 74 CISG.

²⁷ If a buyer claims a future loss, this must be proved with reasonable certainty.

²⁸ See F.S. GIAOUI, *Damage to Reputation: A Comparative Analysis of Pecuniary Com-*

In case of a fundamental breach, the contract may be terminated²⁹; this remedy may be pursued when the parties expressly agreed on the fundamental role of certain obligations under the agreement.

5. *Conclusion*

During the last few years, greater sustainability has become a leading goal for multiple businesses: multinational corporations and supply chain businesses are often implementing environmental, human rights, and social requirements both in their marketing communications and in their suppliers' agreements.

Nevertheless, through the supply chain contracts, sustainability clauses frequently are formulated as "statements of principles" and in broad terms. Due to the vagueness of the formulation, sustainability clauses are not always enforceable and, therefore, risk resulting more as a "greenwashing" instrument³⁰ than a legitimate contractual provision.

pensation for Non-Pecuniary Harm, in *Loyola of Los Angeles International and Comparative Law Review*, n. 1/2023.

²⁹ See artt. 49(1) and 25 CISG.

³⁰ As P. VERBRUGGEN, *Regulatory governance by contract*, quot., p. 93 stated, "In the absence of astute and persistent monitoring and enforcement by external actors, regulatory compliance becomes only voluntary and the risk increases that this particular regulatory strategy is used as 'window dressing'".