Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements

by

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Abstract

Our current society is not successful in mitigation of global social and environmental challenges. States lack legal tools, and sometimes also the will, to secure social and environmental interests transnationally and the existing soft and private regulation is criticized for its weak legitimacy, effectiveness and enforcement. Regardless of this regulatory gap, companies who do not comply with the globally accepted sustainability standards run reputational risks that can lead to long-term negative economic effects. Moreover, stakeholders expect companies not only to follow the standards themselves but also to do business exclusively with socially responsible partners. Unawareness, either intentional or negligent, of unethical behaviour within a company's supply chain may lead to an assumption that the company is complicit in such a conduct.

The paper discusses a hypothesis that sustainability contractual clauses (SCCs) in international supply chain agreements may help to overcome the regulatory gap in relation to global sustainability while concurrently protect companies against potential social, economic and legal risks threatening in connection to unethical behaviour of their suppliers. As parts of enforceable business contracts, SCCs are considered to overcome the heavily criticized softness of other CSR regulation and, therefore, to be more successful in fostering ethical behaviour of suppliers who are legally independent but often in economic and business terms dependent on the sourcing companies. However, this hardening function is questionable face-to-face the lack of case law or another proof of SCCs' formal enforcement. This article aims to shed a light on the question whether SCCs can be the efficient regulatory solution for global challenges we are looking for or whether they are yet another corporate social responsibility tool 'without teeth'. The central questions are: why SCCs are presumed to be effective regulatory means for global sustainability, how these clauses are seen through the lenses of international contract law and whether they can actually contribute to a positive change in suppliers' social and environmental performance.

Based on the analysis of SCCs' features and the underlying regulatory framework, the author concludes that while SCCs would not be enforceable by courts in most cases, they can still be successful in regulating global sustainability. Their positive effects on suppliers' behaviour will depend on how companies draft and use such clauses. It is suggested that the full potential of private contracting could be triggered by adequate governmental regulation.

1 Introduction

The primary purpose of business is to strive for profit within the applicable legal framework. Despite this, today we witness companies increasingly engage under the imperative of corporate social responsibility (CSR),[2] in the promotion of social and environmental standards, an activity that was traditionally in the sole responsibility of states.[3] As governmental regulation of transnational social and environmental issues is failing, public and private actors have developed various other tools implementing CSR into daily business operations. Many of these tools (such as CSR reporting or labelling) and their legal regulation have been widely discussed by legal scholars.[4] This article examines one of the CSR tools that has received much less academic attention,[5] although it is extensively used in practice:[6] social and environmental clauses in international supply chain contracts (hereinafter sustainability contractual clauses or SCCs). As parts of business contracts, SCCs are considered to overcome the heavily criticized softness of other CSR regulation. However, this hardening function can be questioned because there is a lack of case law or other proof of SCCs' formal enforcement. Thus, this article aims to shed a light on the question whether SCCs can be the efficient regulatory solution for global challenges we are looking for or whether they are yet another CSR tool 'without teeth'.

The promotion of social and environmental objectives and their balanced development has always belonged to the states' competence and responsibility. However, despite intensive international efforts to reach sustainable development, an increasing number of national regulations and social pressure on companies to limit their socially and environmentally

[2] For the purpose of this article CSR is defined as business measures consistent with law and ethical standards under which companies accept the responsibility for the effects their activities have on the environment and society.

[3] UN HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Protect, respect and remedy: a framework for business and human rights', UN Doc A/HRC/8/5, 7 April 2008 (hereinafter the Protect, Respect and Remedy Framework), part II., par. 27-50.

[4] For literature review on CSR reporting see e.g. Rüdiger Hahn, Michael Kühnen, 'Determinants of Sustainability Reporting: A Review of Results, Trends, Theory, and Opportunities in an Expanding Field of Research' (2013) 59 Journal of Cleaner Production; for legal aspects of CSR reporting see e.g. Daniel Gergely Szabo, 'Mandatory corporate social responsibility reporting in the EU' (PhD thesis, Aarhus University 2013); for CSR labeling see e.g. Mark A. Cohen, Michael P. Vandenbergh, 'The potential role of carbon labeling in a green economy' (2012) 34 *Energy Economics*.

[5] Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds) *The new corporate accountability: Corporate social responsibility and the law* (CUP 2009) 59.

[6] Michael P. Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance' (2007) 54 *UCLA L. Rev.* 913; Pace University School of Law and IACCM report [2010] 'The Triple Bottom Line: The Use of Sustainability and Stabilization Clauses in International Contracts' (hereinafter IACCM report); Katerina Peterkova, 'Sustainability Clauses in International Business Contracts' (PhD thesis, Aarhus University 2014) 148-149.

harmful activities, contemporary society is not successful in mitigation of global challenges, such as climate change or securing safe working conditions. Continuous melting of ice in the Arctic or the recent fires in Bangladeshi garment factories serves asproof. Unequal development and clashing social and economic interests of developed and developing countries lie in the midst of the regulatory conundrum and prevent us from reaching international consensus and viable solutions.[7]

Moreover, while states generally have the competence to enforce compliance with national and international social and environmental standards against companies within their jurisdictions, they lack legal tools to secure the same compliance on their companies' business partners abroad. On the one hand, private parties are not subject to international law and, on the other hand, the applicability of national law is geographically and personally limited.

Thus, while governments in developed countries adopt various regulations to limit socially and environmentally harmful activities of subjects under their jurisdiction, they indirectly create incentives for these subjects to outsource their activities to countries with weaker laws.[8] The situation is further exacerbated as some developing countries do not fulfil their international obligations, i.e. they do not enforce international law within their territory, either because they lack the institutional capacity or because they fear an outflow of foreign investment.[9] They may even purposefully relax their social and environmental regulation in order to create competitive advantage for their domestic companies.[10]

In this way a legal gap is created where private parties may escape from the legal consequences of the fact that their cross-border activities are not aligned with globally recognized social and environmental standards.[11] This regulatory gap needs to be closed if we aim for effective solutions to global challenges.

Since states are not able or willing to meet their obligations in the environmental and social area, other actors, including non-governmental organizations, industrial associations and

[7] Michael P. Vandenbergh and Mark A. Cohen, 'Climate Change Governance: Boundaries and Leakage' (2010) 18 *N.Y.U.Envtl.L.J.* 221, 222.

[8] Ibid at 262 et seq; Commission Communication, 26 May 2010, COM(2010) 265, OJ 2011 C 121/15, s 4.

[9] Protect, Respect and Remedy Framework, para 14.

[10] This phenomenon is known as 'race to the bottom'. While this topic is relevant to the article, it is not central to the main discussion and is not further followed here. From the vast amount of literature concerning this topic, see e.g. Ian Sheldon, 'Trade and Environmental Policy: A Race to the Bottom?' 57 *Journal of Agricultural Economics* 365.

[11] Alice de Jonge, 'Transnational corporations and international law: bringing TNCs out of the accountability vacuum', (2011) 7 *Critical perspectives on international business* 66, 67-68; André Sobczak, 'Are Codes of Conduct in Global Supply Chains Really Voluntary? From Soft Law Regulation of Labour Relations to Consumer Law' (2006) 16 *Business Ethics Quarterly* 167, 168.

companies themselves, have taken on the task.[12] They develop various types of soft and private regulations. Companies, who do not comply with these legally non-binding regulations, run reputational damage risks that can lead to public shaming in media, drop in demand for their products, outflow of financing and loss of competitive advantage against their peers.[13] Moreover, the general public and other stakeholders, such as national governments or investors, expect companies not only to follow the standards themselves, but also to do business exclusively with socially responsible partners. Companies are thus asked by their stakeholders, although they have no formal legal responsibility to do so,[14] to act as global regulators and replace in this function states that have no available legal means to enforce rules on social and environment concerns internationally. Unawareness, either intentional or negligent, of unethical behaviour within a company's supply chain may lead to an assumption that the company is complicit in such a conduct. The case of technology giant Apple Inc. (Apple) can serve as an example. In 2011, inhumane labour conditions at Apple's supplier FoxConn in China were revealed. After the issue was discussed in media extensively, Apple pledged to strengthen its suppliers' audits.[15] However, last year more issues were uncovered and Apple was again at the centre of attention accused of lying.[16]

Therefore, in order to protect themselves when engaged in cross-border activities that are not covered by state-based hard regulation and enforcement, companies employ various tools to control potential social, economic and legal risks in a manner that fits with both their business strategies and public expectations. Most common CSR tools include an articulation of corporate CSR statements, adopting suppliers' codes of conduct, participation in voluntary CSR initiatives and CSR reporting.[17] However, these CSR tools are voluntary, non-binding and unilateral activities and, thus, do not provide companies with sufficient coercive power over their business partners. Some scholars have argued that the lack of factual leverage can be

[12] Ingeborg Schwenzer and Benjamin Leisinger, B., 'Ethical Values and International Sales Contracts', in Ross Cranston, Jan Ramberg, Jacob Ziegel, J. (eds) *Commercial Law Challenges in the 21st Century: Jan Hellmer in memoriam* (Iustus Forlag 2007) 249.

[13] From vast literature, see e.g. Doreen McBarnet, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability', in McBarnet, Voiculescu and Campbell, supra note 5.

[14] Similarly Karin Buhmann, 'Corporate social responsibility: what role for law? Some aspects of law and CSR' (2006) 6 *Corporate Governance: The International Journal of Effective Board Performance* 188, 190.

[15] Apple Supplier Responsibility 2012 Progress Report <http://images.apple.com/supplier-responsibility/pdf/Apple_SR_2012_Progress_Report.pdf> accessed 25 February 2014.

[16] Jim Armitage, ''Even worse than Foxconn': Apple rocked by child labour claims' (*The Independent*, 30 July 2013) <http://www.independent.co.uk/life-style/gadgets-and-tech/even-worse-than-foxconn-apple-rocked-by-child-labour-claims-8736504.html> accessed 13 February 2014.

[17] Paul Hohnen, (author), Jason Potts, J. (ed), *Corporate Social Responsibility: An Implementation Guide for Business* (International Institute for Sustainable Development 2007) <http://www.iisd.org/publications/pub.aspx?id=884> accessed 13 February 2014.

overcome by imposing sustainability contractual obligations on business partners.[18] With the backup of judicial enforcement, contracts give to soft law and self-regulatory CSR instruments a hard law edge and may, therefore, be more successful in fostering ethical behaviour of suppliers who are legally independent but often in economic and business terms dependent on the sourcing companies.

If that is correct, then many questions arise. Why do governments not simply oblige companies to include sustainability clauses in all their business contracts? Why is there no case law, when media reveal many breaches of contracts in this area? If contracts are not enforced through courts,[19] how do they differ from unilateral tools, such as codes of conduct? Can international supply chain contracts help to achieve sustainable development? These are some of the questions that are addressed in this article with the overall aim to investigate if contractual form indeed imparts hard law edge to social and environmental requirements and thus enhance global sustainability. The central questions are: why SCCs are presumed to be effective regulatory means for global sustainability; how are these clauses seen through the lenses of international contract law; and whether they can actually contribute to a positive change in suppliers' social and environmental performance.

2 Sustainability Contractual Clauses

Before entering deeper into the topic, it is first necessary to define what sustainability contractual clauses are and how do they differ from other contractual content. SCCs are provisions in business contracts that cover social and environmental issues which are not directly connected to the subject matter of the specific contract. This means that they do not specify the physical quality of the delivered goods,[20] but rather prescribe how the parties should generally behave when conducting business.[21] An example is a requirement to avoid child labour or to reduce emissions in the production process. The most common issues covered by SCCs include the protection of human rights, labour conditions, environmental protection and anti-bribery provisions.[22] When a supplier does not follow these standards, the product

[18] See e.g. Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 *J. Law & Soc.* 20; Eva Kocher, 'Private Standards between Soft Law and Hard Law: The German Case' (2002) 18 *Int.J.Comp.L.L.I.R.* 265, 266.

[19] Doreen McBarnet and Marina Kurkchiyan, 'Corporate social responsibility through contractual control – Global supply chains and 'other regulation'', in McBarnet, Voiculescu and Campbell, supra note 5, at 79; Fabrizio Cafaggi, 'The Architecture of Transnational Private Regulation' (2011) EUI Working Paper LAW 2011/12, European University Institute, 9; Li-Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *Am.J.Comp.L.* 711, 725.

[20] Lin, ibid at 717.

[21] IACCM report, supra note 6, at 24.

[22] Ibid at 29.

delivered may not suffer from any physical damage in the sense of lower usability or functionality, but may still have a lower market value.[23] The breach, if discovered, may further damage the sourcing company's reputation and thus have an impact on its long-term economic results.

The list of covered issues shows that SCCs protect rather general public interests than private interests of the contractual parties. The protected subjects are then third parties external to the specific deal, such as the suppliers' employees.[24] This does not correspond to the common understanding of a contract as a framework for a private transaction stipulating the rights and obligations of the parties to facilitate a specific exchange.[25] Moreover the protected economic interests are of long-term character (e.g. reputation building) rather than maximizing benefits of the specific exchange. Overall, we can see that if sustainability requirements are cut out, the contract can still exist and the main objective can be carried out.

The use of contracts for other than private exchange related purposes also shifts the notion of contract as such. From enforceable exchange of promises, contracts are becoming relational tools.[26] From frameworks of private transactions, they move towards regulation of behaviour in general.[27] From contracts between independent parties, they come closer to a type of organization.[28] These shifts can be observed in a number of international business contracts. But it is in sustainability requirements that all of them are present at once.

Although SCCs can appear in many different types of contract,[29] this article focuses only on supply agreements concluded between a multinational company from a developed country and its suppliers from developing countries. The reason for this is not only to keep the research in a feasible extent, but mostly because supply chains of Western-based multinationals are highly sensitive to unethical behaviour as shown in the example of Apple.

[23] Schwenzer and Leisinger, supra note 12, at 265.

[24] Joe Phillips, Suk-Jun Lim, 'Their brothers' keeper: global buyers and the legal duty to protect suppliers' employees' (2009) 61 *Rutgers L.Rev.* 333, 369; James J. Brudney, 'Envisioning enforcement of freedom of association standards in corporate codes: a journey for Sinbad or Sisyphus?' (2012) 33 *Comp.Lab.L.& Pol'y* J. 555, 580.

[25] Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private 'Bads'' (2012) 23 *EJIL* 695, 711.

[26] Ian R. Macneil, *The new social contract: an inquiry into modern contractual relations* (Yale University Press 1980); Paul J. Gudel, 'Relational Contract Theory and the Concept of Exchange' (1998) 46 *Buff.L.Rev.* 763.

[27] E.g. Hugh Collins, Regulating Contracts (OUP 1999, reprinted 2005); Fabrizio Cafaggi (author), Horatia Muir-Watt (ed), Making European Private Law: Governance Design (Edward Elgar 2008) 2.

[28] E.g. George S. Geis, 'The Space Between Markets and Hierarchies' (2009) 95 *Va.L.Rev.* 99, 101-102; Geunther Teubner, *Networks as Connected Contracts* (Hart Publishing 2011).

[29] Vandenbergh, supra note 6.

3 Why Sustainability Contractual Clauses Can Be Effective

3.1 An Ineffective Regulatory Framework

Looking at the specifics of SCCs in supply chain contracts acting on the background of 'failing states'[30] and continuous global challenges, we have to ask what gives us the confidence that SCCs can be an effective means for global sustainability. The indications, suggesting that SCCs could indeed be successful where other regulation fails, are several.

First indication is the already mentioned lack of transnational binding regulation.[31] While the legal vacuum is filled in by soft and private CSR regulation, such regulation suffers from several shortcomings. CSR regulation varies extensively in regards to the type of the regulating entity (public, public-private, private), the form (e.g. guidelines, codes of conduct), the content (e.g. general or industry specific requirements) and the scope of governed subjects (e.g. all companies or members of an initiative). Yet, we can observe a similarity among these diverse regulations in regards to SCCs. Basically, all the regulations approach SCCs as a tool to 'harden' their own soft nature and, thus, to overcome their deficiencies in respect to legitimacy, effectiveness and enforcement.

The legitimacy of national and international law is derived from the state's authority vested in it by the governed subjects.[32] An alternative to such an authority is, however, missing at the transnational level.[33] The uncertain legitimacy of transnational CSR regulation leads to its lower effectiveness, which is furthermore undermined by a lack of verifiable reporting and monitoring systems.[34] CSR audits, the most common monitoring tools, are conducted without any connection to public authorities and the auditing entities have no formal power to enforce the findings. Finally, transnational private and soft regulation is not generally subject to review by the national and international courts.

The deficiencies characterize CSR regulation as based on voluntary participation with questionable legitimacy and effectiveness and lacking formalized and consistent enforcement. Hence, in order to secure and validate its role, the CSR regulation needs means to remedy the

[30] Schwenzer and Leisinger, supra note 12 at 249.

[31] For the purpose of this article, transnational regulation is understood as all regulation which governs actions or events between or involving private entities that transcends (i.e. is applicable regardless) national frontiers. This includes both private regulation and governmental regulation.

[32] Deirdre Curtin and Linda Senden, 'Public accountability of transnational private regulation: Chimera or reality? (2011) 38 *J. Law & Soc.* 163, 164-165.

[33] Ibid; Tineke Elisabeth Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting* CSR (Kluwer 2010) 256 *et seq*.

[34] de Jonge, *supra* note 11, at 72.

deficiencies and drive compliance among business community and international supply chains. Using the position of companies to insert CSR regulation or requirements into their supply chain contracts is one of such few available means.

International contracts are results of negotiation between contractual parties, thus the question of legitimacy does not arise here. While this is theoretically true, practice may appear different, since a majority of contracts concluded within international supply chains may not be products of negotiation but rather unilaterally imposed rules by economically stronger parties.[35] Moreover, sustainability requirements do not affect only the contractual parties but directly influence the life of third parties; global citizens.[36] Thus, we could discuss whether contractual parties have the authority to govern these issues. I argue that this should not be an issue, because unlike private regulatory regimes, contracts impose obligations only on parties who agree to them. They cannot oblige external subjects to adhere to a bilateral arrangement; these subjects may only benefit from the results. However, this opinion is valid only in the case where contracts are not the only regulation in the area, when states do not entirely pass the regulation onto private parties. Contractual clauses and their enforcement are vulnerable and can easily be influenced by the economic interests of the contractual parties, and therefore although they contribute to positive changes, they should be rooted in a broader regulatory system. Nevertheless, they are generally enforceable by courts, thus their effectiveness and enforcement is normatively secured.

In the light of the foregoing, it seems that contracts can be the answer to the problems of CSR regulations. This understanding is confirmed throughout the text of the main CSR regulations and their accompanying documents. The articulation ranges from more subtle references to contracts to express requirements that contractual leverage is used.

The best-known CSR initiative,[37] United Nations Global Compact (UNGC), requests its participants to extend their influence in the areas of child labour and environmental protection throughout their supply chains.[38] The UNGC practical guide on supply chain sustainability advises companies to clearly formulate their CSR expectations towards their suppliers in a code of conduct and subsequently implement the code through its 'integration … into supplier contracts'.[39] A similar approach, when the regulation does not directly request companies to include SCCs into their contracts, but the same can be found in the related documents, is used

[35] McBarnet and Kurkchiyan, supra note 19, at 86-88; Friedrich Kessler, 'Contracts of Adhesion – Some Thoughts About Freedom of Contract' 43 *Colum.L.Rev.* 629, 640.

[36] Lin, supra note 19, at 742-742.

[37] Caroline Schimanski [2013] An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles, European Commission (Directorate-General for Enterprise and Industry), at 7.

[38] UNGC, Commentary to Principle 5 and Principle 8.

[39] UN Global Compact Office and Business for Social Responsibility [2010] Supply Chain Sustainability: A Practical Guide for Continuous Improvement, at 23.

in the Protect, Respect, Remedy Framework[40] and the OECD Guidelines for Multinational Enterprises (2011).[41]

A more direct request to use SCCs is articulated in the ISO 26000 Guidance on social responsibility (ISO 26000) that expects companies not to contract with risky partners[42] and to influence their suppliers by imposing SCCs upon them.[43] An even stronger position towards the use of contracts for sustainability goals can be found in some business driven private initiatives, for example the Business Social Compliance Initiative (BSCI).[44] When becoming a member, each company has to commit and sign that it will 'ensure' that its subcontractors will comply with the requirements of the BSCI Code of Conduct and make compliance with it a condition of all supply agreements.

Overall, the regulators realize that soft and private CSR regulation does not effectively substitute missing governmental hard law. Therefore, to fortify the CSR regulation's effects, they require companies to use contracts, as hard legal tools, to influence behaviour in their supply chains.

3.2 The Growing Regulatory Power of Companies

The next suggestion for the success of contracts in regulating global sustainability is the constantly growing power of multinational companies. The concept of a company as a legal entity was originally established to make profit for its owners while providing goods and services to society at large.[45] However, in the current global economy, companies are no longer merely legal concepts, but also strong economic, and therefore also political and regulatory, actors. According to the World Investment Report of the UN Conference on Trade and Development, there were approximately 82,000 transnational corporations worldwide in 2009. Their economic power was demonstrated by the fact that the 100 largest of them accounted for about 4 % of world GDP.[46] Moreover, from the 100 world largest economies in 2000, only 49 were

[40] UN GA, A/HRC/8/16, 15 May 2008; UN Mandate of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises (SRSG), The Corporate Responsibility to Respect Human Rights in Supply Chains, 10th OECD Roundtable on Corporate Responsibility, discussion paper, 30 June 2010.

[41] OECD, OECD Guidelines for Multinational Enterprises (OECD Pub 2011), Commentary on General Policies, paras 18, 19 and 21.

[42] ISO 26000, paras 5.2.3 and 6.3.5.2.

[43] ISO 26000, para 7.3.3.2.

[44] <https://www.bsci-intl.org/> accessed 24 February 2014.

[45] Archie B. Carroll, 'The pyramid of corporate social responsibility: Toward the moral management of organizational stakeholders' (1991) 34 *Business Horizons* 39, 40-41.

[46] UNCTAD [2009] World Investment Report, vol. 1, *Transnational Corporations, Agricultural production and Development*, Chapter 1 (B), at 17.

countries and 51 are corporations.[47] General Motors, as the largest company, was ranked above economies such as those of Norway and Denmark.[48] With their strong economic power and transnational reach, companies have the means to influence political and legislative processes (most obviously by lobbying, sponsoring and signing bilateral investment agreements with national governments) as well as the everyday life of people worldwide (through e.g. the environmental effects of their operations and employment policies) and other business entities, especially those in their supply chains. From being governed they are evolving into governing entities,[49] yet without being subjected to international law obligations.[50]

3.3 Widespread Use of Sustainability Contractual Clauses

The third indication of the effectiveness of SCCs is the fact that they are not a sporadic but widespread phenomenon. They can be found in the majority of business contracts concluded in recent years. A study from 2007 found that over 50 % of the sample companies include one or more types of environmental requirements in their business contracts.[51] A later study from 2010 showed a rapid increase in these contractual practices, whereby almost 80 % of the sample companies stated that they had previously imposed sustainability requirements upon their business partners.[52] Finally, a study of self-reported information in sustainability reports and corporate websites from 2013 revealed that companies use four types of commitments to impose sustainability requirements upon suppliers.[53] First, just over 50 % of the investigated companies report inserting the requirements directly into their supply chain contracts. About 35 % report demanding of their suppliers that they comply with certain sustainability requirements, although they do not speak of a binding form. 25 % of the sample companies report that they request their suppliers to commit in writing to sustainability standards prior to entering into a contract. Finally, approximately 13 % of the sample companies only recommend to their suppliers to follow sustainability practices, but do not make it a condition of the mutual business relationship at any level.

[47] Sarah Anderson and John Cavanagh [2000] *Top 200: The Rise of Corporate Global Power*, Institute for Policy Studies.

[48] Ibid.

[49] Protect, Respect and Remedy Framework, para 2.

[50] See Alice de Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar Publishing 2011); de Jonge, supra note 11.

[51] Vandenbergh, supra note 6.

[52] IACCM report, supra note 6, at 26.

[53] Peterkova, supra note 6, at 148-149.

The widespread use of sustainability contractual clauses means that certain best practice has or is developing in this respect. Thus, it is easier to build upon an already started trend than to impose new obligations upon companies.

3.4 Enforceability through Contract Law

The final indication of SCCs' potential is their normative enforceability through international contract law rules.

A contract for the sale of goods is one of the oldest legal instruments in the world.[54] Although differences exist between individual jurisdictions, many principles of contract law are similar across the globe; these include the principle of contractual freedom, the underlying moral imperative *pacta sunt servanda* and the enforceability of contracts through public legal institutions. The legal system of contracts' enforcement copes rather well with the growing number of inter- and transnational private transactions. Where parties do not choose applicable law, default law will be determined according to the international private law rules, often leading to the applicability of the Convention on Contracts for the International Sale of Goods (CISG) as a part of the applicable national law.[55] When adopting CISG, the aim of the legislators was to agree on uniform rules applicable to contracts for sale of goods concluded between parties situated in different states, without recourse to international private law rules. There is no reason *per se* why the CISG should not apply to SCCs that form part of a contract if the applicability requirements are met.[56] Once applicable, CISG may help to answer the question of whether sustainability requirements have become a valid part of a contract, how they should be interpreted, whether or not their breach causes a non-conformity in the delivered goods and what remedies parties may claim in the event of breach. However, we should bear in mind that many countries, which are considered problematic from the CSR perspective, are not the contracting states to CISG.[57] Not only because of this reason also other instruments of international contract law, although of soft nature, may become relevant and applicable.

These instruments include the UNIDROIT Principles of International Commercial Contracts 2010 (UPICC) and the Principles of European Contract Law (PECL). Both UPICC and PECL

[54] Richard A. Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *World Bank Research Observer* 1, 2.

[55] United Nations Convention on Contracts for the International Sale of Goods, (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

[56] CISG arts 1, 2 3, 4, 5, 6 and 7(2).

[57] Cf BSCI Risk countries list (<http://www.bsci-intl.org/resources/rules-functioning> accessed 26 February 2014) and CISG contracting states (<http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> accessed 26 February 2014).

were prepared by groups of experts with the aim of re-stating international contract law in the form of non-binding instruments. The soft character allowed covering also those issues that were excluded from CISG, e.g. third parties' rights.[58] As soft law instruments, the applicability of UPICC and PECL is more complex than in the case of CISG. They do not constitute a part of national legal systems, but may be still applied by courts and other dispute resolution bodies in certain situations.[59] They might also be used to interpret or fill in gaps in other applicable international and national laws, including CISG.[60] As in the case of CISG, there is no formal barrier to UPICC and PECL being applied to SCCs, although they were not drafted with this purpose in mind.

The two soft-law instruments may soon be accompanied yet by another one – the EU Regulation on a Common European Sales Law (CESL).[61] However, for now, CESL remains only a proposal for a legislative act.

Despite some inherent flaws of the international law of contracts,[62] the system is pretty clear, accessible to private parties and tailored for international business relations. Therefore, provided that SCCs do not prescribe anything illegal or impossible, they should be enforceable under the international law of contracts.[63]

4 Enforceability of Sustainability Contractual Clauses

4.1 Form

From the presented preconditions it appears that contracts can be successful where other regulation fails. However, this conclusion must be critically assessed. While the ineffective

[58] Michael Joachim Bonell, 'The CISG and the UNIDROIT Principles of International Commercial Contracts: Two Complementary Instruments' (2008-2009) 10 *International Law Review of Wuhan University* 100, 103.

[59] UPICC, Preamble.

[60] See e.g. Anukarshan Chandrasenan, 'UNIDROIT Principles to Interpret and Supplement the CISG: An Analysis of the Gap-filling Role of the UNIDROIT Principles' (2007) 11 *Vindobona Journal of International Commercial Law and Arbitration* 65; for the opposite view, see Lucia Carvalhal Sica, 'Gap-filling in the CISG: May the UNIDROIT Principles Supplement the Gaps in the Convention? (2006) 1 *NJCL*.

[61] Commission Legislative Proposal on a Common European Sales Law, 11 October 2011, COM(2011) 635, OJ 2012 C 37/04; Jan Smits 'The Common European Sales Law (CESL) Beyond Party Choice' (2012) 20 *ZEuP* 904.

[62] Unified interpretation and application is one of the most problematic issues; see e.g., Frank Diedrich, 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 *Pace Int'l L.Rev.* 303.

[63] Schwenzer and Leisinger, supra note 12.

regulatory framework, widespread use of SCCs and growing power of multinational enterprises are undeniable facts, the enforceability of SCCs through applicable contract law raises some concerns, especially facing the lack of case law. Therefore, it is necessary to examine if and how the features of SCCs influence their enforceability.

First of all, a sustainability clauses must become a valid part of a contract in order to be enforced. Companies and their suppliers should be aware that CSR standards may become an integral part of a contract not only by their direct implementation into the contractual text, but also by reference to another document, such as a code of conduct or a soft law instrument.[64] While express provisions do not pose any formal problems, the incorporation by reference can sometimes raise concerns as to whether the referenced document becomes validly a part of the contract. We can find guidance in international rules regarding standard terms and conditions. Basically, a code of conduct or any other CSR document may qualify as standard terms and conditions,[65] if it is drafted by one party only in advance of the contract and intended for general and repeated use.[66]

In order to establish if a referenced document became a part of a contract we have to look into the form and content of the reference. International contract law does not provide any specific rules in this respect; therefore, the general rules on interpretation of the parties' intentions will apply. The reference must be made in such a form and language that a reasonable person would comprehend that the mentioned document is intended to form part of the contract.[67] It does not need to be in writing or signed.[68] Furthermore, it does not need to be placed directly in the contractual text, but it can be for example made clear during pre-contractual negotiations.[69] Thus, signing a code of conduct by a supplier in the pre-contractual phase, which states that the buyer intends to cooperate only with suppliers fullfilling therein-stipulated requirements, may be interpreted as incorporation of the code as standard terms and conditions into the contract.[70] Moreover, it is necessary that suppliers become aware of the content of the

[64] Vandenbergh speaks of 'embedded agreements', see Michael P. Vandenbergh, 'The private life of public law' (2005) 105 *Colum.L.Rev.* 2029, 2045.

[65] Louise Vytopil, 'Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices' (2012) 8 *Utrecht Law Review* 155, 166.

[66] UPICC art 2.1.19; PECL art 2.209 (3); CESL art 2 (b); the CISG does not contain a special provision on standard terms and conditions.

[67] Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010), art 14, para 37.

[68] Ibid.

[69] Stefan Vogenauer and Jan Kleinheisterkamp (eds), Commentary on the Unidroit Principles of International Commercial Contracts (PICC) (OUP 2009), art 2.1.19, para 13.

70 Ibid art 2.1.19, para 13.

referenced CSR documents.[71] A mere statement that a supplier must fullfil requirements stipulated in a code of conduct is not sufficient;[72] he must be also able to access the text.[73]

Except for express provisions or incorporation by reference, some authors argued that sustainability requirements become part of international contracts impliedly, without the necessity of contractual parties expressly acknowledging them. [74] This may happen through the concepts of practices that the parties have established between themselves or international trade usages.[75]

A practice between parties can be established in a repeated or long-lasting business relationship.[76] In the CSR context, a practice may for instance emerge in relation to monitoring and enforcement of sustainability requirements. This may happen when a company adopts a suppliers' code of conduct stating the possibility of compliance monitoring through third-party audits, but does not incorporate it in its supply agreements. Then, if a supplier repeatedly allows the audits to take place and consequently accepts and follows eventual corrective action plans, we could assume that the compliance monitoring became an established practice between the parties.

Parties are also bound by trade usages that are widely known and regularly observed by traders involved in the particular trade and of which the parties knew or ought to have known.[77] Schwenzer and Leisinger suggest that observance of ethical standards constitutes such an international trade usage.[78] However, I argue that the scope of CSR obligations that would fall under the usage is not clearly established. We may compare all the public and private CSR initiatives and derive the common standards from them. However, the fact that there are some standards that a majority of companies agree would be good to follow does not mean that they are actually followed.[79] For example, while we could accept that the ban of child labour is theoretically accepted standard, the practice is different as breaches are common. Thus, I argue that we cannot consider general sustainability requirements to form an international trade usage as yet. However, sets of rules specific to individual industries may be found to function as

71 CISG and UPICC derive the obligation from the rules on the contract formation; CESL art 70(1).

[72] It may be sufficient if the supplier has 'an actual and positive knowledge' of the code, see Schwenzer, supra note 67, art 14, para 39. Some domestic legal systems are less strict; see Vogenauer and Kleinheisterkamp, supra note 69, art 2.1.19, para 17.

[73] *Machinery Case* (BGH, 31 October 2001, VIII ZR 60/01).

74 Schwenzer and Leisinger, supra note 12.

75 CISG art 9; UPICC art 1.9; PECL art 1:105; CESL art 67.

76 Schwenzer, supra note 67, art 9, para 8.

77 Schwenzer, supra note 67, art 9, para 16.

78 Schwenzer and Leisinger, supra note 12, at 264.

[79] Schimanski, supra note 37 (the study found that only 32 % of companies refer to the UNGC; however, the UNGC was still the initiative referred to most often).

trade usage if they are not only proclaimed by the majority of traders in those industries but also observed by the parties.

4.2 Content of Sustainability Clauses

The content of SCCs varies greatly in relation to the topic and protected interests as well as the style, length and specificity of language, and hence may influence their enforceability.

Next to substantive rules, international contracts also contain certain implied terms on the parties' obligations regarding their mutual relationship. Such additional terms can be derived from the principle of good faith.[80] This principle has a general character, underlying all international contracts, as well as specific applications, such as the parties' duty to cooperate and the ban on inconsistent behaviour. The duty to cooperate implies that parties should render to each other reasonable cooperation to perform their contractual obligations.[81] Suppliers could for example argue that a buyer did not cooperate enough if he requests that the suppliers act in socially responsible manner, but in reality thwarts compliance by other contractual terms (typically low prices or last-minute changes in orders).[82] The principle that the parties should not act inconsistently then for example implies that if a buyer implements a code of conduct into a contract by reference, but does not enforce it for a span of several years, he should not be able to enforce it suddenly without giving to the supplier prior notice.[83]

Moreover, it was already stated above that SCCs are disconnected from the subject matter of a contract. Such separation from the core of a business agreement may complicate assessment of supplier's compliance and also the enforcement of the provisions via traditional remedies.[84]

The final theme to mention in relation tothe content of SCCs, and also one of the most difficult features of SCCs to grasp, is the level of language specificity. The used language may influence the understanding and interpretation of a provision by the contractual parties and, thus, the scope of parties' obligations and available remedies. It is therefore important for companies to choose such a level of specificity that the contractual provisions bind suppliers to the extent that the companies require. It is not an easy task to find appropriate language in the CSR area, where regulation is quickly changing, a certain level of non-compliance is often

[80] UPICC arts 1.7 and 5.1.2; PECL art 6:102; CESL art 68. In CISG, good faith is considered a general principle of the Convention, see Ulrich Magnus, 'Comparative editorial remarks on the provisions regarding good faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7', in John Felemegas (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007); Vogenauer and Kleinheisterkamp, supra note 69, art 1.7, para 2.

[81] UPICC art 5.1.3.

[82] McBarnet and Kurkchiyan, supra note 19, at 88.

[83] Vogenauer and Kleinheisterkamp, supra note 69, art 1.8, para 11.

[84] See s 4.4.2 below.

expected and the provisions have to balance relationship and risk management.[85] Thus, although the conventional economic rationale of commercial contracts pushes the parties towards avoiding the costs and risk of litigation by formulating contractual terms as precisely as possible,[86] there are reasons why companies choose to adopt vague contractual terms. They may do so if they have low negotiation power, their CSR strategy is not strong enough, they wish to retain flexibility of the contract,[87] it is hard to control and measure the compliance, they wish to communicate goals and values to their business partners rather than to future judges[88] or there is no concrete statutory sanction threatening.[89]

Leaving SCCs vague may be beneficial for the parties and may be more helpful in reaching the objective of sustainable development. However, vague terms open up room for ambiguous interpretations, which may cause problems, especially in the event of their enforcement through review by the courts. The courts will have to apply the rules on contract interpretation, looking into parties' intentions and behaviour, the circumstances of the contract (including the preliminary negotiations), usages and practices, the nature and purpose of the contract, the common meaning of the terms and possibly good faith.[90] Using vague terms may thus cast doubts on the applicability of the underlying contract law and the enforceability of the terms. Such doubts undermine the notion of SCCs' binding nature, which is an important incentive for compliance even if the parties do not intend actually to use the formal enforcement mechanisms.[91]

4.3 Third Parties

4.3.1 Rights of Third Parties

Another aspect of SCCs to examine is their influence over out-of-contractual subjects. According to the principle of privity of contract, a contract may confer rights and impose

[85] Tim Coltman et al., 'Supply chain contract evolution' (2009) 27 *European Management Journal* 388, 389.

[86] George G. Triantis, 'The efficiency of vague contract terms: a response to the Schwartz-Scott theory of U.C.C. article 2' (2002) 62 *La.L.Rev.* 1065, 1067; Karen Eggleston, Eric A. Posner; Richard Zeckhauser, 'The design and interpretation of contracts: Why complexity matters' (2000) 95 *Nw.U.L.Rev.* 91, 104-106.

[87] McBarnet and Kurkchiyan, supra note 19, at 70; Collins, supra note 27, at 167 *et seq*.

[88] Triantis, supra note 86, at 1073.

[89] Eggleston, Posner and Zeckhauser call this reason 'political economy' (supra note 86, at 105); Louis Kaplow, 1992, 'Rules versus Standards: An Economic Analysis' (1992) 42 *Duke L.J.* 557, 559-560.

[90] CISG art 8; UPICC ch 4; PECL ch 5; CESL ch 6.

[91] Cf. Glinski, supra note 135, at 123.

obligations only on the contractual parties.[92] However, under some circumstances, this principle will be relaxed and third parties may accrue certain rights.[93] There are two situations where third parties are relevant to SCCs' enforcement: firstly, when third parties try to enforce the contract between the buyer and the supplier, and secondly, when the buyer tries to extend the applicability of SCCs beyond first tier suppliers.

Corporate CSR policies have always been criticized for their 'greenwashing' purposes, low effectiveness and soft nature.[94] Proponents of CSR as well as subjects influenced by ethically tainted behaviour have tried to find creative ways to ensure that companies keep to what they pledge. They have used the claim of false advertisement, breach of unilateral promises and other third party beneficiaries' claims.

False advertising cannot be used directly to enforce SCCs as contracts are addressed to suppliers. However, it can be claimed in order to enforce companies' public statements that sustainability standards are part of supply agreements, whose compliance is monitored by the company in question.[95] Therefore it is crucial for companies to make good choices as to what they include in their sustainability reports or websites.

The possibility to claim breach of unilateral contracts, i.e. unilateral statements that create contractual relationships, depends on the specific jurisdiction. European contract law instruments suggest that a unilateral statement may be enforceable if the person making it intends to create binding effects.[96] The intention is to be determined from how the addressee would reasonably understand it.[97] In the USA, courts have developed the doctrine of 'unilateral contract', under which unilateral statements can have a contractual character although the subjects making them do not intend to extend a contractual offer to the addressees.[98] The

[92] Justinian's Institutes, 3 19 19; see Jan Hallebeek, 'Contracts for a third-party beneficiary : a brief sketch from the Corpus Iuris to present-day civil law' (2007) 13 *Fundamina: A Journal of Legal History* 11, 12.

[93] Ingeborg Schwenzer and Mareike Schmidt, 'Extending the CISG to Non-Privity Parties' (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration* 109, 109.

[94] See e.g. Subhabrata Bobby Banerjee, 'Corporate Social Responsibility: The Good, the Bad and the Ugly' (2008) 34 *Critical Sociology* 51; Igor M. Alves, 'Green Spin Everywhere: How Greenwashing Reveals the Limits of the CSR Paradigm' (2009) 2 *Journal of Global Change & Governance* 1; for new perspective of the criticism of CSR see Gerard Hanlon, Peter Fleming, 'Updating the Critical Perspective on Corporate Social Responsibility' (2009) 3 *Sociology Compass* 937.

[95] A landmark case is *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). See also European Center for Constitutional and Human Rights and the Clean Clothes Campaign against the German retailer Lidl (Heilbronn district court, Germany).

[96] PECL art 2:107; Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Outline Edition, Selier 2009), art 4:301.

[97] Cf DCFR art 4.302.

[98] *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 115 L.R.R.M. 4493 (Minn. 1983); see also Brudney, supra note 24, at 577.

Walmart case[99] however showed that the language used and the method of dissemination will be absolutely essential in establishing the existence of such a contract.

Finally, external subjects may pursue rights as third party beneficiaries. With some differences, the general conditions for creation of a third party right under international contract law instruments are similar.[100] As a starting point, the contractual parties must intend to confer such a right. The intention can be either expressed or implied in the contract.[101] Normally, a third party's right will not be found if a third party benefitted from the contract only incidentally.[102] It has been argued that this cannot happen in the CSR area as the essential goal of buyers' codes is to benefit workers or other parties such as people living in the vicinity of suppliers' factories.[103] However, some also claim that the right can only arise from promissory obligations to benefit others and not from obligations not to harm others, which is relevant especially in relation to environmental and anti-corruption issues.[104] Furthermore, the conferred right must be specific. If there is no clear right, for example because vague language is used, there can be no breach. Lastly, the third party must be identified with adequate certainty, at least as a member of a specific group.[105] This requirement can be especially complicated in relation to breaches of a contractual duty of care where there is an indefinite number of third party beneficiaries,[106] such as in relation to carbon emissions that have global consequences.[107]

While the various third parties' strategies have not hitherto been successful at courts,[108] they have not been entirely rejected either. The success of such claims will largely depend on the formulations of SCCs. Companies are aware of this 'open door' and try to minimize the possible risks by the inclusion of disclaimers in their contracts.[109] However, we can see positive indirect effects of these strategies; the negative advertising connected to any formal proceeding force companies to change their CSR strategies, namely to become more transparent and

[99] *Doe v. Wal-Mart Stores*, Inc., 572 F.3d 677 (9th Cir. 2009) (*Walmart case*).

[100] UPICC ch 5 s 2; PECL art 6:110; CESL art 78. CISG does not provide for third party beneficiaries' rights, see art 4. Cf Schwenzer and Schmidt, supra note 93, at 114.

[101] Vogenauer and Kleinheisterkamp, supra note 69, art 5.2.1, para 11.

[102] *Walmart case*.

[103] Phillips and Lim, supra note 24, at 369; Brudney, supra note 24, at 580.

[104] Stephen A. Smith, 'Contracts for the Benefit of Third Parties: In Defence of the Third-Party Rule' (1997) 17 *Oxford Journal of Legal Studies* 643, 646.

[105] Vogenauer and Kleinheisterkamp, supra note 69, art 5.2.2, paras 3-5.

[106] A duty to care is a legal obligation, under which a subject is obliged to exercise reasonable care in performing actions that could result in harm to others.

[107] George S. Geis, 'Broadcast Contracting' (2012) 106 *Nw.U.L.Rev.* 1153.

[108] Most cases being dismissed or settled out of court.

[109] For example, art 15.8 of the Product and Service Supply Agreement of Verizon Australia Pty. Limited, version PSSA –Australia_051010-2 <www.verizonenterprise.com/resources/legal/au-vzb-pssa_en_xg.pdf> accessed 26 February 2014.

honest about them. Therefore, the third parties' actions can be seen as more of a 'stakeholder tactic', rather than a personal attempt by the plaintiffs to gain compensations for their losses.

4.3.2 Extension of SCCs beyond First-tier Suppliers

Implementation of CSR issues into international supply contracts is a positive step towards global sustainability; however, it may lead nowhere if the provisions are not enforced throughout the whole supply chain.[110] This remains a major issue in CSR, since buyers may force compliance on their direct suppliers, but face difficulties in achieving compliance of further supply chain tiers with whom they have no direct legal relationship.[111]

Looking at this conundrum, one possibility would be to treat SCCs as a kind of warranty. Implied warranties of merchantability and fitness for a particular purpose are in some jurisdictions automatically transferred with the goods' ownership on each subsequent buyer.[112] A sub-buyer then enforces the warranty via a direct contractual claim against the original seller. However, as SCCs do not influence the tangible quality of goods, they can hardly create such claims. Moreover, although the extension of implied warranties to subsequent buyers is well established in some jurisdictions, it is still unknown in others.[113] Hence a question arises as to which law is applicable to decide the admissibility of the claim.[114] If we take international contract law as the applicable legal framework, such claim would not most probably be admissible.[115]

Since the legal enforcement of contracts between two upstream subjects in a supply chain is not realistic, the regulators expect that companies will couple the contractual chain of CSR requirements with due diligence processes.[116] However, the buyers will find themselves in exactly the same situation: able to control their direct suppliers but unable to control the execution of due diligence by sub-suppliers. So, although such requirements strengthen the pressure on direct suppliers, they may not secure greater confidence of buyers in relation to further tiers of their supply chains. Yet, extending the applicability of SCCs up the supply chain

[110] Margaret M. Blair, Cynthia Williams and Li-Wen Lin, 'The new role for assurance services in global commerce' (2008) 33 *J.Corp.L.* 325, 337 *et seq*.

[111] Fabrizio Cafaggi (ed), *Enforcement of Transnational Regulation: Ensuring Compliance in a Global World* (Edward Elgar 2012) 6.

[112] Schwenzer and Schmidt, supra note 93, at 111-113; Nicolas Carette, 'Direct Contractual Claim of the Sub–buyer and International Sale of Goods: Applicable Law and Applicability of the CISG' (2008) 16 *ERPL* 583, 586.

[113] Carette, *supra* note 112, at 589.

[114] Donald J. Smythe, 'The Road to Nowhere: Caterpillar v. Usinor and CISG Claims by Downstream Buyers Against Remote Sellers' (2011) 2 *George Mason J.I.C.L.*, 123.

[115] *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp 2d 659 (N.D.Ill. 2005).

[116] SRSG, supra note 40, at 5-6.

remains one of the few available tools to cope with the imposed duty to manage sustainability throughout the whole supply chain.

4.4 Remedies

4.4.1 Three-step Best Practice: Monitoring, Relational Enforcement, Contract Termination

The last feature to consider when assessing the enforceability of SCCs under the international contract law is the range of available remedies and other enforcement tools.

An extension of SCCs beyond first-tier suppliers is a complex issue, but not even a direct legal relationship ensures that sustainability requirements will or even can be effectively monitored and enforced. On the one hand, companies may not intend to do that, if they merely use SCCs as a part of their 'greenwashing' strategy. On the other hand, companies sincerely pursuing sustainability goals may encounter a lack of enforcement tools or suppliers' resistance to cooperate.

Before analysing various enforcement tools, the meaning of 'enforcement' should be briefly discussed. Enforcement is not always of a formal legal character. Even better results can, and often are, achieved through informal processes, such as reputation effects. The latter predominates in relation to SCCs. Companies do not start formal enforcement procedures, but rather choose informal ways to secure suppliers' compliance.[117] One reason is that formal proceedings have a major drawback - they have a remedial character, while the character of SCCs is preventive, aiming at avoiding negative impacts of corporate behaviour on third parties,[118] assuring suppliers' compliance with sustainability objectives and managing business and legal risks in the case a breach occurs.[119] For this purpose, companies have developed a three-step best practice.

The first step of SCCs' enforcement - preventive monitoring - is essential, because non-compliance is not detectable after the goods are delivered.[120] For example, we cannot see from the goods' appearance that children were used to produce it. The majority of companies use suppliers' self-assessment to start with. It is often required during the suppliers' selection

[117] Lin, supra note 19, at 724.

[118] Ibid at 726.

[119] McBarnet and Kurkchiyan, supra note 19, at 75; Fabrizio Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 *Fordham Int'l L.J.* 1557, available through < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2153096&download=yes> accessed 26 February 2014, at 29.

[120] Schwenzer and Leisinger, supra note 12, at 265.

process as a part of risk assessment and due diligence as well as during the contractual term. As a cheap although highly subjective alternative, self-assessments can be conducted often and commonly serve as detecting 'red flag' issues, which are then further followed up by suppliers' audits.[121] A variety of audits exists, including internal and external, announced and unannounced audits on site, audits coordinated among groups of firms and according to different audit standards. Each type has some associated positives and negatives, but all of them face a common criticism pointing towards unreliable and subjective results and corruption practices.[122] In response to the criticism, companies are becoming more transparent about the audit results.[123] This information, despite its possible incompleteness, is absolutely essential for implementing any practical change in suppliers' behaviour through various soft and hard remedial strategies.

If non-compliance is discovered, the buyer will usually work with the supplier to find solutions. The most common tool that companies use is a so-called 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. The aim of these relational strategies is to secure compliance with sustainability requirements in a collaborative manner and avoid disputes. It is common that buyers expect a certain level of non-compliance among their suppliers and thus do not break off cooperation if a supplier is willing to improve.

In addition to the positive relational enforcement tools, companies may also rely on name-and-shame strategies. An increasing number of CSR initiatives establish a database of compliant suppliers.[124] A supplier, who is erased from such a database or, worse still, listed as non-compliant can no longer be used by members of the specific initiative.

Relational enforcement tools are essential for the effectiveness of SCCs as they aim to actually change behavioural patterns in supply chains. However, although neither companies nor regulators stress it, the effectiveness of the relational tools is grounded in the threat of formal legal sanctions.[125] This reliance on the indirect enforcement power of formal legal sanctions is

[121] E.g. Johnson&Johnson Responsibility Report 2011 <https://www.jnj.com/sites/default/files/pdf/2011-responsibilty-report.pdf> accessed 26 february 2014, at 27.

[122] Clean Clothes Campaign report [2005] *Looking for a Quick Fix: How Weak Social Auditing is Keeping Workers in Sweatshops*, at 17-31; McBarnet and Kurkchiyan, supra note 19, at 77-78.

[123] E.g. Nestlé Creating Shared Value Report 2011 <http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/2011-csv-report.pdf>, at 145.

[124] E.g. ICTI Care program in the toy industry <http://www.icti-care.org/e/content/cat_page.asp?cat_id=211> accessed 26 February 2014.

125 Yehuda Adar and Moshe Gelbard, 'The Role of Remedies in The Relational Theory of Contract–A Preliminary Inquiry' (2011) 7 ERCL 399, 405-406; Robert A. Kagan, Neil Gunningham and Dorothy Thortnton, 'Fear, duty and regulatory compliance: lessons from three research projects', in Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Edward Elgar Publishing 2011) 41.

evident from the frequent reservation of the right to terminate a contract if the supplier's non-compliance is not remedied.

Contract termination play an important role; a refusal to source from a supplier is considered as the most severe punishment.[126] Although contract termination is a remedy provided to a buyer under all international contract law instruments,[127] it is most often executed outside of any formal enforcement proceedings; a company may simply stop placing orders to the supplier.[128] 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.[129] This is easy if the contract states that non-compliance with SCCs constitutes a fundamental breach,[130] but much more difficult if it does not. Usually, a fundamental breach is found when the main obligation under a contract is not fulfilled.[131] A breach of ancillary obligations can also result in a fundamental breach, but most probably not if those obligations were not connected to the goods' non-conformity.[132] 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 CSR standards.[133]

At the end, it should be stressed that termination of a relationship with a non-compliant supplier is not an effective way of using SCCs for sustainability goals. On the contrary; contract termination means that the supplier will not change its behaviour or, perhaps more relevantly, that the buyer does not help the supplier to change its behaviour. Therefore, it can be concluded that the possibility of contract termination plays an important role in the use of SCCs, but the role relates more to the deterrence function of such a provision than its actual use. In this sense, underlying contract law is crucial in allowing multinational buyers to exert legal pressure over their suppliers.

[126] Collins, supra note 27, at 101.

[127] CISG art 49; UPICC ch 7 s 3; CESL ch 11 s 5; PECL ch 9 s3.

[128] Kocher, supra note 18, at 268.

[129] CISG art 25; UPICC art 7.3.1(2); CESL art 87(2)(a); PECL art 8:103. Schwenzer and Leisinger, supra note 12, at 268.

[130] E.g. Boeing Research and Technology (BR&T) Non-Government General Terms & Conditions (10/12/2010), <http://www.boeingsuppliers.com/terms_conditions/RD_GP_10-12-10.pdf> accessed 26 February 2014, at 11-12.

[131] Schwenzer, supra note 67, art 25, paras 57-58.

[132] Vogenauer and Kleinheisterkamp, supra note 69, art 7.3.1, para 87.

[133] On foreseeability see Schwenzer, supra note 67, art 25, paras 26-33.

4.4.2 Specific Performance and Damages

A brief note should address the other two typical contractual remedies next to contract termination - specific performance and damages - although they are not used in the enforcement practice of SCCs.

Specific performance actually cannot be used in relation to SCCs, since these requirements do not relate to the physical product quality.[134] The courts have been reluctant to recognize CSR production method-related requirements as product characteristics in consumer cases, and it can be expected that the same would happen in business cases as well.[135]

In order to claim damages under international contract law the buyer then has to prove a breach, damage that was foreseeable and a causal relationship between the two.[136] All may pose problems in relation to SCCs. Firstly, a breach can occur only where there is a binding obligation. As discussed earlier, the binding nature of SCCs is dependent on the relevant provision's form and specificity. Secondly, if an SCC is breached, most likely a non-pecuniary damage occurs, usually a reputational harm. Whereas UPICC and PECL expressly provide for the possibility of recovering non-pecuniary loss,[137] the same is the subject of an academic discussion and contradicting court decisions under CISG[138] and it is expressly excluded in relation to reputational loss by CESL.[139] Finally, the causal relationship between breach of an SCC and relevant damage will often be '*a matter of speculation and guesswork*'.[140] And it will be even harder if a buyer claims a future loss, which must be proved with reasonable certainty.[141] 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.

In the light of the foregoing, it seems that awarding damages for breaches of SCCs under international contract law it is not feasible. Although theoretically not impossible, the practical limitations appear to be simply too complex.

[134] Supra note 20.

[135] Kocher, supra note 18, at 270; Carola Glinski, 'Corporate code of conduct: moral or legal obligation?' in McBarnet, Voiculescu and Campbell, supra note 5, at 125.

[136] CISG art 74; UPICC arts 7.4.2 and 7.4.4; PECL ch 9 s 5; CESL arts 159 and 161; Schwenzer, supra note 67, art 74, para 64.

[137] UPICC art 7.4.2(2); PECL art 9:501(2)(a).

[138] Schwenzer and Leisinger, supra note 12, at 269; Peter Schlechtriem, 'Non-Material Damages – Recovery Under the CISG?' (2007) 19 *Pace Int'l L.Rev.* 89.

[139] CESL, regulation proposal art 2(c).

[140] Schlechtriem, supra note 138, at 94.

[141] UPICC art 7.4.3(1); PECL art 9:501(2)b); CESL art 159(2). In regards to CISG, see CISG-AC Opinion No. 6, Calculation of Damages under CISG Article 74, Rapporteur: Professor John Y. Gotanda, Villanova University School of Law, USA, para 3.19.

5 Hardening of Soft Law Effects

5.1 Soft Law and Legalization

Looking back on all the features of SCCs, these provisions would not in most cases be held enforceable by courts since: their inclusion into a contract is not always done in an appropriate manner; they are often vague to an extent that no clear obligation can be deduced from them; third parties have limited enforcement powers; and contract law remedies are not particularly suitable to formally enforce SCCs. This leads to the quick conclusion that international contract law rather hinders than supports the use and effects of SCCs. In other words, that the contractual form does not actually imparts hard law edge on soft sustainability requirements.

However, the conclusion could be impetuous. As this article examines the contribution of SCCs towards global sustainability rather than the protection of contractual parties' interests, the main questions are whether the contractual form of the clauses manages to change suppliers' behaviour towards more sustainable one and whether it can help other soft and private regulations to overcome their deficiencies. These effects may be achieved by the theoretical subjection of SCCs to international contract law, without the need to formally enforce them.

A major contribution of formal contract law lies in the legalization of CSR, which was traditionally perceived as an area of voluntary action. It has been argued that legalization leads to greater cooperation and compliance of actors at the international level.[142] Legalization, understood as a 'move to law',[143] does not necessarily mean that contractual form transforms legally unenforceable soft requirements into legally enforceable hard ones, but rather transforms soft regulation into less soft. Abbott et al. define legalization as a multidimensional continuum oscillating around three dimensions: *obligation*, *precision* and *delegation*.[144] At one end of the spectrum lies typical hard law with all three dimensions maximally legalized, at the other end is a complete absence of legalization, meaning no law in any sense.[145] Any regulation that is weakened around one or more of the dimensions constitutes soft law.[146]

Global CSR regulation is dominated by soft law instruments. By insertion of sustainability requirements into supply chain agreements the requirements are hardened to certain extend

[142] Miles Kahler, 'Conclusion: The Causes and Consequences of Legalization' (2000) 54 *Int'l Org.* 661, 673 *et seq.*

[143] Louis Bélanger and Kim Fontaine-Skronski, ''Legalization' in international relations: A conceptual analysis' (2012) 51 *Soc.Sci.Inf.* 238, 239.

[144] Kenneth W. Abbott et al., 'The Concept of Legalization' (2000) 54 *Int'l Org.* 401, 401.

[145] Ibid at 402.

[146] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2009) 54 *Int'l Org* 421, 422.

around each of the dimension. However, it is important to bear in mind that the legalization effect primarily depends on the parties' will to implement SCCs into their business contracts. Thus, although contracts can be seen as creating binding obligations, they cannot fully substitute governmental regulation.[147]

5.2 Obligation

Obligation is the notion of binding force of a commitment or a rule; it lies deep in our conceptual understanding of what we consider as *binding*. The obligation dimension of sustainability requirements may be influenced in several ways by the contractual form and/or the standardization of the CSR area.

Using the form of a binding commitment, even though the undertaking may not be legally enforceable, is a signal of its seriousness towards suppliers.[148] It has been suggested that the increased credibility of commitment through the use of binding language might compensate for the low possibility of non-compliance detection.[149] '...(T)urning a promise into a contract means that the promise is to be believed, accepted and relied upon'.[150] The reliance is moreover created not only between the contractual parties, but also to third subjects.

By signature the requirements furthermore gain the character of agreed terms.[151] Such formal and conscious acceptance of the terms as a part of a business deal is likely to increase the internalization of the values and goals by the supplier. This may also explain why companies insist on signing their codes of conduct by suppliers even without the intention to create a contract.

By taking on the contractual form the CSR standards also come under the moral imperative of *pacta sunt servanda*.[152] A signature may seem unimportant if the incorporated standards are drafted in vague terms; but it makes a clear, almost symbolic demarcation of what is considered a part of the deal and, therefore, ethically binding.[153] A general consensus exists that a legally

[147] See also section 3.1 above.

[148] Cf Rosalinde Klein Woolthuis, Bas Hillebrand and Bart Nooteboom [2002] *Trust and Formal Control in interorganizational Relationships*, ERIM Report Series Research in Management; see also Abbott and Snidal, supra note 146, at 422.

[149] Abbott and Snidal, supra note 146, at 428-429.

[150] Denise Rousseau, *Psychological Contracts in Organizations: Understanding Written and Unwritten Agreements* (SAGE Pub1995) 18.

[151] Cf. Rousseau, supra note 150, at 9-10.

[152] Richard Hyland, ''Pacta Sunt Servanda': A Meditation' (1993-94) 34 *Va.J.Int'l L.* 405, 427.

[153]Morris R. Cohen, 'The Basis of Contract' (1933) 46 *Harv.L.Rev.* 553, 582.

valid contract imposes moral obligations on a promisor; thus, a supplier will probably feel obliged to comply with the standards, irrespective of their actual legal force.[154]

Some authors also speak about the formalization of CSR requirements and regulation.[155] CSR regulations occupy an unclear position within the hard legal framework. Bestowing a contractual form on these regulatory forms allows us to place them within the established conceptual frameworks of binding and non-binding rules.

A consistent and widespread use of SCCs also contributes to the standardization of the area. It leads to the development of best practice for CSR in international supply chains,[156] where legal regulation is missing.[157] It provides companies with practical guidance on what stakeholders expect of them and how to fullfil those expectations,[158] and a benchmark for comparison with their peers.[159] It also creates pressure on companies who lag behind. With more subjects implementing best practice, the perception of participation as an obligation strengthens.[160]

The use of SCCs could even evolve into a trade usage if it becomes widely known and regularly observed by contractual parties in a particular trade.[161] This level of legalization is of great importance, because it strengthens the obligation considerably, transforming soft best practice into hard trade usage that can be interpreted and applied by courts or arbitral tribunals.

Finally, it is not always necessary to enforce the law in order to give it effect. Making a statement through law or private contracts may alone change our social norms and behaviour.[162] This phenomenon is known as the expressive function of law.[163] International supply contracts will lead to different expressive effects in different jurisdictions. Where the contractual content conforms to the local social norms, it will be easily internalized by suppliers and vice versa. Local cultural and social norms can be very strong and hard to change through

[154] For a literature review on the empirical evidence, see Ben Depoorter and Stephan Tontrup, 'How law frames moral intuitions: the expressive effect of specific performance' (2012) 54 *Ariz.L.Rev.* 673, 706, fn 141.

[155] Collins, supra note 27, at 174 *et seq.*

[156] IACCM report, supra note 6, at 23-24.

[157] Glinski, supra note 135, at 129.

[158] See e.g. Stephen Brammer et al. [2011] *Managing sustainable global supply chains: Framework and Best Practices*, Network for Business Sustainability report.

[159] Christopher E. Bogan and Michael J. English, *Benchmarking for Best Practices: Winning Through Innovative Adaptation* (McGraw-Hill 1994).

[160] Kahler, supra note 142, at 680.

[161] See s 4.1 above.

[162] Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 *U.Pa.L.Rev.* 2021, 2025; Kenneth W. Abbott and Duncan Snidal, 'Values and Interests: International Legalization in the Fight against Corruption' (2002) 31 *JLS* S141, S151; Abbott and Snidal, supra note 146, at 425.

[163] Robert Cooter, 'Expressive Law And Economics' (1998) 27 *JLS* 585, 587.

international law. A bottom-up approach through private contracts may thus be more successful.

To sum up, SCCs change the perception of *obligation* not only on the part of the contractual parties but also on the part of a broader audience. The extra-contractual effects may lead to hardening of obligations all the way from the soft to the hard end, potentially leading to a change in social norms or the creation of a trade usage that becomes impliedly included in all business contracts for the sale of goods.

5.3 Precision

The precision of language used in SCCs has already been discussed in relation to the link between the language specificity and SCCs' enforceability. The discussion here moves to the question whether the precision dimension is legalized by the inclusion of soft CSR requirements into hard international supply contracts.

CSR regulations are mostly drafted in general to vague language that has to be clarified through their implementation and enforcement. This vagueness has been the subject of strong criticism for years now[164] and appears despite the fact that precision of language is considered an aspect of CSR regulation directly linked to the compliance level of the regulated subjects. Precision is closely connected with the delegation dimension of legalization. A vague regulation may become precise in adjudication.[165] Since we have no decision-making authority at the transnational level, it seems that precision in the language of CSR regulation is even more important, in order to limit inappropriate and self-serving interpretations.[166]

At first, it seems that the contractual form cannot change the precision of CSR regulations; this is especially true when it comes to express provisions. However, the situation may be different when speaking about incorporation by reference, because we have to check the language of both the standards themselves and the reference. Vagueness of CSR standards will not be remedied by their inclusion into a contract, regardless if the text of the reference is vague or precise. However, if precisely drafted sustainability standards are included in a contract through a vaguely drafted reference, for example a provision stating that 'suppliers should support and

[164] Andreas Rasche, ''A necessary supplement': what the United Nations global compact is and is not' (2009) 48 *Business & Society* 511, 522-524; Surya Deva, 'Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34 *Syracuse J.Int'l L.& Com.* 107, 129.

[165] Abbott and Snidal, supra note 146, at 421.

[166] Similarly in relation to international law, Kern Alexander, 'The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach' (2000) ESRC Centre for Business Research, University of Cambridge, Working Paper No. 168, 6; or Abbott et al., supra note 144, at 414.

respect the company's code of conduct', such a reference may undermine the precisely described obligation in the referred document.[167]

Overall, the contractual form does not enhance precision in the same way as in relation to obligation. The vagueness of regulation cannot be remedied through a mere change of legal form and on the contrary a vague contractual provision may impede the effects of high precision in incorporated regulation.

5.4 Delegation

Delegation means that third parties have been granted authority to implement, interpret and apply the rules.[168] This dimension raises the most concerns in relation to transnational CSR regulation that is based on voluntary participation. National and international courts do not have the jurisdiction to decide disputes in this area[169] and there is no official executive power to overview compliance. The compliance monitoring and enforcement is thus performed by companies themselves or by third party auditors. No connection to public authorities and no formal enforcement power of these subjects and their findings result in doubtful quality and effectiveness of the transnational CSR regulation.[170] The question is whether this deficiency can be cured by using contracts.

In the implementation and monitoring phases, the contractual form does not really assist the delegation dimension. As parts of private contracts, SCCs are implemented and monitored by the contractual parties. Although the contractual parties may assign this task to a third party (e.g. an external auditor), this does not mean that the delegation is strengthened, because the third party usually does not have the authority to carry through enforcement of its findings in a binding manner.[171]

With regard to the enforcement phase, by taking the form of a contract, the delegation is hardened as SCCs become subjected to the underlying law of contract. Thus, at least theoretically, their enforcement can be carried out through courts or arbitral tribunals that have

[167] CF the HP's Supplier Social & Environmental Responsibility Agreement <http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supagree.pdf> accessed 26 February 2014 and HP' General Specification for the Environment <http://www8.hp.com/us/en/hp-information/global-citizenship/society/general-specification-for-the-environment.html> accessed 26 February 2014.

[168] Abbott et al., supra note 144, at 401.

[169] Courts or tribunals may however refer to transnational CSR regulation or enforce it indirectly, using other legal instruments, such as advertising law (supra note 95) or labor law (see e.g. André Sobczak, 'Corporate social responsibility: From labour law to consumer law' (2004) 10 *Eur. Rev. of Labour and Research* 401).

[170] David L. Owen et al., 'The new social audits: Accountability, managerial capture or the agenda of social champions?' (2000) 9 *European Accounting Review* 81.

[171] Cf. ibid at 415.

the jurisdiction to decide international disputes according to the applicable contract law.[172] However, only contractual parties, or eventually third party beneficiaries, can seek enforcement. If they do not, the possibilities of indirect enforcement by extra-contractual parties are only limited.[173] Moreover, as described earlier, international contract law may not be suitable to enforce social and environmental requirements, as the available remedies may not correspond to the underlying purpose of the CSR policies and there are unlikely to be remedies for all affected subjects. Nevertheless, the fact that there is rarely enforcement through formal proceedings and that contract law remedies are not ideal does not erase the existing possibility of courts to sanction non-compliance.

Given the foregoing, the conclusion must be that even the theoretical possibility of seeking formal enforcement strengthens the delegation dimension of soft CSR regulation considerably, since it formally transfers the right to interpret SCCs and resolve any disputes to independent parties (courts) that interpret and apply international contract law.

6 Conclusion

The aim of the article was to explore the general assumption that contractual form imparts hard law character to soft social and environmental requirements and thus contributes to global sustainability. Three issues were addressed to tackle the problem: preconditions for SCCs' effectiveness in regulating transnational sustainability, their enforceability according to the international contract law instruments and their legalization effects.

The examination of the background that SCCs operate on provides the answer to the initially posed research question: these provisions could indeed be the regulatory solution to global challenges we are desperately seeking. The power of multinational companies allows them to develop and implement sustainability requirements within their spheres of influence that transcend national boundaries. These requirements may possibly substitute missing or inefficient states' regulation and cure the deficiencies of transnational soft and private initiatives. The presumed success of SCCs is rooted in the understating that as parts of business contracts, SCCs are ultimately enforceable by courts according to the applicable contract law. However, as it stands the majority of current SCCs would not be formally enforceable due to their unclear contractual form, frequent vagueness and disconnectedness from the subject matter of the contract. Still, as the discussion on legalization effects of SCCs showed, the reliance on international contract law framework is not groundless. Opposite so; the inclusion of a requirement into a contract triggers psychological (e.g. internalization of values, moral

[172] For contract enforcement mechanisms' overview, see Michael Trebilcock and Jing Leng, 'The Role of Formal Contract Law and Enforcement in Economic Development' (2006) 92 *Va.L.Rev.* 1517. For SCCs' enforcement mechanisms' overview see Lin, supra note 19, at 723 *et seq.*

[173] See s 4.3.1 above.

obligations) as well as legal (e.g. standardization, development of new trade usage) processes that have hardening effects. The contractual form thus strengthens suppliers' perception of the agreed terms as binding, although they may not be originally enforceable, and hence enhances the level of suppliers' compliance. The conclusion therefore is that SCCs have the potential to be an effective form of transnational regulation for achieving global sustainable development. The question is how to make sure that the potential is used and maximized.

Some results are already achieved by the mere act of SCCs' inclusion into contracts. For example, the expressive function of contracts will work regardless of the parties' intention. However, the positive effects of SCCs on suppliers' social and environmental performance can furthermore be enhanced by modification of SCCs' features. With stronger contractual commitment, more precise language and use of the three-step best practice in SCCs' enforcement combining formal with informal means, SCCs can become formally enforceable and achieve stronger hardening effects. This optimal use of SCCs can be influenced by the contractual parties as well as by the underlying public and private regulations.

Therefore, the findings of this article may firstly serve as an inspiration for companies to focus the improvement of their supply chain strategies, whether in order to achieve sustainable development goals or to better protect their own interests. Understanding when SCCs are actually enforceable or what extra-legal effects they may cause is essential for their successful design and use.

However, more importantly, the author calls for more attention of both public and private regulators to the use of SCCs. As states are unable to reach solutions to transnational social and environmental challenges on the international level, it could be easier for them to adopt policies, laws and regulations supporting corporate activities such as SCCs that may have the necessary transnational reach, but mean lower negotiation costs for states. These regulations could take the form of extending the CSR reporting obligation to the usage of SCCs, building institutional help with enforcement by third parties or offering assistance in drafting SCCs (e.g. through official guidelines) or even their pre-approval. Such governmental regulations would also strengthen the legitimacy of SCCs.

The thoughts indicated above in relation to public regulators can be similarly applied to private regulators. Although the range of private CSR regulations is overwhelming, most of them do not provide any rules on SCCs. As shown above, they do require or recommend to companies to use contracts as a tool to implement CSR strategies, but do not provide any guidance as to how, in what form and with what content SCCs should be implemented and enforced. Private regulators should focus more on this practical side of SCCs' use and possibly develop more precise guidelines and rules than has hitherto been the case.

With the conscious use of underlying contract law and CSR regulation for the optimal use of SCCs, we could be one step closer to effective regulation of global social and environmental issues.