

Abstract: This chapter aims at investigating the relationship between the Sustainable Development Goals (SDGs) and contract law in a comparative and interdisciplinary perspective. In fact, scholars are still at the beginning of researching how closely concepts, methodologies, and instruments of private law, including but not limited to contract law, can contribute to the greatest challenges of our time. Precisely, this exploration grounds on three main issues. First, the chapter aims at discussing whether contract law may contribute to enhancing and governing the SDGs. In this respect, it considers three case studies, consisting of (1) the standardization and certification processes of SDG indicators, (2) the agreement concerning the enforcement of some of the SDGs included in the Bangladesh Accord, and (3) the practice of incorporating sustainability contractual clauses (SCCs) into international supply chain agreements. Second, it analyzes the nature and scope of the interplay of contract law and sustainable development (SD) and the enforcement problem of contractual clauses dealing with the goals of SD. Third, the chapter considers the potential need and possibilities for contract law to respond to the public challenges of the SDGs and to come up with new orientations.

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Sustainable Development and Comparative Contract Law

Three Case Studies

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23.1 Introduction: The EU Green Deal

The concepts, tools, and goals of SD ([Dernbach and Cheever, 2015](#)), including their institutional indicators issued by the UN (SDGs), have attracted significant attention in the area of public law and public international law. Scholars in these fields have widely explored and discussed the topic to date ([Kanie and Biermann, 2017](#); [Segger, Cordonnier, Saito and Weeramantry, 2017](#)). The consequent effects of the controversial concept of SD on the legal world are inevitable and increasingly pervasive ([Vogt and Weber, 2019](#)).

Within the European Union, sustainability acts as a legally protected social value, being a principle by which member states will guide and align their policies. In particular cases, sustainability is assimilated to a legal standard which characterizes in qualitative terms certain European Union measures. The Treaty on European Union (TEU) provides in Article 3, paragraph 3(a) that the “European Union aims to establish an internal market that works for the sustainable development of Europe, based, among other things, on balanced economic growth and a high level of protection and the improvement of the quality of the environment.” This rule, which is part of EU primary law, addresses only the economic and environmental dimensions of sustainability. Similarly, Article 11 of the Treaty on the Functioning of the European Union

(TFEU) promotes sustainable development only from an environmental perspective. The European Union's social sustainability goals in international relations with third states are covered in Article 21, paragraph 2 of TEU. Lastly, sustainability sets a standard for economic and monetary policy, Article 119 of TFEU providing a sustainable balance of payments.

These goals are actually promoted through legislative provisions in the EU (e.g., EU regulations, EU directive) concerning specific obligations to enhance sustainability on states and private actors. In particular, the recent European Green Deal aims at making EU policy goals in this area effective, and the policy instruments well-defined, diverse, and at least equal to the number of policy goals.¹ The various action plans, strategies, regulations, and directives adopted in the implementation of the Green Deal meet this requirement. Conversely, the United Nations 2030 Agenda does not specify any effective measures to achieve the goals, or to what standard they should be implemented. The 169 targets set in 2015 are rather subdivisions of the 17 SDGs and do not provide for the member states available instruments for enforcement.

The European Green Deal not only declares sustainable development as a goal in itself but also sets a comprehensive roadmap of multi-annual strategies and top-to-bottom legislative acts to achieve it. Among these, the Corporate Sustainability Due Diligence Directive (CSDDD) stands as a cornerstone in embedding sustainability into corporate governance.²

The CSDDD introduces binding obligations for companies to identify, prevent, mitigate, and account for adverse human rights and environmental impacts within their operations, supply chains, and value chains. By doing so, it shifts sustainability from a voluntary corporate responsibility to a legally enforceable duty. This aligns with the broader EU vision of harmonising sustainable development with economic growth, ensuring that environmental and social considerations are integral to market practices. Additionally, the Directive supports the EU's overarching climate neutrality objectives by holding businesses accountable for their carbon footprints and encouraging long-term strategies that prioritize decarbonization and biodiversity protection. Specifically, in the EU, sustainability is political by its objectives and normative by its implementation pathways. The European Green Deal not only declares sustainable development as

a goal in itself but also sets a road map of multi-annual strategies and top-to-bottom legislative acts to achieve it. Such an example is the Proposal for a Corporate Sustainability Due Diligence Directive,³ which also addresses the issue of sustainability in contractual private relationships (Ciacchi, 2024; Čulinović-Herc, 2023; Stella Richter and Passador, 2022).

Nevertheless, with regard to private law, by contrast, there has been less attention in the EU and, comparatively, although the SDGs concern not only governments and parliaments, the UN and other international institutions, but mainly business and the private sector (Akkermans and van Dijk, 2019). The Max Planck Institute for Comparative and International Law has organized a conference to launch this new research agenda, “The Private Side of Transforming the World—UN Sustainable Development Goals 2030 and the Role of Private International Law,” on September 10–12, 2019 (Michaels, Ruiz Abou-Nigm and van Loon, 2021). Specifically, companies are gradually pushed by the EU toward the adoption of principles of both social and environmental responsibility within their strategies, structures, and management systems (Stella Richter and Passador, 2022; Sjäfjell, 2022).

For this chapter, I note that sustainability, and its indicators according to the UN (SDGs), interacts with private law in many aspects and, particularly, focus on contract law. As noted before, scholars in private law have started considering their interplay only recently (Akkermans and van Dijk, 2019). On the one hand, the indicators encourage freedom of contract when they call to “correct and prevent trade restrictions and distortions in world agricultural markets” (2.b) or “promote the development, transfer, dissemination and diffusion of environmentally sound technologies to developing countries on favourable terms [*omissis*] as mutually agreed” (17.7).

On the other hand, the same indicators may require to impose restrictions, for example, the “immediate and effective” eradication of forced labor, “modern slavery,” and child trafficking (8.7, 16.2); “by 2030 [to] significantly reduce illicit financial and arms flows” (16.4); and to “substantially reduce corruption and bribery in all their forms” (16.5). There is clearly also a role for tort law, including its application to cross-border situations, for example, in order

to fulfill goals regarding environmental protection and climate change ([Mola and Poneibò, 2021](#); [Poneibò, 2016](#); about property rights, see [Ballardini, Kaisto, and Similä, 2021](#)).

Within this context, the chapter questions how contract law offers support as a means of giving force to international standards related to sustainability by imposing obligations on companies in other countries. Moreover, because these public values are “embodied” in that quintessential private law instrument—the contract—they would more readily come within the purview of domestic courts or private arbitral bodies. In other words, it considers the contract governance of sustainability ([Grundmann, Möselein and Riesenhuber, 2015](#); [Brownsword, van Gestel and Micklitz, 2017](#); [Zumbansen, 2007](#)). This concept shows how legal departments of transnational corporations (TNCs) draw on the openness of contract as a framework for multiple forms of social cooperation to establish complex cascading webs of contracts. Ensuring control throughout the supply chain implies a new mode of usage for contract, beyond safeguarding and toward organizing cooperation. Yet the exact role of contract remains obscure for practical and conceptual reasons—practically because contracting is barely litigated upon in public, and conceptually because paradigms of contract, as they are taught in law schools around the world, largely stem from the 19th century, with few incremental developments since. In particular, from the perspective of privity, the idea that contracts are foundational building blocks in globally fragmented and centrally governed networks of production can hardly be grasped.

One may easily note that this interaction of public international law and national contract law constitutes a hybrid regulatory system for sustainability. It means a system in which different forms of regulation interact, such as public and private law, hard and soft law standards developed by international organizations and private regulation by companies.

Interestingly, only contracts between private parties can give a binding effect to standards that are otherwise not binding: In short, the chapter notes that public functions regarding the protection of our future are subject to a process of outsourcing to private actors (namely, transnational corporations and their global supply chains). The problem here is how feasible a move from soft to hard law (i.e., binding contractual obligations) of these goals without a direct

regulation by states and/or international organizations. All this privatization in the international sphere raises many questions on whether private outsourcing will contribute to fundamental public law values, such as human rights regulations, regulations against corruption and waste, and environmental protection. Surely, to be successful, such a system needs the adoption of effective enforcement mechanisms to hold TNCs responsible for the way they act in addressing sustainability. To date, such mechanisms are still lacking.

In light of the preceding information, three case studies about the interplay of contract law and the goals of SD are considered in the following paragraphs. The case studies concern (1) the standardization and certification processes of SD indicators, (2) the agreement included in the Bangladesh Accord, and (3) the practice of incorporating sustainability contractual clauses into international supply chain agreements.

23.1.1 Standardization and Certification

First, contract law appears to play a central role in designing and governing the main private initiatives for SD, such as, just to provide an example, standardization, certification, and conduct codes ([McCall-Smith and Rühmkorf, 2019](#)). In fact, corporate sustainability is a new and evolving corporate management paradigm ([Salminen, 2019](#)). The term “paradigm” is used deliberately, since it is an alternative to the traditional growth and profit-maximization model. While corporate sustainability recognizes that corporate growth and profitability are important, it also requires the company to pursue societal goals, specifically those relating to SD: environmental protection, social justice and equity, and economic development ([Stäfel, 2016](#)).

Against this background, numerous sustainable supply chain governance initiatives have emerged across domestic jurisdictions and continents, including standards and certification initiatives, often filling the regulatory vacuum created by the lack of state regulation and effective global and national policies for sustainability ([Eberlein, Abbott, Black, Meidinger, and Wood, 2004](#)).

What the chapter stresses here is that these initiatives are primarily ground on international agreement networks among the interested parties, such as TNCs, suppliers, standardization networks, and auditors. In this sense, it is possible to argue that contract law is giving a substantial contribution in establishing, designing, and governing the said private sustainability mechanisms. However, the academic and scientific debate on the contribution of contract law to SD is still in its infancy.

By now, there is a substantial research body on SD and on sustainability standards and certification by third parties (i.e., auditing), above all in the social sciences, in business literature, as well as in development studies and agricultural economics ([Brandi, 2016](#)).

Firstly, the lead firms dominating importation into high-income economies employ a battery of standards to achieve multiple objectives. Directly and indirectly, standards and regulations determine not only the terms of market entry but also the extent to which different producers position themselves in GVCs in a manner that provides for socially and environmentally sustainable income growth. In general, they aim at reinforcing the objectives of the SDGs by promoting living standards, better forms of work, greater social inclusion, and the protection of the environment. In particular, it is possible to note that there are two families of regulations and standards affecting sustainability. Some of these standards affect the character of products (raw materials, intermediates, final goods, services), and others concern the character of the processes involved in the production of these products.

Secondly, in the social sciences, certification has been studied, for instance, as a non-state market-driven governance system, gaining rulemaking authority as private or transnational governance initiatives ([Büthe and Matli, 2017](#)), and with a focus on various interactions between different transnational business governance schemes ([Eberlein, Abbott, Black, Meidinger, and Wood, 2004](#)). In the business literature, certification has been investigated in the context of environmental management systems as well as green or sustainable supply chain management or governance ([Brandi, 2016](#)), including in the context of global supply chains ([De Marchi, di Maria, and Micelli, 2013](#)). In addition, business literature and the literature on

environmental management are increasingly addressing the potential link between economic and environmental benefits and have investigated, for example, how organizations define, interpret, and implement sustainability (Brandi, 2016).

Surely, TNCs and, more generally, private actors have gained substantial agency in enhancing sustainability—they have an increasing influence on outcomes, even on global issues, such as climate change (idem). Well, once private power becomes viewed as a delegation of sovereignty, it becomes quite difficult to distinguish between private and public law as ways of regulating and structuring markets (Peters, Köchlin, Förster, and Fenner Zinkernagel, 2009). The problem is that their agency exists, to quote an author, “beyond the state and its international organisations” and, I would add, without mechanisms to hold them liable in case of failure (Abbott, 2011). For our purposes, it is worth noting that this hybridization of public international law and contract law is a puzzle for legal scholars primarily because this process shows a variety of interactions crossing the public–private boundary, “entangling” public and private institutions, but these are largely ad hoc, not systematic.

23.1.2 Contracting for Sustainable Development

On May 15, 2013, a group of companies, mainly TNCs, agreed on legally enforceable commitments concerning sustainability by entering the Bangladesh Agreement (“the Accord”). The Bangladesh government ordered the organization to cease its operations by November 30, 2018, claiming that its national regulatory body was fully capable of taking over their work. The Accord disagreed, and a legal battle ensued. On May 19, 2019, the agreement was accepted by the Bangladesh Appellate Court, which has given permission for the Accord to continue during a transition period.

Basically, 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 (Salminen, 2018). Precisely, under the Accord, each signatory company committed, for example, to disclose its supplier factories in Bangladesh to recognized, independent fire safety experts and require these factories to submit to rigorous fire safety inspections led by these experts. The company also accepted a public disclosure of all the inspection reports of its supplier factories under the program, while requiring all its suppliers to implement all repairs and renovations necessary to make their factories safe, as determined through the inspection process. Also interesting, the company undertook to pay suppliers prices sufficient to make it possible for them to afford the necessary repairs and renovations and to operate in a safe manner and required suppliers to allow worker representatives into their factories to educate workers about workplace safety and worker rights.

Moreover, the Accord also provides a general remedy in case of breach of suppliers' obligations, by stating that each signatory company shall cease doing business with any supplier that fails to comply with any of these requirements.

One may argue that the Bangladesh Accord represents one of the successes of the freedom of contract in that it opens up vast possibilities for companies, especially TNCs, to come to act differently, even where regulators feel themselves constrained from acting. In fact, these commitments are not merely general statements of intent but binding, contractually enforceable obligations. Indeed, many of the Accord's signatory brands and retailers routinely include similar language in the legally binding contracts they make with suppliers, contractors, creditors, and consumers.

It is also important to note that the Accord establishes a private dispute resolution mechanism. Precisely, Article 5 of the Accord details the procedural aspects by providing that (1) disputes concerning implementation are first submitted to the seven-member oversight steering committee, which is comprised of three representatives chosen by the trade union

signatories and three representatives chosen by the company signatories, with a representative of the ILO serving as a neutral chair. (2) Any decision of the steering committee may, at the request of either party, be appealed to a binding arbitration process, governed by the rules of the United Nations Commission on International Trade Law, which is the standard procedure for international arbitrations. As set out in the Accord, an arbitrator's award may be enforced in a law court of the domicile of the signatory party against whom enforcement is sought (e.g., an award against a German company may be enforced in a German court) according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention, that was adopted by a United Nations diplomatic conference on June 10, 1958, and entered into force on June 7, 1959.⁴ In this respect, it is worth noting that the commercial arbitration process provided for in the Accord is the same process relied upon by TNCs around the world to enforce the commitments made to them in commercial contracts with their ordinary business partners. In other words, under the Bangladesh Accord, the failure by a company to adhere to its obligations may result in an adverse, binding arbitral award, which may then be enforced by a court in the company's home country. Such an award could, for example, require the company to comply with its obligations to help pay for the installation of safety features, such as emergency exits, found necessary for one of its supplier factories to operate safely.

In this light, scholars noted that the Accord is a development of some significance. It is true that, for the first time, a number of TNCs have signed with global trade union federations what "looks like" a legally binding agreement, enforceable through the courts ([Salminen, 2018](#)). By entering the Accord, these companies commit to a range of measures aimed at transforming the working conditions at the premises of offshore suppliers who manufacture ready-made garments for them. On one hand, the Accord is, at the base, simply a contract. In this sense, the risks assumed by signatory companies are no different than those to which these same firms willingly expose themselves in the normal course of business in countries around the world, which routinely involves their entering into legally binding agreements with suppliers,

contractors, creditors, and landowners, to name a few. On the other hand, in our view, the Accord produces few—if any—firm legal rights for or obligations on anyone ([Salminen, 2018](#)).

In summary, the Accord seems non-binding, aspirational, legally speaking, and weak. Thus, the chapter notes that contract theories—traditional, relational—struggle to make sense out of the legal nature of emergent complex contractual structures, like the Accord, that involve values and ethical considerations.

23.1.3 Incorporating Sustainability Goals Into Contractual Terms

The role of codes of conduct (as well as policies and guidelines issued by corporations) in advancing corporate social responsibility has attracted the attention of private law scholars in the last years ([Rühmkorf, 2015](#); [Vytopil, 2015](#); [Beckers, 2015](#); [Beckers, 2019](#)). The implementation of supplier codes of conduct varies widely. Some companies only publish them on their website without implementing them through contractual mechanisms. Others implement a code of conduct through general terms and conditions. Another category of companies considers such codes of conduct to be a core element of their contracts with suppliers. Although the implementation of codes of conduct varies, the majority of the globally operating enterprises who have implemented a sustainability policy utilize a contractual mechanism to enhance compliance with their codes of conduct.

Within such a wider framework, the chapter focuses on the “contractualization of sustainability” process, namely, the implementation of the sustainability provisions of companies’ codes of conduct and policies into contractual obligations.

In other words, sustainability contractual clauses (SCCs) would, in that way, represent a “juridical translation” of sustainable development objectives, leading to a contractual synthesis of disparate goals, such as fighting corruption, reducing poverty, protecting the environment for the present and future generations, and respecting diversity, just to mention a few.

Indeed, public law scholars were the first to discuss sustainability clauses in public procurement as well as in investment agreements (Cotula, 2010). Surprisingly, contract law scholars have largely ignored SCCs, with few exceptions (Mitkidis, 2015; Mitkidis, 2014). While this literature sometimes suggests that contract plays a role here, it never seriously considers what that means (see Cafaggi, 2013, who notes that “[t]ransnational commercial contracts have also become vehicles of implementation of public international regulation,” and Verbruggen, 2014). The review of companies’ practices in the literature helps in showing the different ways in which companies incorporate such standards into international commercial agreements.

Generally, legal counsels of TNCs usually design SCCs according to three main models, and their texts range from vague (non-binding) statements to more precise (binding) contractual obligations (Poncibò, 2022; Poncibò, 2016). Firstly, companies often include express clauses about sustainability goals into their agreements (“sustainability contractual clauses,” SCCs). A model clause, which usually is very detailed and complex, requires thus:

The Supplier hereby undertakes: [*omissis*] not to tolerate corruption in any way, shape or form in any jurisdiction, even if such activities are allowed, tolerated or non-prosecutable;—to assess and reduce the environmental impact of its own products and services throughout their entire life cycle;—to use material resources responsibly, in order to achieve sustainable growth that respects the environment and the rights of future generations [*omissis*].

Pirelli Group, Sustainability Contractual Clause

<www.pirelli.com/asset/index.php?idelement=59887> accessed 15.03.2022

Additionally, the contractual provision goes further by requiring the (weaker) party of the agreement (mainly a supplier) to address (by a miracle, one may think) a long list of obligations concerning social, economic, and environmental problems traditionally remitted to public law

and agencies. They also include, just to mention a few, child labor, diversity and equal opportunities.

Secondly, companies may use international standards or their conduct codes, policies, and guidelines as a reference point (the reference model). The clause consists in referring to the companies' documents mentioned here. It sounds like this:

The Supplier hereby declares to have read and understood the “Values and Ethical Code”, the “Code of Conduct” and the [omissis] group policy “Social Responsibility for Occupational Health, Safety and Rights, and Environment”, published on the web. The Code establishes [omissis] the principles that conduct the management of [omissis] group's business, as well as contractual relations and other relations with third parties.

(Poncibò, 2016, para. 1 and para. 2)

More important, the clarity of the language in both the SCCs and the standards or codes referred to varies from more binding forms that require the contractual partners to meet these standards to more aspirational forms. In the latter case, particularly with respect to the reference model, the wording used is vague, and it can be said that it does not represent a binding provision but merely a statement. In this light, the issue of whether SCCs are binding and enforceable depends upon the way they are drafted in contracts between the parties.

Thus, the reference to international standards and codes of conduct often results in a mere statement because of the vagueness of the actual document. It would be different if the SCC at issue contained mandatory requirements and continuous improvement benchmarks or indicators. In the latter case, it is possible that the contractual provision is binding and enforceable.

23.2 Contract Law and Sustainable Development

The chapter underlines that the contracts and contractual provisions dealing with the goals of SD here examined have an evident public dimension because they deal with challenges such as environmental protection, equality, and distributive justice, just to mention a few ([Poncibò, 2016](#), para. 2 and 3). Now, this shift of public interest within the private contract—which was intrinsically not meant to receive it—has not yet found a satisfying translation about the responsibility of the concerned actors. The debates around the idea of the many sustainability goals still need to find the proper answers. The question is how far it is appropriate and feasible to translate the new borders of the public interest—induced by the ever-growing intervention of private operators—into binding contractual obligations.

23.2.1 Promising Justice

The contract governance of SD concerns a number of environmental, economic, and societal goals of the present and future generations ([Salas-Zapata and Ortiz-Muñoz, 2019](#)). If the chapter refers to the UN indicators, the concept embraces, for example, those requirements with the goals of fighting poverty (SDG 1), of building effective, accountable institutions (SDGs 16.3, 16.5, 16.6, 16.7), and of ending all forms of discrimination against girls and women (particularly SDGs 5.2, 5a). Transparent and corruption-free institutional (SDG 16.5) proceedings, which have a sustainable effect, are also of highest priority.

In practice, the internet offers some examples of sustainability contractual clauses (SCCs) that TNCs often advertise before the public ([Lomfeld and Wielsch, 2013](#); [Zumbansen, 2013](#)). Accordingly, a supplier undertakes, for example, to assess and reduce the environmental impact of its own products and services throughout their entire life cycle, and use material resources responsibly, in order to achieve sustainable growth that respects the environment and the rights of future generations (Pirelli, para. 2.5). In addition, the supplier is also required to fight corruption, ensure equal opportunities, and ensure that wages shall be sufficient to meet the basic needs of personnel (Pirelli, para. 2). These obligations do not complete the picture, because

suppliers are generally subject to the principles, values, and commitments as expressed in the company's documents, such as policies, guidelines, and codes of conduct, to mention a few. In the words of an author, "these terms literally promise justice" ([Lipson, 2019](#)).

There is no need to point out that the traditional contract theory asserts the normative significance of the bilateral structure of a contract by limiting considerations of contract justice to the relationship between parties. Privity, as an expression of party autonomy, aims at capturing the significance of a contract's bilateral nature. Contractual rights and duties are limited to the parties who have consented to contract: Only they can pursue remedies for breach or seek to enforce the contract (see [Rühmkorf, 2015](#), pp. 98–101).

On the contrary, in promising justice, SCCs and agreements concerning sustainability are often directed to the welfare of individuals who are not parties to the contract, such as employees and local communities. Thus, unlike traditionally third-party beneficiaries, the beneficiaries of these provisions are diffuse, undefined, and with respect to future generations, unknown to the parties of the contract. As a result, a non-contracting third party may often have an interest in enforcing a contractual provision, or an entire agreement, having the scope of advancing sustainability goals. For instance, the employees of third-world country suppliers who experience violations against their human rights and poor working conditions, or the general public affected by environmental pollution ([Monteillet, 2017](#)).

This demand for justice has not found a satisfactory solution to date: Only the party that a contractual clause expressly mentions and identifies may have a right to enforce clauses that are beneficial for them (for example, the employees and the local communities) ([Rühmkorf, 2015](#), pp. 102–107, 106). In this respect, the chapter shows that the practical effects of SCCs, and other agreements concerning the sustainability goals, would be stronger if a contractual provision indicated these third parties as beneficiaries in an express way by granting them the right to enforce the agreement. Precisely, a clause should specify the name, membership of the beneficiary, or describe it.

In this respect, it should be pointed out that the doctrine of third-party beneficiaries is *per se* not adapted to protect the diffuse and unknown beneficiaries. The realistic option, especially in dealing with unidentified or diffuse parties, arises from tort law when it interplays with contract law (Poncibò, 2022). For example, the contract (or the contractual provision) represents a factual element that may give rise to a tortious liability.

Consequently, it is important to say that, in the case here examined, contract law interacts with many other fields of law, such as tort, trade and commercial law, competition and consumer law. It is necessary to have in mind the multidimensional nature of the problem. These contracts and clauses about the goals of SD are evidently producing side effects on third parties protected by tort law (Ulfbeck and Hansen, 2019).

23.2.2 The Transnational Context

The contract governance of SD clearly shows to have a transnational dimension (Ulfbeck and Hansen, 2017; Poncibò, 2022). For example, it should be recalled that the Bangladesh Accord (paragraph 1.1) results from the agreement of a group of international players at the international level. In this way, Western TNCs with global supply chains increasingly incorporate various goals with suppliers (paragraph 1).

Clearly, the multi-jurisdictional environment of global trade strongly influences the design of these contractual provisions: For example, contract remedies mainly consist in private mechanisms (or arbitration in the case of the Bangladesh Accord) because of the lack of trust about enforcement before domestic jurisdictions, especially in LDCs (Cafaggi and Iamiceli, 2015).

Moreover, the contents of such contractual provisions are becoming standardized. In other words, the adoption of SCCs in the general terms and conditions of purchase is becoming a common practice for TNCs.

More important, companies can only enforce potential violations against their policies dealing with sustainability goals if they become aware that there is a breach of such policy along the supply chain in the first place. Therefore, it is important that transnational companies check their supply chains closely, namely, via the private mechanisms of coordination and subordination described in paragraphs 1.3 and 2.2. For this reason, the contractual provisions require the supplier to establish a mechanism of internal audit and reporting to the buyer.

Additionally, TNCs usually have a contract with its first-tier supplier alone, but not with the other suppliers further down the supply chain. However, it is clear that it is possible to overcome this problem by including a provision in the contract which demands that the first-tier supplier conclude the same or similar contractual obligations regarding corporate social responsibility with the other suppliers further down the supply chain. In this sense, sustainability clauses require the supplier “to ensure that any subcontractors and suppliers comply with the same conduct established above, and to regularly oversee observance of said obligations” (Pirelli’s Sustainability Model Clause (Art. 2 lett. b)).

In this perspective, one may note that the contractual relationships governing the relationships between buyers and suppliers in global supply chains, while nominally contractual in the traditional sense, are establishing a sort of private order institutions. SCCs, for example, usually contain very detailed internal procedures for managing the relationship, monitoring, auditing, and dealing with failures. They also institutionalize auditing and certification by auditors.

Accordingly, some legal scholars have shown how to work around constraints imposed by privity of contract by exploring other contract doctrines, such as the choice in action doctrine that enables, to some extent, contractual enforcement of obligations across chains of suppliers as opposed to merely between two parties located within a chain (Cafaggi, 2011). In particular, some authors are researching for solutions for firms to enforce obligations against members of a supply chain outside of the restrictions of privity in order to increase commercial efficiency and

facilitate the enforcement of higher labor and environmental standards (Sobel-Read, Anderson and Salminen, 2018).

Both authors seek to answer the question of how parties in the chain can ensure enforcement or pursue liability for breach of obligations that arise from contracts they are not party to. The point of view that underlies the question takes for granted the contractual right and obligations that contracts seek to impose.

In consideration of the aforementioned, the chapter concludes the section by stressing the transnational dimension of the contract governance of sustainability through the exercise of control over supply chains across jurisdictions. In such a context, it is evident that contract law assumes peculiar aims and features when it operates to manage chains of suppliers in different jurisdictions (Poncibò, 2016).

23.2.3 Fostering Social Change by Contract

It is worth noting that legal counsels are not drafting SCCs to create incentives for performance and breach primarily through courts or arbitration. It should also be underlined that the same Bangladesh Accord seems to be more a symbolic act than a contractual agreement of binding promises and subject to enforcement.

In particular, SCCs often refer to codes of conducts and policy documents mainly containing principles and guidelines not subject to contractual enforcement for their vagueness and lack of clarity. Moreover, SCCs expressly drafted into international supply agreements can result in a vague and imprecise statement, depending on their language and clarity. In summary, these contractual provisions—often—contain mere statements relevant for the parties and third parties, and for this reason, contract law faces difficulties in serving as a tool for the goals mentioned here.

This chapter argues that the fact that these contractual provisions are not enforceable (or under-enforceable) is not problematic. Some authors have already argued that promissory

relationships of any significance often involve a mix of enforceable and unenforceable elements to achieve various goals (Bernstein, 2015).

For the purposes of this chapter, it emerges that contract law may serve sustainability by achieving social change within and outside the global supply chain. Indeed, SCCs are “sending” a message to suppliers and promoting a change in their behavior. Put differently, in analyzing the contract governance of sustainability, it is important to consider the expressive function of law. Indeed, legal scholars (and political ones) use it to make broad claims about the expressive dimension of statutes, judicial opinions, and other legal documents (McAdams, 2015; Sunstein, 1996). The nature of these claims varies. Some authors say that legal change will “send a message” of some sort for (morally) sanctioning and promoting behavioral change. Others claim that people comply with certain laws (the typical example: seat belt mandates and smoking restrictions) because of the expressive or symbolic effect of these rules (McAdams, 2015, p. 11 n.1, 2).

For example, someone noted how the law can work by changing the “social meaning” of behavior (the example is the law against dueling that created a new meaning to the decision to refuse a duel). Thus, there are so many normative claims about legal expression (and there is probably not one theory but a set of literature employing the same term).

Our point here follows: It is possible to understand these clauses (and the Bangladesh Accord) because of their symbolism. For example, the Bangladesh Accord has had a powerful symbolic impact, while it remains questionable whether the obligations contained in the Accord are enforceable before domestic jurisdictions. While McAdams (2015) has not included contract law into his analysis, the theory is very helpful in our case. Most surely, the literature in the field has rarely entered in the domain of contract law (Hadfield, 1998). The question is whether a statement in a contract (or the contract itself) is symbolic, expressive, or meaningful.

In reading contractual statements examined here, one may think of a case for scholars interested in semiotics. In the words of Eco, “[t]he sign is used to transmit information; to say or to indicate a thing that someone knows and wants others to know as well.” The sign fits into this

simplified canonical model of communication: source, sender, channel, message, receiver (Eco, 1978).

To be clear, our argument is that both the statements of the Bangladesh Accord and the SCCs—which are proliferating—in commercial contracting are signs, symbols that the parties, mainly TNCs as buyers, are sending to suppliers, traders, consumers.

A question is how signs are conveyed. It is therefore true that the expressive function generally implies an effective communication of the legal statement. Usually, contracts are subject to confidentiality and do not reach the public. Nevertheless, in our case, codes of conduct, the Bangladesh Accord, and SCCs are widely advertised in global supply chains, to traders, but also to the public. The large majority of companies publish these documents online to reach the public domain. The publication is, in reality, the cornerstone of an effective corporate sustainability.

This practice confirms that such statements are primarily directed at informing, signaling, and promoting social changes among suppliers and, more generally, in the community of traders. For this reason, TNCs, when adopting such provisions, are keen to reach a wider audience, also for reputational goals and risk-sharing strategies (Pirelli).

23.3 The Problem of the Enforcement

23.3.1 A Holistic Concept

If one desires to regulate the performance of suppliers with respect to SD Goals through contractual mechanisms, a question might be what sustainability is. The concept covers a broad spectrum of interlinked goals (i.e., holistic concept). In fact, sustainable development cannot be achieved through isolated initiatives but rather requires an integrated effort at various levels, comprising social, environmental, and financial aspects.

In recent years, the growing concerns for environmental and climate change, together with issues of poverty, increasing disparity between societies, and the tensions brought by social inequalities, have placed SD under the spotlight. National and international institutions, policymakers, and cross-country initiatives, as well as academics, have increased the attention given to social and environmental sustainability worldwide. Whereas everyone seems to agree on the importance of sustainable development, its very nature and meaning are discussed and analyzed.

As a result, the actual implementation of sustainability risks to be limited by the vagueness and ubiquity of its definition. For instance, due to the ubiquity of the notion of sustainability, different discourses (e.g., environmental, economic, social, cultural, ethical) have emerged over time, thereby associating this concept with social responsibility, environmental management, or business sustainability, which are often treated in separated ways. These different discourses have also revealed their appeal over corporations, whose role and responsibility for SD are becoming central because of the many shortcomings of public actors, such as states ([Trubeck, Thomas and Santos, 2019a](#); [Trubeck, Thomas and Santos, 2019b](#)).

In this context, a sort of “sustainability rhetoric” is emerging in mission statements, internal codes, and external reporting systems. In some cases, this rhetoric was used in the attempt to reconstruct the eroded legitimacy of companies and did not necessarily involve the actual implementation of (or participation in) SD. Otherwise, such active implementation and participation would require organizations to alter their existing practices and to allow a concrete strategic move toward sustainability ([Giovannoni and Fabietti, 2014](#)).

Thus, the point here is whether the process of incorporation of SD Goals into a contract is really feasible. Clearly, the contractual arrangement should make clear what is expected from the supplier and which SD Goal the buyer is referring to.

23.3.2 Relational Contracting and Enforcement

This chapter also notes that the contract governance of SD is an example of relational contracting. To clarify, the three cases here examined rely on informal mechanisms of cooperation and trust (Macneil, 1978–1978; Macneil, 1985).

Firstly, the relational theory of contract has the merit of further extending the legal realist approach to provide a rich sociological account of the role of contract-making in the social order. It emphasizes how contracts are “embedded” in complex social relationships and, consequently, can vehicle not only the interest of the parties but also other (societal) values, such as solidarity and equality (Bernstein, 1996; Bernstein, 1992; Bernstein, 2001). On the contrary, contract theory—in its traditional conceptualization—is not capable to find an explanation of the increasing contractualization of public values.

Secondly, the contract governance of SD implies the establishment of a private order institution. It is also true that businesses have devised contractual structures to govern their relationships, especially when trading with their suppliers that, while nominally contractual in the traditional sense, are better understood as private order institutions. In these senses, they have structured their supplier relationships in ways that make the legal system largely irrelevant to their contracting relationships.

Thirdly, in our case, the formal legal infrastructure governing the contractual relationship appears to be of secondary importance compared to informal norms that are particularly relevant with respect to enforcement. To be clear, companies are not relying on mere promises to perform SD obligations or the shadow effects of potential court-imposed remedy to induce the level of performance. Rather, to increase the likelihood that their suppliers will perform as promised, they have developed a variety of methods that either recreate or approximate the core management techniques associated with intra-firm hierarchy (e.g., internal monitoring, training). To ensure that products meet their quality specifications, they go to great lengths to regulate the production processes used in suppliers’ plants. In some instances, they also try to exert influence over sub-suppliers’ plants. For example, they require suppliers to operate their plants in

conformity with sustainability standards and may impose additional requirements that are designed to better tailor these standards to their individual company's particular needs.

23.3.3 Current Challenges in Global Value Chains

The enforcement of contractual provisions concerning SD Goals represents a challenge for contract law scholars. One might question the need to enhance contractual mechanisms as the current supplier codes of conduct contribute to improvement of the human and labor rights conditions. One might also consider it to be an illusion to assume that drafting more thorough contractual provisions will solve SD-related issues.

A big challenge is to assess the breach of a supplier with respect to SD Goals. Often, information on supplier performance is unavailable or insufficient. Therefore, buyers need access to this information and a contractual provision implementing a supplier obligation to provide that information is helpful. This provision might entail an obligation to provide information on the supply chains of the supplier as well as the most salient risks in these supply chains. Furthermore, it might also entail an obligation to implement a thorough process to engage with subcontractors and provisions on the cases in which subcontracting is permitted. In connection with this it might be worthwhile to impose mechanisms of self-evaluation on the supplier too. This creates an independent obligation for the (first-tier) supplier to conduct its own self-evaluation and to deal with its suppliers, notwithstanding the need for the buyer to monitor whether this is actually done. Moreover, implementing third-party audits, of which meaningful dialogue with local stakeholders is an important part, might also prove beneficial.

In particular, it emerges that the parties favor informal and private mechanisms to prevent and, when necessary, to react to a breach of contractual promises. Thus, when companies are committed to ensuring the sustainability of their businesses, they should be able to monitor the progress and evaluate the impacts so that they are able to ascertain in an objective way whether

they have fulfilled their sustainability commitment or not. For example, it is possible to read thus:

The Supplier acknowledges that the company has the right, at any time, to verify, either directly or through third parties, compliance by it with the obligations herein undertaken.

(Pirelli Group, Sustainability Contractual Clause, para. 2.3)

Together, these oversight and audit should reduce the likelihood of a breach and thus set off a chain of reactions that either terminate or severely damage the parties' relationship. They also make it possible for these contract provisions to condition on information that in their absence would not be observable and would only be verifiable through the filing of a lawsuit and the conduct of civil discovery. Consequently, these provisions both expand the range of commitments that can be extra-legally enforced and significantly reduce the likelihood of a buyer filing a suit or terminating a supplier based only on his best guess of what civil discovery would reveal (Gilson, Sabel and Scott, 2010).

In addition, SCCs develop procedural tools to deal with their breach, including reporting, whistleblower strategies, corrective action plans, and blacklisting. For example:

The Supplier may report to . . . any breach or suspected breach of the “Values and Ethical Code”, the “Code of Conduct” and the . . . Group policy “Social Responsibility for Occupational Health, Safety and Rights, and Environment” or any applicable laws.

idem, para. 2.3

In such a context, traditional remedies in both civil law and common law remain in the shadow. The model clause states:

The Parties hereby agree that the company 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 . . . above.

idem, para. 2

Thus, in case the party (often a supplier) is in breach of the SCC, the buyer can procure a remedy that, in our case, will most probably consists in demanding damages (Bair, 2009).

Making matters worse, the more likely form of damage for breach of SCCs will be to the reputation of the company. Thus, if the company learns the hard way that suppliers in its chain engaged in problematic labor practices, the harm would not be that breach necessarily impaired the value of the goods themselves but instead that breach damaged the corporation's reputation. In theory, courts in both common law and civil law may recognize claims for reputational damage as a consequence of a breach of contract, but they do not like to do so because, like all claims of consequential damage, courts worry that the harm may not have been in the contemplation of the parties and may be difficult to quantify (Lipson, 2019).

23.4 Conclusions

One of the biggest challenges of our time relates to the lack of political will. Many governments around the world are not fulfilling their duty to protect, as well as their duties to respect and fulfil the sustainability goals for both present and future generations (Sullivan, 2019).

In such a context, private law scholarship in the EU and globally is still at the beginning in researching how closely concepts, methodologies, and instruments of private law, including but not limited to contract law, are linked to sustainable development. In our case, private actors (TNCs, traders, suppliers) do not merely exacerbate the legitimacy crisis in public law (Trubeck, Thomas and Santos, 2019 a, b).

In discussing this topic, the chapter confirms that the distinction between public and private law is vanishing with respect to SD Goals. The achievement of SD Goals depends on a hybrid system of public international law and contract law, a system that evidently overcomes the traditional boundaries of disciplines (McCall-Smith and Rühmkorf, 2019). Thus, rather than a two-party model, it is necessary to focus on the context of the transaction, for example, the wider social body of social relations, ecosystems and sustainable development, and state or social regulatory structures. This paves the way for a socio-legal analysis of transactions that can draw from a wide and diverse array of approaches in the humanities and social sciences. Our case also reveals that a purely private realm exists only as a legal construction in contract law. Such an approach is also sensitive to the observation that our understanding as private lawyers remains too narrow, and it is necessary to take courage in reconsidering the public dimension of private contracts (Lomfeld and Wielsch, 2019).

On such basis, this chapter has offered an initial exploration of the contract governance of SD. Precisely, it argues that it consists of a network of contracts among private actors within global supply chains and across national jurisdictions. Such an argument becomes evident in considering the network of agreements behind the processes of creating standards, as well as monitoring and auditing their implementation. SCCs are becoming standard clauses of international supply agreements, with the hope that the contractualization of SD Goals will contribute in overcoming the mere rhetoric of sustainability.

Firstly, the investigation confirms that there are many cases where contract law interplays with SD. The cases examined in this chapter show that contracts can themselves serve as vehicles to promote public law values. Thus, although typically conceived as the quintessential private law form, contracts used in this way can be a tool to “publicize” the private relationship in part (e.g., the case of SCCs) or totally (e.g., the case of the Bangladesh Accord).

Secondly, the chapter discusses how such a relationship is essentially based on formal and informal contracting, a dynamic well explained in McNeil’s work on the relational theory of contract law. Such theory is useful to understand the diversity of the ways in which contractual

relationships occur, given the values, ideals, practices, and self-understandings of the participants in contractual relations and the wider relationships.

Thirdly, from our analysis, it is possible to conclude that contracts and contractual clauses dealing with the goals of SD could help create behavior standards, performance benchmarks, and a means for promoting a change within the global values chains. While such contractual provisions are not a panacea, they may also be useful because of their expressive function.

Finally, the focal point of this chapter consists in arguing that the contract law has a new social dimension consisting in promoting intergenerational justice as part of the SD Goals. In other words, this emerges by considering that the contractualization of SD sounds like promising justice across borders, and such process has a social impact, not necessarily supported by the enforcement of contractual obligations.

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