

CRISTINA PONCIBÒ

A CONTRACT LAW FOR FUTURE GENERATIONS

While attention for the social and environmental impacts of international business is certainly not new, the past years have seen renewed interest due pressing global problems such as climate change, poverty, and human rights violations. Multinational enterprises (MNEs) are increasingly called upon to play an active role and thus contribute to a more sustainable development. Interestingly, legal scholars are studying how MNEs are adopting codes of conduct advancing sustainable development goals to rule their commercial relationships with their suppliers in global supply chains. Some of these goals are incorporated in contractual terms when the company insert sustainability contractual clauses in international supply agreements. These contractual provisions dealing with public values represent “irritant clauses” for contract theory and pose some challenging questions to contract law scholars. The article considers, in particular, the following research questions: firstly, are these contractual provisions binding and enforceable by the parties or by a third party to the contract? Secondly, are they really “part of the contract” or do they play many functions? Thirdly, do they have an impact in advancing sustainability goals? Finally, the case of sustainability contractual clauses confirms that a new, specifically intergenerational, contract theory is needed.

Key words: *comparative contract law, contract theory, private actors, global value chain, sustainable development goals, environmental sustainability*

Cristina Poncibò, Associate Professor of Comparative Private Law, Turin University, e-mail: cristina.poncibo@unito.it.

IRRITANT CLAUSES

Sustainability contractual clauses (hereinafter: “SCCs”) concern some of the Sustainable Development Goals.¹ Precisely, on 25 September 2015 the UN General Assembly unanimously adopted the Resolution Transforming our world: the 2030 Agenda for Sustainable Development. It is known that the core of the Resolution consists of 17 Sustainable Development Goals (hereinafter: “SDGs”) with 169 associated targets, and many more indicators. It is known that SDGs are build on the earlier UN Millennium Development Goals, “continuing development priorities such as poverty eradication, health, education and food security and nutrition”. Yet, going “far beyond” the MDGs, they “[set] out a wide range of economic, social and environmental objectives”.² The SDGs add new targets, such as migration (8.8; 10.7), the rule of law and access to justice (16.3), legal identity and birth registration (16.9), and multiple “green” goals. And, more than the MDGs, they emphasize sustainability.

Legal scholars have been exploring SCCs within the context of public procurement, investment agreements and international supply chain contracts.³ In particular, the article examines the case of contractual provisions dealing with the goal of environmental sustainability by taking them as examples to discuss - more generally - the aims, structure and impact of SCCs. The title of the article reflects one of the main functions of SCCs: precisely, our analysis argues that they play an “expressive function” over global value chains (hereinafter: “GVCs”) and society (see at paragraph 4). These provisions are particularly common in managing the commercial relationships between MNEs and suppliers in GVCs. GVCs have

¹ The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015, provides a shared blueprint for peace and prosperity for people and the planet, now and into the future. At its heart are the 17 Sustainable Development Goals (hereinafter: “SDGs”), which are an urgent call for action by all countries – developed and developing – in a global partnership. They recognize that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

² United Nations, *The Sustainable Development Goals Report 2018*, New York, United Nations, 2018; United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, New York, United Nations, 2015.

³ Lorenzo Cotula, *Investment contracts and sustainable development. How to make contracts for fairer and more sustainable natural resource investments*, London, 2010; Katerina Mitkidis, *Sustainability Clauses in International Business Contracts*, The Hague, The Netherlands, 2015. See also Katerina Mitkidis, “Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements”, *Nordic Journal of Commercial Law*, No. 1, 2004, 1–31. Cristina Poncibò, “The Contractualisation of Environmental Sustainability”, *European Review of Contract Law*, No. 4, 2016, 335–355.

emerged as an expression of neoliberal globalisation policies.⁴ In particular, legal scholars have noted how Contract Law has been served to organise the cooperation within GVCs.⁵

In our case, Contract Law has been adopted to promote the goals of sustainability.⁶ Precisely, the above-mentioned SCCs are “legal irritants” with respect to traditional contract theory.⁷

As a preliminary point, the article stresses that the possibility to enforce such clauses clearly depends on their “legal meanings”. It also suggests that it is very useful to examine an example of a “sustainability clause” before entering the discussion.⁸ In particular, the following aspects emerge from the analysis of a contract lawyer.

Unilateral provisions (controlling GVCs by contract)

The MNEs mostly drafted and adopted their codes and then incorporated them into their contracts without consulting suppliers. In most cases, this was a unilateral initiative on the part of the MNE, rather than a process of negotiation.⁹

⁴ Hinrich Voss, “Implications of the COVID-19 Pandemic for Human Rights and Modern Slavery Vulnerabilities in Global Value Chains”, *Transnational Corporations Journal*, Vol. 27, No. 2, 2020, 113–126; Gary Gereffi, *Global Value Chains and Development. Redefining the Contours of 21st Century Capitalism*, Cambridge, 2018; Gary Gereffi, John Humphrey, Timothy Sturgeon, “The Governance of Global Value Chains”, *Review of International Political Economy*, No. 12, 2005, 78–104.

⁵ Klaas Hendrik Eller, Jaakko Salminen, “Reimagining Contract in a World of Global Value Chains”, *European Review of Contract Law*, 2020, 16, 1 fs. and Fabrizio Cafaggi, Paola Iamiceli, “Regulating Contracting in Global Value Chains. Institutional Alternatives and their Implications for Transnational Contract Law”, *European Review of Contract Law*, Vol. 16, No. 1, 2020, 44.

⁶ Jaakko Salminen, “The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers – Liability in Global Supply Chains?”, *The American Journal of Comparative Law*, Vol. 66, No. 2, 2018, 411–451. The Accord is a contract between apparel brands, retailers and importers, on the one hand, and international trade union federations, on the other. It sits almost entirely apart from domestic law and regulation, or public international law. Funded by the private sector, garment industry signatories, it provides for a system of oversight, credible inspections, mandatory remediation, and transparent reporting. Those contractual obligations are enforceable through international commercial arbitration, at the suit of the signatory unions.

⁷ Gunther Teubner, “Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences”, *Modern Law Review*, Vol. 61, 1998, 11–32.

⁸ Para 1 and para 2 of the sustainability contractual clause of Pirelli Group. The full text of the sustainability clause of Pirelli Group has been accessed at www.pirelli.com/asset/index.php?idelement=59887 (June 2019).

⁹ MNEs use contract law as a mode of ensuring a better control over suppliers throughout GVCs. See Claire A. Cutler, Thomas Dietz, *The Politics of Private Transnational Governance by Contract*, Abingdon, 2017.

Mapping

A first question here is to fix the legal meaning of SCCs. In order to answer this question, the few empirical studies show that MNEs tend to adopt a variety of similar contractual provisions ranging from vague (non-binding) assertions to more precise contractual obligations.

First, some SCCs contain a clear, binding and verifiable clause (“express term model”). In this case the issue of whether SCCs clauses are binding and enforceable depends on the way they are drafted in the contractual text. Generally, unspecified and generic promises are not considered as contractual terms. A good question is whether the model clause here mentioned is sufficiently detailed and precise to create an obligation between the parties and, thus, enforceable.

Second, certain SCCs consist in referring to the code of conduct of the company (“reference model”). They may also refer to an international sustainability standard, a national legislation (“reference to international standards, guidelines”).

Still, the question of whether or not SCCs are binding depends on the wording of the provision of the code of conduct or standard. Thus, in three cases here considered, the binding force of SCCs depends on their wording and clarity. In practice, MNEs usually frame the requirements in broad terms when drafting SCCs, especially when they adopt the reference models. Although general terms might be intended to reach a broad audience and retain rule flexibility, the terminology risks to be so vague that no clear obligations can actually be extracted from the text.

Long-term commitments based on cooperation between MNEs and suppliers

These provisions are part of contracts to “govern” the global values chain so that they contribute in setting the legal framework for exchanges between the parties over time and, in pursuing this goal they provide mechanisms of cooperation and control over their suppliers (e.g. monitoring, training, auditing and certification).¹⁰

Analysis

The empirical studies about SCCs show that they may – or may not – being enforceable depending on their wording. Often, the reference to environmental

¹⁰ Stefan Grundmann, Fabrizio Cafaggi, Giuseppe Vettori, “The Contractual Basis for Long-Term Organizations – The Overall Architecture”, *The Organizational Contract*, (Eds. S. Grundmann, F. Cafaggi, G. Vettori), Abingdon, 2013, 10–11.

sustainability and the “rights of future generations” remains vague, imprecise under contract law theory. In very few cases, the parties give binding effect to SDGs standards (that are otherwise) not binding on the parties.

Clearly, vague clauses – from which no specific right or obligation can be deduced – will not be enforced under the law of contracts. If an obligation is not clearly stipulated, there may be no breach. Therefore, the mere fact that these provisions are incorporated into the contractual text will not remedy their vagueness. Interestingly, while they often result in non-binding legal statements contained in contracts, MNEs adopt SCCs in contracting with suppliers to play another (and interesting) function that we discuss in the paragraph about the many functions of Contract Law.

ENFORCING SCCS BETWEEN THE PARTIES

At least three scenarios have to be distinguished here. First, the enforcement down the chain of suppliers and sub-suppliers. Second, the enforcement by third parties to the contract, such as the employees of the suppliers, local communities, or consumers. Finally, one may question whether these provisions may also have an impact on the rights of future generations.

First of all, the enforcement between the parties, MNE and suppliers, seems to favour the assessment of contractual obligations under a “cooperative ethics” approach – that is, one in which contracting parties are expected to cooperate especially in a long-term contractual relationship.¹¹

Such an approach finds an explanation, for example, according to the relational theory of contract.¹² In brief, the theory views the formal legal infrastructure governing the contractual relationship as being of secondary importance compared to informal norms of decency, solidarity and cooperation. Under this conventional understanding, resorting to the formal law of remedies upon breach misses the mark: instead of reflecting the parties’ on-going commitment to promoting their goals through cooperation and mutual agreement, such a move reflects a diametrically opposed set of values. Scholarly literature pertaining to the relational theory has typically focused on extra-legal or informal devices for the

¹¹ Fabrizio Cafaggi, Paola Iamiceli, “Contracting in global supply chains and cooperative remedies”, *Uniform Law Review*, 2015, 1–45. The article focuses on food global value chains.

¹² Ian Roderick Macneil, “Reflections on Relational Contract”, *Journal of Institutional and Theoretical Economics*, 1985, 541–546. The network theory of contract law may also be useful to explain the framework for SCCs. It is not possible to develop this point more in the article, see for reference Hugh Collins, “Introduction to Networks as Connected Contracts”, *Networks as Connected Contracts*, (Eds. Gunther Teubner & Hugh Collins), Oxford, 2011, 14–15.

regulation of long-term contractual relations, such as: 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, and the frequent use of alternative dispute resolution mechanisms.¹³

Indeed, it seems that no single contractual approach or theory is fully equipped to provide an analysis of the major implications. Rather, it seems about time to initiate a dialogue between competing or complementary contractual theories to explore their respective understanding of and contribution to GVCs, including for example the network theory of contract law.

RELATIONAL CONTRACT THEORY AND REMEDIES: TRAINING, CONTRACTUAL MONITORING, AUDITING AND CERTIFICATION

Again, the article suggests considering the example of sustainability clause already mentioned at paragraph 1 with particular attention to the part of the clause dealing with remedies in case of breach of the obligation to promote SDGs goals.¹⁴

The exam of the clause confirms that is it useful to discuss informal remedies by adopting a distinction between *ex ante* strategies and *ex post* remedies. In particular, scholars focusing on CSR liability have studied over time a number of solutions.¹⁵

¹³ Yehuda Adar, Moshe Gelbard, "The Role of Remedies in the Relational Theory of Contract: A Preliminary Inquiry", *European Review of Contract Law*, 2011, 7, 399–424. Jay M. Feinman, "Relational Contract Theory in Context", *Northwestern University Law Review*, Vol. 94, 1999–2000, 737 and I. Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law", *Northwestern University Law Review*, Vol. 72, 1977–1978, 854.

¹⁴ Paragraphs 3 and 5 of the sustainability clause of Pirelli Group "(...) 3. The Supplier acknowledges that Pirelli has the right, at any time, to verify, either directly or through third parties, compliance by it with the obligations herein undertaken. (...) 5. The Supplier may report to *ethics@pirelli.com* any breach or suspected breach of the "Values and Ethical Code", the "Code of Conduct" and the Pirelli Group policy "Social Responsibility for Occupational Health, Safety and Rights, and Environment" or any applicable laws; reports may be anonymous but shall contain a description of the events that constitute the breach of the provisions contained in the above mentioned Pirelli documents, including information about time and place of occurrence of the relevant events, as well as the persons involved. Pirelli will not tolerate threats or reprisals of any kind against employees and third party collaborators arising from such reporting and shall adopt all appropriate actions against any persons engaging in any such acts of threat or reprisal. Furthermore, Pirelli shall ensure the anonymity of those reporting the breaches, subject to the requirements of applicable law".

¹⁵ Anna Beckers, *Enforcing Corporate Social Responsibility Codes On Global Self-Regulation and National Private Law*, Oxford, 2015. Anna Beckers, "Towards a Regulatory Private Law Ap-

Ex ante perspective

Precisely, strategies to prevent the risk of a breach of SCCs include, for example training, Self-assessment, due diligence, monitoring and audits (internal audit and audits by third parties).

Just to provide an example, the Accord on Fire and Building Safety in Bangladesh provides some examples of similar relational strategies to prevent the breach of SCCs. The Accord is a contract between apparel brands, retailers and importers, on the one hand, and international trade union federations, on the other. It sits almost entirely apart from domestic law and regulation, or public international law. Funded by the private sector, garment industry signatories, it provides for a system of oversight, credible inspections, mandatory remediation, and transparent reporting. Those contractual obligations are enforceable through international commercial arbitration, at the suit of the signatory unions.¹⁶

Legal and management scholars have particularly focused their attention on the process of auditing within GVCs.¹⁷ In particular, audits in this case are used to “monitor” and “verify” a company’s conformance with the voluntary standards put in place by industry, often in collaboration with NGOs. As well, with declining state-based labour and environmental inspection systems in many countries (as governments outsource enforcement) auditing by private firms is being employed as a means to assess compliance with “hard” environmental and labour law. Over the last few years, a wave of international guidelines and legislation to promote auditing as a way to enforce and verify standards in global supply chains has legitimized and expanded the use of audits as a governance instrument under US and EU legislation. Unfortunately, according to empirical studies, audits do not seem to have proven to be very effective so that they are receiving so many criticisms from scholars in various disciplines.¹⁸

proach for CSR Self-Regulation? The Effect of Private Law on Corporate CSR Strategies”, *European Review of Private Law*, Vol. 27, No. 2, 2019, 221–243. Andreas Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chain*, Cheltenham, 2015. Anna Louise Vytöpil, *Contractual Control in the Supply Chain. On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability*, The Hague, The Netherlands, 2015.

¹⁶ J. Salminen, *op. cit.*, 411–451.

¹⁷ Jennifer Bair, “Contextualising compliance: hybrid governance in global value chains”, *New Political Economy*, 2017. Professor Bair offers a sociological perspective on compliance and auditing.

¹⁸ *Ibidem*.

Ex post perspective

Also important, strategies to remedy *ex post* a breach of SCCs are, for example, whistle-blower strategies and corrective action plans. In the latter case, if non-compliance is discovered, the buyer will usually work with the supplier to find solutions. For example, the most common tool that companies use is a “corrective action plan”, under which the parties agree what the supplier must do to remedy the breach. Sometimes, the buyer will even provide a supplier with capacity building resources, such as training or assistance.

In this respect, blacklisting or name-and-shame strategies may also be relevant. MNEs also adopt “name-and-shame strategies”, practically consisting in the establishment of a database of compliant suppliers: the members of the specific initiative can no longer use a supplier, who is erased from such a database or, worse still, listed as non-compliant (“blacklisting”). This information, despite its possible incompleteness, is essential for implementing any practical change in suppliers’ behaviour through various soft and hard remedial strategies.

Analysis

First of all, the reliance on informal remedies may contribute in explaining the paucity of relevant case law on the enforceability of SCCs.¹⁹ Anyway, informal remedies (both *ex ante* and *ex post*) do not represent – in our view – effective enforcement mechanisms to hold MNEs and their suppliers accountable for the way they purport to promote SDGs in their GVCs.

THE “SHADOW” OF FORMAL REMEDIES

Our point consists in noting that enforcement occurs in the “shadow” of formal remedies. In case the supplier is in breach of a SCCs, the buyer can procure a remedy, in English Law (and in common law generally) the primary remedy against the party is the right to demand damages. The situation differs from civil law, where the usual remedy is to force the defaulting party to perform the contract. The remedy of specific performance is rarely awarded in English Law.

Fundamental Breach/Termination /Damages

The breach of SCCs might constitute a fundamental breach of the agreement (just to provide an example, see Article 49(1) and Article 25 of the United

¹⁹ A. Beckers, 2015, op. cit.; A. Rühmkorf, op. cit.; A.L. Vytopil, 2015, op. cit.

Nations Convention on Contracts for the International Sale of Goods (CISG) leading to its termination.²⁰ Usually, a fundamental breach is found when the main obligation under a contract is not fulfilled, or when the parties expressly agreed on the fundamental role of certain obligations under the agreement.

This is the case of the example mentioned before: “(...) 4. *The Parties hereby agree that Pirelli may terminate the Contract/s and/or the Order/s in the event that the Supplier should be held responsible for any breach of any of the provisions of paragraph 2 above.*”

Nevertheless, in other cases, the breach of SCCs may result in a non-fundamental breach. This when considering SCCs as posing ancillary obligations. If it comes to a formal disagreement about the right to terminate, the court would have to establish whether the breach in question amounted to a fundamental breach.

Interestingly, a fundamental breach must also be foreseeable according to the general rules on contract interpretation. The main aspect to examine in this respect will once again be the language of the SCCs and/or the manner in which the supplier was informed of the buyer's standards with respect to sustainable development.

Coming to contractual damages, in order to claim damages for the breach of SCCs, the buyer then has to prove a breach, a damage that was foreseeable and a causal relationship between the two (e.g. Article 45(1), and 74 CISG).²¹

²⁰ Arts 49 (1) and 25 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980). Art 49 (1) states that: “The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed”. Art 25 precises that: “A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result”.

²¹ Art. 45(1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980). Art. 45 (1) states that :”If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may: (a) exercise the rights provided in articles 46 to 52; (b) claim damages as provided in articles 74 to 77”. Art. 74 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980). precises that “Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract”.

All aspects may pose problems in relation to SCCs. Firstly, a breach can occur only where there is a binding obligation. As noted, the binding nature of SCCs is dependent on the relevant provision's form and specificity. Secondly, the causal relationship between breach of an SCC and relevant damage will often be a controversial matter and it will be even harder if a buyer claims a future loss, which must be proved with reasonable certainty. It may be impossible to reach reasonable certainty, unless the buyer, for example, faces litigation by third parties due to the breach in question and expects to lose it.

Additionally, if an SCC is breached, most likely a non-pecuniary damage will occur - usually reputational harm. Whereas UPICC and PECL expressly provide for the possibility of recovering non-pecuniary loss, the same is the subject of an academic discussion and contradicting court decisions under CISG.

Indeed, the most common and probably the most detrimental consequence of suppliers' breach is the buyer's damaged reputation. Specific performance is inconsequential, because the buyer cannot recover the loss suffered. Claiming damages might be more helpful for the buyer, but establishing a link between the supplier's breach and any loss suffered by the buyer may be difficult. Furthermore, calculating damages is problematic. Damages often include non-monetary damage such as future loss of profit due to harmed reputation.

Non-conformity of the goods

The breach of SCCs does not influence the tangible quality of goods so that the legal consequences of their infringement do not follow the usual reasoning according to Article 35(1) CISG requiring the seller to deliver "goods which are of the quantity, quality and description required by the contract".²²

²² Art. 35 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980). Art. 35 states as follows: "(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity".

Whilst Article 35(1) deals with what the contract actually requires, Article 35(2) sets out a series of objective criteria used to determine conformity. It is a subsidiary definition, which only applies to the extent that the contract does not contain any, or contains only insufficient, details of requirements to be satisfied under the said provision. Thus, the primary consideration is whether the contract requires the goods to be produced by safeguarding certain sustainability goals.

If these goals are not expressly required by the contract, Article 35(2) requirements can then be considered. Indeed, the way of producing the goods influences their value on the market: a buyer may be willing to pay a higher price for goods manufactured and traded by respecting the environment and other values.

Following that reasoning, one may say that the goods produced under conditions violating these goals are not of the quality impliedly asked under the contract (Article 35(1),(2) CISG).

ENFORCEMENT BY THIRD PARTIES TO CONTRACT

The enforcement down in the chain of suppliers and sub-suppliers is an important issue for the actual reach of the sustainability commitments of the contract. However, contract law concerns, first and foremost, the parties. The doctrine of privity of contract stipulates that it is a general rule that third parties cannot be subjected to a burden by a contract to which they are not party.

However, the recognition of third party's rights to enforce a contract has puzzled contract law theory and practice.

It also is possible to note that the principle become generally accepted across international²³ and European jurisdictions. In this respect, article 6:110 PECL (Stipulation in Favour of a Third Party) states that (1) A third party may require performance of a contractual obligation when its right to do so has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose of the contract or the circumstances of the case. The third party need not be identified at the time the agreement is concluded (...).²⁴

²³ Articles 5.2.1.–5.2.6. UNIDROIT Principles of International Contracts (2016 edition).

²⁴ (2) If the third party renounces the right to performance the right is treated as never having accrued to it. (3) The promisee may by notice to the promisor deprive the third party of the right to performance unless: (a) the third party has received notice from the promisee that the right has been made irrevocable, or (b) the promisor or the promisee has received notice from the third party that the latter accepts the right. From its part, English Law third parties were unable to en-

Now, traditional approaches to third party's rights to contracts under European Contract Law are not easily applicable to the case of third parties to SCCs. EU Contract Law seem to converge in requiring the intention of the parties to bestow a right on a third party ("intention" and "right"). In addition, the issue becomes more and more difficult in increasing the "distance" to the contract from the employees of the supplier to local communities, consumers, NGOs, and supporters of SDGs goals. Here the issue concerns the identification of the third party. This does not mean that the third party must be defined in the agreement, but it must be identifiable at least as a member of a specific group, or class.

On such basis, legal scholars have examined arguments in favour and against the application of third party's rights to contract with respect to SCCs. According to the author of this paper, both perspectives have some merit, while they are not conclusive. Here the point is clear: how far can we go in redesigning the doctrine of third party's rights to contract. Private law offers many options in this respect, without the need to "force" the structure of contract law. There is a clear difficulty in enlarging the boundaries of the doctrine to include an indeterminate number of potential plaintiffs such as in the case of standing for sustainability.

THE MANY FUNCTIONS OF CONTRACT LAW

A contractual clause is generally designed for enforcement. Here the question is whether SCCs play another function that do not necessarily and primarily rely on formal or informal enforcement (see the paragraphs above).

Our argument follows: the contractual provisions dealing with SDGs, such as in the case of environmental sustainability, play an expressive function within the particular social and economic environment of GVCs. In other words, legal scholars have explored the fact that law conveys a social meaning that reinforces or changes the norms of a community, beyond its role in establishing and enforcing rules. In our case, we argue that SCCs and their effects over suppliers can be better understood within the theoretical framework offered by the authors dealing with the expressive function of law.²⁵ In particular, legal scholarship explores

force a contract that they are not party to, even if the contract has been expressly entered into for their benefit. The Contract (Rights of Third Parties) Act 1999 opens up the possibility for such third parties to derive enforcement. The first avenue for such a right is that a term of the contract expressly provides that the third party may enforce a right in its own right, or when the third party is a beneficiary to the contract. In such a case the party has to be identified in the contract with the name or as a member of a group or according to a particular description.

²⁵ Cass Sunstein, "On the Expressive Function of Law", *European Constitutional Law Review*, Vol. 5, 1996, 66–72.

the expressive and communicative functions in law in “making legal statements” as opposed to its function in directly controlling behaviour. Precisely, Sunstein in the mid-1990s does so by focusing on the particular issue of how legal statements might be designed to change social norms. He also catalogues a range of possible (and in my view legitimate) efforts to alter norms through. In applying such a theory to our case, we stress that the contractual provisions dealing with sustainability are basically legal statements. MNEs design them to affect suppliers’ behaviour over the GVC in respecting and advancing SDGs. SCCs aim at changing social norms (more precisely trade usages and practices) along the GVCs (i.e. the community of traders). Here the focus is not on enforcement, but on social change.²⁶

Clearly, the question is whether these legal statements are contributing in changing the social norms among traders of the GVCs and thus favouring sustainability goals, in particular, with respect to environmental dimensions of the concept.

With respect to Sunstein’s theory our case study concerns contractual provisions, not law. They are not usually subject to publication, nor they have the informative and communicative force of legislation. Nevertheless, contractual provisions adopted by MNEs to govern suppliers’ behaviour in their GVCs have certain peculiarities that justify our argument about their expressive force. Precisely, in this respect it is important to stress two points.

Firstly, the codes of conduct and SCCs are widely publicized by MNEs on websites, brochures, events, just to mention a few, to promote the company’s reputation. In this respect, SCCs are often an essential part of a marketing strategies directed to non-consumer and consumer markets depending on the goods and services at issue. In fact, in case they contain false information, or omissions, such statements, including SCCs, can be deemed as unfair practices before consumers and SMEs under the European Unfair Commercial Practice Directive.²⁷ This is to say that SCCs contain statements that MNEs use to bring to the attention of a wider audience of traders and consumers. Again, this practice differs completely from the usual confidentiality covering international commercial agreements

²⁶ It is not always necessary to enforce the law in order to give it effect. For example – by making a statement through law, whether through governmental regulation or private contracts – the statement may change our judgments, social norms and behavior. This phenomenon is known as the expressive function of law. C. Sunstein, *op. cit.*, 66.

²⁷ Anna Louise Vytöpil, “Liability for ‘greenwashing’?. On unfair commercial practices, the legal duty to be transparent and the case of a ‘safe harbor’”, *Law and Responsible Supply Chain. Contract and Tort Interplay and Overlap*, (Eds. Vibe Ulfbeck, Alexandra Andhov, Katerina Mitkidis), UK, 2019, 110 fs.

between companies. Thus, similar clauses have the capability to reach global markets and societies, especially through the web, and social media. While the theories of the expressive function of law focus on formal law and soft law, we argue that, in this specific case, these contractual provisions are advertised to markets and societies, and for this reason, they may have an impact.

Secondly, SCCs and provisions having a similar scope in supporting SDGs are becoming standardised in contracting within GVCs. The standardisation implies that they are commonly designed and used among traders and, more important, this process entails a proliferation of these clauses in international supply agreements. One may argue that such process may amount to establishing a trade usage and its legal consequences according to CISG.

Thus, such a theory invites us to consider how rules alter the social meaning of behaviour and promote the adoption of laws creating new norms of behaviour.

Informing

The expressive effect of contracts is also connected to their informative role. New information about risks of a specific behavior may shift relevant social norms. It is, therefore, desirable that MNEs accompany their contracts and codes of conduct by the underlying explanations, because providing information may have even greater effect on compliance than enforcement.

Signalling

In addition, an author notes that the relevant law is a signal or statement unaccompanied by much in the way of enforcement activity. There is a large set of instances in which laws that (a) aspire to announce or signal a change in social norms are nonetheless (b) accompanied by little enforcement activity.²⁸ In our case, the contractual form, even though the undertaking may not be legally enforceable, signals the seriousness of the issue towards suppliers. The increased credibility of commitment with contract might compensate for the low possibility of non-compliance detection. If they do not comply, suppliers may therefore fear adverse consequences, although these may not amount to any formal dispute resolution.

Taking a moral obligation

By taking on the contractual form, the supplier comes under a moral imperative. A signature may seem unimportant if the incorporated SCCs is draf-

²⁸ C. Sunstein, op. cit., 66–72.

ted in vague terms or its enforceability is otherwise doubtful; but it makes a clear, almost symbolic demarcation of what is considered a part of the deal and, is therefore, ethically binding.

A consensus exists that a legally valid contract also imposes certain moral obligations on a promisor; therefore, a supplier will probably feel obliged to comply with the code, irrespective of its actual legal force. Under the moral approach to contracts, a contractual commitment creates pressure on the promisor, who strives for consistency of behavior with the contract.

Legitimizing the current method of mass production

Here a central question is whether SCCs really have an impact in advancing SDGs goals, or the result is legitimizing the status quo.

It is at first glance puzzling that the privatization in enforcing sustainability is gaining acceptance despite its longstanding failures to detect or correct sustainable development problems in GVCs.

Deeper probing reveals the fundamental dynamics. Essentially, MNEs, NGOs and governments are endorsing and delegating regulatory authority to private mechanisms as part of the broadly held consensus of private and market-based approaches as an effective way of governing global change.

The regime achieves incremental advances while preserving the business status quo. Auditing helps retailers legitimize and grow their businesses, and maintain and increase their supply chain power. Brand companies use ethical audit programs to position themselves as responsible companies, enhancing their social license to operate, a vital advantage in today's volatile markets. Auditing also helps retailers to monitor suppliers (and thus risk) in a highly decentralized system of global production, in which concern is rising about inequality, environmental degradation, and corporate power, and pressure is growing for accountability and transparency in global supply chains.

Fully assessing the consequences of privatizing SCCs enforcement will require more detailed empirical research-including analyses of variations across sectors and jurisdictions. Within the context of our case study, it is clear that MNEs design this regime also for creating an illusion, consisting in enhancing their corporate reputation, and attempting to limit liability,²⁹ rather than a rea-

²⁹ See the recent case *Vedanta Resources Plc & Anor v Lungowe & Ors* [2019] UKSC 20. This appeal concerned claims brought by 1,826 Zambian citizens who allege that they have suffered damage as a result of toxic discharges from one of the world's largest copper mines. The mine is owned and operated by the second defendant, Konkola Copper Mines plc ("KCM"), a Zambian company.

lity of effective global supply chain governance. These provisions risk not to be designed to address the underlying problems that would lead to the far-reaching changes to labor and environmental standards that some civil society actors are calling for. Rather they tend to contribute in preserving the status quo that hinges on rewards from cheap labor, cheap goods, low prices, and short-term purchase contracts.

Promoting change

Here the conclusive point is that, even MNEs use SCCs purely for strategic purposes and do not truly strive to bring the change in their global value chains, SCCs may still induce behavioral change just by relaying on the “persuasive force” of Contract Law. The same contract will lead to different expressive effects in different jurisdictions. Where the content conforms to local social norms, suppliers and vice versa will easily internalize it. Local cultural and social norms are hard to change through top-down international law. Private contracts, representing a bottom-up approach, may be more successful in changing the social norms. The article does not claim that many functions described in this paragraph are decisive or that they cannot be countered by a demonstration of bad consequences. It states that they play a role in our case study.

CONCLUSIONS

The interplay of Public International Law and Contract Law

The interaction of international trade and SDGs currently appears to be sustained by sources and subjects, i.e. norms and players, within - rather than across - Public International Law and Contract Law. However, some dynamics can be detected which reveal both a potential powerful impact and the need for development of commingling public and private action. The interplay is an example of hybridity between public international law and the contract law regulatory system. One author has noted that the concept refers to a system in which different forms of regulation interact, such as contract law (or private law in general), public law, and hard and soft law, relying on both standards developed by international organisations and on private regulation by and between companies.³⁰

The first defendant is KCM's ultimate parent company, Vedanta Resources plc (“Vedanta”), which is domiciled in England.

³⁰ Aurret van Heerdenn, Sabrina Bosson, “Private Actors and Public Goods – A new role for the Multinational Enterprises in the global supply chain”, *Management & Avenir*, Vol. 23, No. 3, 2009, 36–46.

International treaty law accommodates trade law and other interests relating to SDGs and finds expression in other treaties between trade partners. This process is two-pronged: it is triggered by the choices of private actors which express community interests recognised at international level under the SDGs: conversely, it ultimately has effects on private contracts which underpin trade flows. Principles of conduct in international soft law instruments, without being legally binding on States and individuals, have prompted private actors to incorporate sustainability in their contractual relations. It is becoming a common strategy to adopt contractual clauses for suppliers within the area of human rights, labour conditions, environmental protection, business ethics and sustainable development, as in the case considered here. Formulating these clauses in international supply agreements is certainly a helpful first step in communicating MNEs' values and expectations towards commercial partners, addressing societal concerns about respect for SDGs, and protecting their reputations.

It should be underlined that the insertion of contractual provisions dealing with public values in contracting over GVCs could be better explained by considering the role assigned to MNEs in promoting values along making profits because of the failure of global politics. The above-mentioned interplay between public and private actors creates an example of a hybrid regulatory system. An author notes that the concept refers to a system in which different forms of regulation interact, such as contract law (or generally private law), public law, hard and soft law relying on both standards developed by international organisations and private regulation by and between companies.³¹

Indeed, reliance upon private law tools to render sustainability legally binding, on the one hand, and upon private remedies to enforce sustainable conduct, on the other hand, could be seen from a double perspective: it could equally be said that businesses are called to act as either delegates or agents by international institutions setting principles and voluntary standards. Vice versa, private tools employed in global production can be seen as pursuing public or community interests which have been identified and endorsed at international, multilateral level.

Interestingly, an assessment of whether the current public/private interplay in pursuing sustainability in international trade operations is satisfactory from a legal point of view mainly depends on the enforceability of the obligations that

³¹ Kasey McCall-Smith, Andreas Ruhmkorf, "From international law to national law: The opportunities and limits of contractual CSR supply chain governance", *Law and Responsible Supply Chain. Contract and Tort Interplay and Overlap*, (Eds. V. Ulfbeck, A. Andhov, K. Mitkidis), Routledge, 2019, 37.

bind private actors. The problem here is twofold. First, while private actors are not directly bound by international law, private law – and specifically contract law – has not been designed to assume a public, regulatory function and has proven to be ill-equipped for pursuing public goals. Second, whereas a contract often requires precision, SDG standards are usually identified vaguely and imprecisely. Moreover, the mere incorporation of SCCs into contracts does not make them formally enforceable.

Private contracts, private values

Our case study confirms the trend consisting in pursuing public goal by private contracts. Indeed, it creates a hybrid regulatory system including public international law (e.g. sustainable development goals, in particular) and contract law.

In particular, the case considered here also confirms that contracts in the global supply chains can serve as vehicles to promote SDGs goals in European and non-European jurisdictions: thus, it is possible to say that contract law in the context of GVCs contributes to the politics of rights in our contemporary era.³² It is becoming a common strategy to adopt contractual clauses for suppliers within the area of human rights, labor conditions, environmental protection, business ethics and sustainable development, as in the case here considered. Formulating these clauses in international supply agreements is certainly a helpful first step in communicating MNEs' expectations towards commercial partners, addressing societal concerns about the respect for SDGs, and protecting their reputations.³³

The problem here is that private law, and precisely contract law, was not designed to assume a public, and precisely a regulatory function and results ill-equipped in pursuing public goals. The article stresses the scarce effectiveness of enforcement mechanisms between the parties and by third parties to contracts. Where contract often requires precision, SDGs standards are usually framed in a vague and imprecise way. Also important, contract law is used as an instrument of regulation: it is used as a means to give force to SDGs through specific provisions of international supply agreements.³⁴ In other words, SCCs are means to "regulate" supplier's behaviour over the global value chain. Legal scholars have extensively studied "contracts and regulation", "contract governance" and contrac-

³² Ben Golder, *Foucault and the Politics of Rights*, Stanford, 2015.

³³ Martijn W. Hesselink, "Five Political Ideas of European Contract Law", *European Review of Contract Law*, Vol. 7, No. 2, 2011, 295–313.

³⁴ Kenneth W. Abbott, *Engaging the Public and the Private in Global Sustainability Governance*. Available at SSRN: <https://ssrn.com/abstract=1966730> or <http://dx.doi.org/10.2139/ssrn.1966730> (accessed 12 October 2020).

tual regulation of the global supply chains. Supply agreements often imply long-term contractual relationships between the parties and these contracts are often parts of a larger network of relationships over the supply chain.³⁵ Such literature is very insightful for placing SCCs into the comprehensive theoretical framework of contract governance.³⁶

Are SCCs enforceable?

The sole incorporation of SCCs into contracts does not make them formally enforceable; it does not help in overcoming the deficiencies of the supply chains. SCCs remain generally unilaterally imposed, vague and formally hardly enforceable.

So is there a reason to adopt SCCs? The article argues that SCCs, and contract law in general, play a sort of expressive function in this particular case. Thus, the “hidden life” of SCCs is more interesting for the researcher because here contract law triggers legal, psychological and social processes with respect to suppliers, but also third parties. In other words, SCCs shape our social norms and perception of right versus wrong. Thus, they have an impact in fostering social values. Their increasing adoption by MNEs in contracting with suppliers offers a very promising research agenda for comparative contract law scholars. It does not matter that MNEs are attempting to legitimate the *status quo* or avoid liability before third parties and society. In this respect, the article has underlined many functions of Contract Law that can help us in finding an explanation with respect to the increasing presence of irritant contractual provisions concerning the environment, civil rights, equality, poverty in international commercial contracts.

Finally, the coordination of treaties and contracts in the global market, which could be enhanced by treaties that expressly impose on the State parties the obligation to regulate and enforce sustainable business conduct at home and abroad, has not (yet) been achieved. Here the point is that without understanding the interplay of public international law and contract law on the matter, legal scholars will struggle to reconcile the presence of non-binding international goals and irritant contractual provisions in terms of the environment, civil rights, equality, and poverty in international trade.

³⁵ Stefan Grundmann, Florian Möslin, Karl Riesenhuber, *Contract Governance Dimensions in Law and Interdisciplinary Research*, Oxford, 2015.

³⁶ Roger Brownsword, Rob A.J. van Gestel, Hans-Wolfgang Micklitz, *Contract and Regulation*, Cheltenham, 2017.

Dr CRISTINA PONCIBO

Vanredni profesor, Univerzitet u Torinu

UGOVORNO PRAVO ZA BUDUĆE GENERACIJE

Rezime

Iako izučavanje društvenih i ekoloških uticaja međunarodnog poslovanja zasigurno nije nov trend, proteklih godina ponovo se javlja interesovanje za ove teme zbog aktuelnih globalnih problema poput klimatskih promena, siromaštva i kršenja ljudskih prava. Multinacionalna preduzeća (MNE) se sve više pozivaju da se aktivno uključe i na taj način doprinosu borbi za održivi razvoj. Zanimljivo je da pravnici izučavaju kako MNE sve češće usvajaju kodekse ponašanja koji unapređuju ciljeve održivog razvoja, a koji se primenjuju na njihove poslovne odnose sa dobavljačima u globalnim lancima snabdevanja. Neki od tih ciljeva uključeni su u odredbe o održivom razvoju ugovora koje kompanije zaključuju. Ugovorne odredbe koje se odnose na javne vrednosti otvaraju više spornih pitanja. Posebna pažnja u radu posvećena je sledećim dilemama: da li su pomenute ugovorne odredbe obavezujuće i primenljive za ugovorne strane ili za treće lice u ugovoru; da li ove odredbe zaista čine deo ugovora i najzad, da li one utiču na unapređenje ciljeva održivosti.

Ključne reči: uporedno ugovorno pravo, teorija ugovora, privatni akteri, globalni lanac vrednosti, ciljevi održivog razvoja, ekološka održivost

Bibliography

- Abbott K.W., *Engaging the Public and the Private in Global Sustainability Governance*, available at SSRN: <https://ssrn.com/abstract=1966730> or <http://dx.doi.org/10.2139/ssrn.1966730>, 2020.
- Adar Y., Gelbard M., "The Role of Remedies in the Relational Theory of Contract: A Preliminary Inquiry", *European Review of Contract Law*, 2011.
- Bair J., "Contextualising compliance: hybrid governance in global value chains", *New Political Economy*, 2017.
- Beckers A., "Towards a Regulatory Private Law Approach for CSR Self-Regulation? The Effect of Private Law on Corporate CSR Strategies", *European Review of Private Law*, Vol. 27, No. 2, 2019.
- Beckers A., *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law*, Oxford, 2015.
- Brownsword R., van Gestel R.A.J.A., Micklitz H.W., *Contract and Regulation*, Cheltenham, 2017.
- Cafaggi F., Iamiceli P., "Contracting in global supply chains and cooperative remedies", *Uniform Law Review*, 2015.

- Cafaggi F., Iamiceli P., “Regulating Contracting in Global Value Chains. Institutional Alternatives and their Implications for Transnational Contract Law”, *European Review of Contract Law*, Vol. 16, No. 1, 2020.
- Collins H., “Introduction to Networks as Connected Contracts”, *Networks as Connected Contracts*, (Eds. Gunther Teubner & Hugh Collins), Oxford, 2011.
- Cotula L., *Investment contracts and sustainable development. How to make contracts for fairer and more sustainable natural resource investments*, London, 2010.
- Cutler C.A., Dietz T., *The Politics of Private Transnational Governance by Contract*, Abingdon, 2017.
- Eller K.H., Salminen J., “Reimagining Contract in a World of Global Value Chains”, *European Review of Contract Law*, 2020.
- Feinman J.M., “Relational Contract Theory in Context”, *Northwestern University Law Review*, Vol. 94, 1999-2000, 737 and I. Macneil, “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law”, *Northwestern University Law Review*, Vol. 72, 1977-1978.
- Gereffi G., *Global Value Chains and Development. Redefining the Contours of 21st Century Capitalism*, Cambridge, 2018.
- Gereffi G., Humphrey J., Sturgeon T., “The Governance of Global Value Chains”, *Review of International Political Economy*, No. 12, 2005.
- Golder B., *Foucault and the Politics of Rights*, Stanford, 2015.
- Grundmann S., Cafaggi F., Vettori G., “The Contractual Basis for Long-Term Organizations – The Overall Architecture”, *The Organizational Contract*, (Eds. S. Grundmann, F. Cafaggi, G. Vettori), Abingdon, 2013.
- Grundmann S., Möslin F., Riesenhuber K., *Contract Governance Dimensions in Law and Interdisciplinary Research*, Oxford, 2015.
- Macneil I.R., “Reflections on Relational Contract”, *Journal of Institutional and Theoretical Economics*, 1985.
- Martijn W. Hesselink, “Five Political Ideas of European Contract Law”, *European Review of Contract Law*, Vol. 7, No. 2, 2011.
- McCall-Smith K., Ruhmkorf A., “From international law to national law: The opportunities and limits of contractual CSR supply chain governance”, *Law and Responsible Supply Chain. Contract and Tort Interplay and Overlap*, (Eds. V. Ulfbeck, A. Andhov, K. Mitkidis), Routledge, 2019.
- Mitkidis K., “Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements”, *Nordic Journal of Commercial Law*, No. 1, 2004.
- Mitkidis K., *Sustainability Clauses in International Business Contracts*, The Hague, The Netherlands, 2015.

- Poncibò C., "The Contractualisation of Environmental Sustainability", *European Review of Contract Law*, No. 4, 2016.
- Rühmkorf A., *Corporate Social Responsibility, Private Law and Global Supply Chain*, Cheltenham, 2015.
- Salminen J., "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers - Liability in Global Supply Chains?", *The American Journal of Comparative Law*, Vol. 66, No. 2, 2018.
- Sunstein C., "On the Expressive Function of Law", *European Constitutional Law Review*, Vol. 5, 1996.
- Teubner G., "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences", *Modern Law Review*, Vol. 61, 1998.
- van Heerdenn A., Bosson S., "Private Actors and Public Goods – A new role for the Multinational Enterprises in the global supply chain", *Management & Avenir*, Vol. 23, No. 3, 2009.
- Voss H., "Implications of the COVID-19 Pandemic for Human Rights and Modern Slavery Vulnerabilities in Global Value Chains", *Transnational Corporations Journal*, Vol. 27, No. 2, 2020.
- Vytopil A.L., "Liability for 'greenwashing'?. On unfair commercial practices, the legal duty to be transparent and the case of a 'safe harbor'", *Law and Responsible Supply Chain. Contract and Tort interplay and overlap*, (Eds. Vibe Ulfbeck, Alexandra Andhov, Katerina Mitkidis), UK, 2019.
- Vytopil A.L., *Contractual Control in the Supply Chain. On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability*, The Hague, The Netherlands, 2015.

Article history

Received: 12.10.2020.

Accepted: 21.10.2020.

ORIGINAL SCIENTIFIC PAPER