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Sustainable development clauses in international contracts through the lens of the UNIDROIT principles

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Abstract

Most transactions that leave an imprint on the environment and communities are organized by commercial contracts. However, little is known about the way in which parties reflect sustainable development in contractual clauses. How can parties to international contracts commit to respect sustainable development goals? What are the possible degrees of commitment? Which contractual mechanisms can apply to the monitoring of compliance? How does one establish a link between the failure to meet sustainable development goals and the contractual liability or termination of contract? This article identifies contractual clauses relating to sustainable development and analyses these clauses through the lens of the 2016 International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (PICC). Drawing inspiration from open access contracts, the analysis will demonstrate that Article 1.8 of the PICC, precluding inconsistent behaviour, and Articles 5.1.4 and 5.1.5, on the duty of best efforts and the obligation to achieve a specific result, as well as the provisions on liability, can assist contract drafters, judges, and arbitrators in drafting and interpreting such clauses.

I. Introduction

From natural gas extraction to the construction of wind turbines, and from the supply of coffee beans to long-term investment contracts, most transactions that leave an imprint on the environment and communities are organized by commercial contracts. Little is known, however, about the way in which parties reflect sustainable development in contractual clauses. Whereas general contract law aspects relating to sustainable development have been addressed in scholarship,¹ several questions need further consideration. How can

This article is based on an essay submitted in April 2022 to the UNIDROIT and Sustainable Development Essay Competition, supported by the International Law Institute (ILI) and facilitated by the UNIDROIT Foundation. The essay has been awarded the first prize, and findings have been presented at a webinar hosted by the UNIDROIT in August 2023.

¹ See (with further references) Fabrizio Cafaggi, 'Transnational Governance by Contract: Private Regulation and Contractual Networks in Food Safety' in Axel Marx (ed), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Elgar 2012); Martijn Willem Scheltema, 'An Assessment of the Effectiveness of International Private Regulation in the Corporate Social Responsibility Arena: a Legal Perspective' (2014) 21(3) *Maastricht Journal of European and Comparative Law* 383; Paul Verbruggen, 'Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial contracts (2014) 35

parties to international contracts commit to respect sustainable development goals? What are the possible degrees of commitment? Which contractual mechanisms can apply to the monitoring of compliance? How does one establish a link between the failure to meet sustainable development goals and the contractual liability or termination of contract?

This article identifies contractual clauses relating to sustainable development and looks at these clauses through the lens of the 2016 International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC).² Drawing inspiration from open access contracts,³ the analysis will demonstrate that Article 1.8 of the PICC, precluding inconsistent behaviour, and Articles 5.1.4 and 5.1.5, on the duty of best efforts and the obligation to achieve a specific results, as well as the provisions on liability, may assist contract drafters, judges, and arbitrators in drafting and interpreting such clauses.

Before doing so, a remark on the choice to discuss such clauses through the lens of the PICC needs to be made. International contracts are ultimately governed by (mandatory) national law, as defined by conflict of laws rules, unless a uniform instrument—for example, the Convention on Contracts for the International Sale of Goods (CISG)—applies.⁴ Since national approaches to the interpretation of contracts vary, a meaningful discussion on contract clauses needs to include comparative law observations. Alternatively, one could rely on an international soft law instrument, which offers solutions formulated with due regard to comparative law considerations. The PICC meet this condition, and the principles have been used by the judges as a source that helps interpret national law⁵ and the CISG.⁶ Furthermore, the PICC can be invoked in situations where national contract law plays a less important role than party autonomy. For instance, if a contractual dispute is submitted to arbitration and the tribunal is allowed to decide as *amiable compositeur*, it may rely on the PICC, because they draw considerable authority on the experience of the drafters and on the quality of solutions, which reflect modern approaches to contract law.⁷ Hence, the PICC offer an appropriate reference for a discussion on clauses relating to sustainable development in this article.

Recht der Werkelijkheid 3; Katerina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015); Alex Geert Castermans and Bénédicte Fauvarque-Cosson, 'CSR in Contracts' in Alex Geert Castermans and Caspar van Woensel (eds), *CSR for Young Business Lawyers* (Eleven International Publishing 2017) 109; Alex Geert Castermans and Cornelis J.W. Baaij, 'The Potential of Contractual Assurances to Advance Supply Chain Due Diligence' Robert Schuman Centre for Advanced Studies Research Paper No. RSC 2023/28; Ingeborg Schwenzer, 'Ethical Standards in CISG Contract' (2017) 22 *Uniform Law Review* 122; Vibe Ulfbeck and Ole Hansen, 'Sustainability Clauses in an Unsustainable Contract Law?' (2020) 16(1) *European Review of Contract Law* 186.

² <<https://www.unilex.info>> accessed 12 June 2024.

³ The paper relies on clauses which can be retrieved from the open access database of the U.S. Securities and Exchange Commission, <<https://www.sec.gov/edgar/search-and-access>> accessed 12 June 2024. Furthermore, it refers to the model clauses drafted by the American Bar Association (ABA). See Working Group to Draft Model Contract Clauses to Protect Human Rights in International Supply Chains, ABA Section of Business Law, *Balancing Buyer and Supplier Responsibilities, Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, <https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf> accessed 12 June 2024.

⁴ United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 11 April 1980).

⁵ José Angelo Estrella Faria, 'The Influence of the UNIDROIT Principles of International Commercial Contracts on National Laws' UNIDROIT (ed), *Eppur si muove. The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell to Celebrate his 70th Birthday* (International Institute for the Unification of Private Law (UNIDROIT) 2016) 1318. Michael Joachim Bonell (ed), *The UNIDROIT Principles in Practice-Caselaw and Bibliography on the Principles of Commercial Contracts* (Transnational Publishers 2002); for more recent case law see <<https://www.unilex.info>> accessed 12 June 2024.

⁶ See inter alia Herbert Kronke, 'The UN Sales Convention, The UNIDROIT Contract Principles and the Way Beyond' in Filip De Ly and others (eds), *Celebrating the 25th Anniversary of the United Nations Convention on Contracts for the International Sale of Goods: Articles Presented March 15–18 2005* (University of Pittsburgh, 2005) 451; Bruno Zeller, *Damages Under the Convention on Contracts for the International Sale of Goods* (3rd edn OUP 2019) ch 14.

⁷ Marcel Fontaine, 'The International "Rayonnement" of the UNIDROIT Principles' (2017) 22 *Uniform Law Review* 202.

The article is structured as follows. First, the concept of sustainable development is sketched out (section II). Thereafter, clauses setting the standards of performance (section III) and clauses related to liability (section IV) are discussed. Finally, concluding remarks are provided (section V).

II. Sustainable development

The problem of over-exploration of natural resources has been known for millennia, and there are historical records of regulation relating to what we call today sustainable development.⁸ Yet the modern concept is fairly recent. It was defined by the Brundtland Commission in 1987 as ‘development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs’.⁹ This definition has paved the way to the establishment of a heterogeneous regulatory framework at the crossroads of international environmental law, human rights law, and international economic law.

As to the substance, the framework has evolved around five pillars: environmental development, economic development, social development, inter-generational equity (promoting the account of interest of future generations), and intra-generational equity (promoting reduction of poverty and inequalities between different countries and between communities within one State).¹⁰ As to the form, this framework has evolved at different levels of rule-making. At the international level, human rights treaties and international environmental law regulate primarily the duties of States. The most recent soft law sources include the United Nations 2030 Sustainable Development Goals¹¹ and the European Green Deal.¹² Although many sources addressed to private parties are non-binding,¹³ legislators have been working on an increasing number of binding instruments addressing aspects of sustainable development.¹⁴

⁸ Lukas Thommen, *An Environmental History of Ancient Greece and Rome* (CUP 2012); Jeremy L. Caradonna, *Sustainability: A History* (OUP 2014).

⁹ Gro Harlem Brundtland, *World Commission on Environment Development, Our Common Future* (OUP 1987) 43.

¹⁰ On the five pillars see (with further references) Emelie Folkesson, ‘Human Rights Courts Interpreting Sustainable Development: Balancing Individual Rights and the Collective Interest’ (2013) *Erasmus Law Review* 142. See also Werner Scholtz, ‘Equity’ in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, OUP 2021) 336.

¹¹ United Nations General Assembly, *Transforming our World: The 2030 Agenda for Sustainable Development* (2015) A/RES/70/1.

¹² Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM/2019/640 final.

¹³ John Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Rights to Development. Protect, Respect and Remedy: A Framework for Business and Human Rights* (2008) UN Doc A/HRC/8/5; OECD Guidelines for Multinational Enterprises, 2011 Edition (OECD Publishing 2011) <<https://www.dx.doi.org/10.1787/9789264115415-en>> accessed 12 June 2024.

¹⁴ See inter alia Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups [2014] OJ L330; Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating from Conflict-affected and High-risk Areas [2017] OJ L130; Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on Sustainability-related Disclosures in the Financial Services Sector [2019] OJ L317; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final, and the text adopted on 24 April 2024 <https://www.euro.parl.europa.eu/doceo/document/TA-9-2024-0329_EN.html> accessed 12 June 2024. See also inter alia US: California Transparency in Supply Chains Act of 2010, Senate Bill 657; UK: The Modern Slavery Act 2015 (Transparency in Supply Chains), 28 October 2015, Regulations 2015, UK Statutory Instruments 2015 n 1833; France: Loi n 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n 0074 du 28 mars 2017; Australia: Modern Slavery Bill 2018, Bills Digest n 12, 2018–19; Germany: Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten, 16 Juli 2021, BGBl. I, 2959; Australia: Modern Slavery Act 2018 n 153, 2018; The Netherlands: Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter

In the meantime, businesses have included references to sustainable development in various corporate policy documents, including ‘codes of conduct’ on environmental, social, and governance (ESG), corporate social responsibility (CSR), ethics, and business and human rights. To facilitate and monitor compliance with such policy documents, many private initiatives have been established.¹⁵ The evolution of this framework has been also influenced by the increasingly active role of civil society. Private actors have initiated unprecedented climate litigation against both States¹⁶ and private companies.¹⁷ Private claims for environmental damage and human rights breaches that multinational companies have committed in developing countries have been instituted in Western courts, and these courts have accepted jurisdiction.¹⁸ This has resulted in the extension of the already heterogeneous regulatory framework to private regulation, tort law,¹⁹ and private international law.²⁰ Furthermore, sustainable development has been reflected in various contract clauses, on which we elaborate further below.

III. Clauses setting the standards of performance

Parties can incorporate the ESG and CSR codes of conduct into their contract. This precludes behaviour, which is inconsistent with these codes of conduct (1). Furthermore, parties may formulate a requirement to comply with sustainable development goals as a duty to use best efforts (2) or as an obligation to achieve a specific result (3). Finally, an additional incentive to achieve the goals may be provided by a *bonus/malus* clause (4).

1. References to codes of conduct: precluding inconsistent behaviour

A contract may include the following clause:

L’Orange shall implement procedures that demonstrate its commitment to the Rolls-Royce Supplier Code of Conduct as set out in Annex 6 (‘Code of Conduct’).
L’Orange shall use its commercially reasonable efforts to communicate these principles

voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Staatsblad 2019, p. 401; Canada: Fighting Against Forced Labour and Child Labour in Supply Chains Act, S.C. 2023, c. 9.

¹⁵ The most prominent one is the United Nations Global Compact. For an overview of the initiatives, see Benjamin J Richardson and Beate Sjøfjell, ‘Business and Industry’ in Lavanya Rajamani and Jacqueline Peel (eds) (n 10) 729.

¹⁶ See inter alia *Urgenda v The Netherlands*, Supreme Court of the Netherlands, 20 December 2019, ECLI:NL:HR:2019:2006.

¹⁷ See inter alia *Vereniging Milieudefensie and others v Royal Dutch Shell PLC*, The Hague District Court, 26 May 2021, ECLI:NL:RBDHA:2021:5339.

¹⁸ See inter alia United States: *Kiobel v Royal Dutch Petroleum Co*, 642 F.3d 271 (2011); *Nestlé USA, Inc. v Doe et al.*, 141 S.Ct. 1931 (2021); United Kingdom: *Vedanta Resources Plc v Lungowe* [2019] AC 1045 (UKSC); Canada: *Nevsun Resources Ltd v. Araya*, 2020 SCC 5; the Netherlands: *Oguru, Efanga, and Vereniging Milieudefensie v Shell Petroleum N.V.*, Court of Appeal of The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:132; *Dooh and Vereniging Milieudefensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd*, Court of Appeal of The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:133; *Vereniging Milieudefensie v Royal Dutch Shell Plc, Shell Petroleum Development Company of Nigeria Ltd*, Court of Appeal of The Hague, 29 January 2021, ECLI:NL:GHDHA:2021:134.

¹⁹ See inter alia Cedric Ryngaert, ‘Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v. Shell Litigation in the Netherlands’ (2013) 8 *McGill International Journal of Sustainable Development Law & Policy* 245; Ekaterina Aristova, ‘Tort Litigation Against Transnational Corporations in the English Courts: The Challenge of Jurisdiction’ (2018) 14(2) *Utrecht Law Review* 6.

²⁰ See inter alia Ralf Michaels, Verónica Ruiz Abou-Nigm, Hans van Loon (eds), *The Private Side of Transforming our World* (Cambridge 2021); Tomaso Ferrando and Samuel Fulli-Lemaire, ‘Global Supply Chains: Doe v. Nestlé’ in Horatia Muir Watt and others (eds), *Global Private International Law* (Edward Elgar Publishing 2019) 236. See also European Commission, Directorate-General for Justice and Consumers, Eva Lein and others, *Study on the Rome II Regulation (EC) 864/2007 on the Law Applicable to Non-contractual Obligations* (2021) 87, <<https://www.data.europa.eu/doi/10.2838/399539>> accessed 12 June 2024.

to its suppliers and encourage them to implement practices consistent with these principles.²¹

What are the implications of such clause? It has at least three implications. First, the content of the document referred to in the clause is incorporated into the contract. This means that each term of the code of conduct becomes a part of the contract and forms contractual obligations that are binding on both parties. The contractual technique of incorporation may be subject to the difficulties of interpretation. For instance, difficulties can arise if the validity of the agreement—the validity of the contractual consent—to respect the code of conduct is disputed or if parties reserve the right to unilaterally modify the content of the document(s) incorporated. However, most legal systems have the tools to deal with such difficulties, and the PICC do so in Chapters 2 and 3.

Second, subject to successful incorporation, the clause precludes behaviour that is inconsistent with the content and spirit of this document. According to Article 1.8 of the PICC, ‘a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.’²² This provision draws on the principle *venire contra factum proprium* known in the civil law legal traditions and on the common law doctrine(s) of estoppel.²³ Depending on the formulation of the clause, the duty may arise for one or both parties of the contract. A breach of the duty may entail creation, loss, suspension, or modification of rights. For instance, a party may be precluded from reliance on a right that it would otherwise have.²⁴ Third, the clause requires the use of best efforts to integrate one party’s code of conduct in the other party’s operations. The duty of best efforts is worth further investigation.

2. Sustainable development as the duty of best efforts

Article 5.1.4(2) of the PICC defines the duty of best efforts as an obligation to ‘make such efforts as would be made by a reasonable person of the same kind in the same circumstances’.²⁵ The efforts relating to sustainable development may be specified in different ways. As noted above, the clause may refer to an ESG or a CSR code of conduct, incorporated into the contract. Alternatively, the clause can specify which objective standards accepted in a particular industry (*les règles de l’art*) should be taken into account. For example:

Service Provider agrees ... to (i) perform all of its duties ... in a good, safe, workmanlike and commercially reasonable manner in accordance with International Mining Practice and Standards; and (ii) perform Services in reasonable alignment with ... GF Companies’ safety, sustainability policies and Code of Conduct.²⁶

In the next illustration, the accent lies on best efforts, as opposed to an obligation to achieve specific results: the tenant undertakes to use ‘commercially reasonable efforts’ in achieving sustainability targets relating to the parties’ project:

²¹ Woodward, Inc. (WWD) Form 10-Q, (Quarterly Report) EX-10.1, 8 August 2018, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

²² This provision gives further content to the general duty of good faith and fair dealing in international trade in the performance of obligations, laid down in article 1.7 of the UPICC.

²³ Stefan Vogenauer ‘Article 1.8’ in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) 226.

²⁴ Illustrations 1–7 to article 1.8 PICC.

²⁵ See inter alia Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (BRILL 2006) 187–230; Kenneth A Adams, ‘Interpreting and Drafting Efforts Provisions: From Unreason to Reason’ (2019) 74(3) *The Business Lawyer* 677.

²⁶ Asanko Gold Inc. (AKG, GAU), Form 6-K (Current report) EX-99.2, 13 August 2018, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

Tenant shall use commercially reasonable efforts to ensure energy efficient operation of the Premises ... by reasonably minimizing unnecessary use of electricity, water, heating and air conditioning. ... For the avoidance of doubt, this Section ... shall not require Tenant to expend any funds to meet any such sustainability targets or to minimize unnecessary use.²⁷

The best efforts clause entails more specific obligations than preclusion of inconsistent behaviour. However, the degree of commitment remains relatively low, because the codes of conduct are typically formulated as principles, and it remains difficult to determine which performance is required. Hence, the best efforts duty will correspond to a minimum degree of diligence. It will correspond to the performance of the contract in a manner that may be generally expected from a diligent (commercial) party in the same circumstances.

In many cases, the standard of diligence will not be difficult to define. In some situations, however, it may create difficulties in interpretation. Although the different pillars of sustainable development (briefly sketched above) are interrelated, they can imply competing objectives. For instance, economic growth can come at the expense of preserving the habitat for further generations; combatting poverty can clash with individual or collective right to clean environment. Striking a balance between the pillars, with reference to the objective test of a diligent party in the same circumstances, which lies at the heart of the role businesses actually play in sustainable development, might be a challenging task for a judge or arbitrator. Reducing the standard of performance to the duty of best efforts might not be satisfying from a principled point of view, according to which the regulation of sustainable development should eliminate any non-compliance, and not simply allow a tolerance level chosen by the company itself, following a risk analysis. Yet acting in a commercially reasonable manner to get profits is inherent to business activity.²⁸ The awareness of the delicacy of the balance between the various pillars of sustainable development may assist in this task. It may also be of assistance in determining whether an obligation at hand implies a duty of best efforts or a duty to achieve a specific result, as provided by Article 5.1.5 of the PICC.

3. Sustainable development goals as specific result

Parties can reflect sustainable development goals in an obligation to achieve a specific result. This type of obligation is described in Article 5.1.4 of the PICC. In the following example, the result is formulated as an obligation of abstention from sourcing minerals in conflict-affected areas: 'Supplier shall not source conflict minerals emanating from mining operations in conflict affected and high-risk areas, hereunder from the Democratic Republic of the Congo and adjoining countries.'²⁹

An obligation of result can also be tied to the requirement to the conformity of supplied goods, as is the case in the following clause on human rights—more specifically, on forced or child labour:³⁰ 'Equipment, materials, or supplies, that will be furnished ... under the

²⁷ EXELIXIS, INC. (EXEL), Form 10-Q (Quarterly report) EX-10.2, 01 August 2018, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

²⁸ Business at OECD (BIAC), Foreign Trade Association Business Social Compliance Initiative (FTA-BSCI), International Chamber of Commerce (ICC) and International Organisation of Employers (IOE), *UN Treaty Process on Business and Human Rights, Response of the International Business Community to the 'Elements' for a Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* <ioe-emp.org/index.php?eID=dumpFile&t=f&f=156161&token=6f0147b79ecce2cfe786632f50818144e4bc00c1> accessed 12 June 2024.

²⁹ Art. 16.3 Vestas, VESTAS' General Purchasing Terms for Goods and Services (applicable for non-strategic, low spend purchase order), <https://www.vestas.com/content/dam/vestas-com/global/en/about/partnering/general-purchasing-terms/2018_general-purchasing-terms-for-goods-and-services-danish-law.pdf.coredownload.inline.pdf> accessed 12 June 2024.

³⁰ On the ties between the conformity of goods and the various instruments in the field of sustainable development see CISG Advisory Council Opinion No 19, Standards and Conformity of the Goods under Article 35 CISG <<https://www.cisgac.com/opinions/cisgac-opinion-no-19>> accessed 12 June 2024.

Contract must not be produced in whole or in part by forced labour, convict labour, forced or indentured child labour, or indentured servitude.’³¹

The clause goes on to define the concept of ‘forced and child labour’. This may be helpful in steering contract interpretation, as concepts differ across countries’ laws:

‘Forced or indentured child labour’ means all work or service: exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or performed by any person under the age of 18 under a contract the enforcement of which can be accomplished by process or penalties.³²

To specify the result further, measurable standards of performance in the field of sustainable development are needed. These can be established by reference to various objective indicators—for example, intelligence data provided by third parties, such as the S&P Global ESG score.³³ Parties may also refer to the certifications from third-party environmental certifiers—for example: ‘LEED, IREM CSP, ENERGY STAR, and other similarly recognized third-party green building certifications.’³⁴ Furthermore, parties may refer to the so-called key performance indicators (KPI) relating to sustainable development. The KPI can either be individually negotiated and included in the contract or made public by one of the parties. Such KPI are typically made public as part of sustainability, CSR, and business and human rights reports. The following excerpt from a press release illustrates this: ‘The Company has also established ambitious economic, environment, social and governance (‘ESG’) objectives. ... Summary highlights of our 2021+ targets are outlined below and further details can be found in our 2020 Annual Integrated Report.’³⁵

A reference to a well-defined KPI or a set of KPI, sometimes called an ‘ESG Trigger’,³⁶ establishes specific and stringent standards of performance. Such clauses offer an efficient way to ensure compliance, because it is easy to ascertain the achievement of a quantified and measurable target. The reference also has a downside. Not all sustainable development goals can be quantified. Hence, the focus on the goals that can be quantified may come at the cost of the (contractual) incentive to comply with other, more broadly formulated principles. To prevent this, a contract drafter may prefer to cover broader goals by a best efforts clause and combine it with the duty to achieve specific results covering the targets that can be quantified.

4. Bonus and malus for achieving sustainability goals

If sustainable development goals are defined, parties can provide an additional incentive—a *bonus*, or an additional gratification—for achieving them. The following example illustrates such mechanism: ‘In addition, the Amendment provides for an ‘ESG’ incentive for the Company to achieve certain sustainability targets. ... If the Company meets these targets, the spread over LIBOR for the Tranche B Term Loan will be reduced by 0.01 per cent.’³⁷

³¹ Lifeflow Technologies Inc, Form 10-12G (Registration statement) EX-10.4, 31 March 2011, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

³² Ibid.

³³ <<https://www.spglobal.com/esg>> accessed 12 June 2024.

³⁴ HEALTHCARE REALTY TRUST INC (HR), Form 8-K (Current report), 03 June 2022, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024. ‘LEED’ is a green building rating system <<https://www.usgbc.org/leed>> accessed 12 June 2024; ‘IREM CSP’ refers to the Institute of Real Estate Management’s Certified Sustainable Property <<https://www.irem.org>> accessed 12 June 2024; ‘ENERGY STAR’ is a certification for energy efficient buildings <<https://www.energystar.gov>> accessed 12 June 2024.

³⁵ TRANSALTA CORP (TAC), Form 6-K (Current report) EX-99.1, 03 March 2021, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

³⁶ Orion Engineered Carbons S.A. (OEC), Form 8-K (Current report) EX-10.1, 05 October 2021, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

³⁷ HEALTHCARE REALTY TRUST INC (HR) (n 36).

In the next illustration, both an upward and downward (*malus*) change in the interest rate are stipulated: '[T]he applicable interest rate for borrowings under the Facilities will be subject to downward or upward adjustments (up to 0.03 per cent per annum) depending on the level of the Company's achievement of certain specified sustainability targets set by the Company.'³⁸ Such additional incentive fits the regulatory framework of sustainable development, which deals primarily with compliance and prevention of breaches, rather than with liability.

IV. Liability-related clauses

In line with the emphasis on compliance, parties may establish contractual mechanisms to monitor compliance (1) and recovery in case of breach (2). Finally, parties may explicitly mention the breach of sustainable development obligation(s) as the reason to terminate the contract (3).

1. Clauses on monitoring of compliance

A contract formalizes a deal between two parties, but the deal may also form an element of a long(er) chain of sourcing or production. One of the challenging aspects of enforcement of the regulatory framework of sustainable development in supply chains is that if a breach occurs at the other stage of such chain, the privity of contract limits the possibility of enforcement to the parties of the contract.³⁹ In an attempt to tackle this limitation, the model clause on sustainable development drafted by the American Bar Association⁴⁰ requires that all the contracting parties, all the way down the supply chain, comply with sustainable development obligations, which are at least as strict as the initial ones. The clause further requires that parties 'keep records of such written contracts' and disclose them at the other party's request. Although privity of contract can impede the enforcement of such clause, it is not superfluous to include it in an agreement, because the clause clarifies the expectations of the contracting parties and promotes adherence to sustainable development standards throughout the entire supply chain.

Such clause can also be useful in ensuring companies' compliance with binding instruments that require companies to prevent human rights breaches and environmental harm in their supply chains.⁴¹ One recent example of such instrument is the EU Corporate Sustainability Due Diligence Directive (the Directive).⁴² It requires multinationals formed in accordance with the legislation of a Member State⁴³ to be diligent in their global operations and to use their best endeavours to prevent foreign subsidiaries or contractors from causing environmental damage and human rights violations. These requirements have an explicit extraterritorial ambit, as they must be transposed into national laws by overriding mandatory provisions⁴⁴ (*lois de police* or *règles d'application immédiate* that dismiss the application of any non-EU country's law if the latter governs the contract).⁴⁵ The Directive will have an impact on contract drafting and practice as several provisions of the Directive

³⁸ HERBALIFE NUTRITION LTD. (HLF), Form 8-K (Current report), 30 July 2021, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

³⁹ Cafaggi (n 1); Scheltema (n 1); Verbruggen (n 1); Castermans and Fauvarque-Cosson (n 1); Ulfbeck and Hansen (n 1). See also Livia Ventura, 'Supply Chain Management and Sustainability: The New Boundaries of the Firm' (2021) 26(3) *Uniform Law Review* 599.

⁴⁰ ABA (n 3).

⁴¹ See instruments (n14); Cafaggi (n 1); Anna Beckers, 'Global value chains in EU law' (2023) 3 *Yearbook of EU Law* 1.

⁴² See the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 COM/2022/71 final, and the text adopted on 24 April 2024 <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html> accessed 12 June 2024.

⁴³ Art. 2 of the Directive provides the instrument's scope.

⁴⁴ Art. 29(7) of the Directive.

⁴⁵ On conflict-of-law aspects of the Directive see inter alia with further references E. Pannebakker, 'Conflict of Laws for Sustainable Supply Chains: A Magic Wand or a Medieval Club?' in Bruno Zeller and Camilla Baasch Andersen (eds), *Issues in Transnational Contracting* (forthcoming).

need to be operationalized through contractual commitments. For instance, companies must ensure that they ‘acquire contractual assurances from a direct business partner’⁴⁶ when operating a supply chain, including its domestic, cross-border, and foreign parts. These assurances should guarantee that responsibilities are ‘shared appropriately by the company and the business partners’.⁴⁷ To fulfil the due diligence obligations, a corporation might be required to temporarily suspend or terminate a business relationship.⁴⁸ The Directive’s impact on contracts thus needs to be reflected in contract clauses not only to provide legal certainty to contracting parties but also to comply with the new norms applicable to supply chains.

Another way to ensure compliance throughout the entire supply chain is a detailed clause on monitoring of compliance. The clause can provide the so-called chain-leader with the right to visit other party’s premises, with or without prior notification, and describe the processes that allow the identification of possible breaches by third parties.⁴⁹ These breaches can subsequently be related back to the contract, to assess, for instance, the performance of the clauses setting the standards of sustainable development.

2. Recovery plan or period as first remedy

Once a breach of obligation(s) relating to sustainable development is discovered, liability, recovery of damages,⁵⁰ and contract termination can follow. However, if parties prefer to place emphasis on compliance, they may draft a clause that prevents the immediate termination of the contract, but requires drawing up a corrective action plan and sets the deadlines for taking corrective action.⁵¹ The corrective action may also include intensified cooperation between the parties,⁵² as illustrated below:

If reasonably deemed necessary by GSK in consultation with Lyell, then Lyell will allow GSK to conduct an onsite inspection of the Bothell Facility in order to confirm implementation of the recovery plan. If Lyell fails to implement the recovery plan to GSK’s reasonable satisfaction, then GSK has the right to terminate activities.⁵³

3. Link with termination

Finally, to give sustainable development obligations special weight, a clause can link their breach with the right to immediately terminate the contract, as stated in the example:

Amarin may terminate this Agreement by written notice with immediate effect: ... in the event Biologix’s conduct is deemed prejudicial to the interests of Amarin. Biologix acknowledges that any OECD Convention, FCPA, UK Bribery Act or other legislation violation, or refusal to subject itself to a Compliance Audit shall be considered highly prejudicial to the interests of Amarin.⁵⁴

⁴⁶ Recitals 46, 48, 54 of the Directive.

⁴⁷ Recital 46 of the Directive.

⁴⁸ Art. 6(2)(e) of the Directive. See also Recitals 50, 57 of the Directive.

⁴⁹ For an example see the illustration in section 4.2.

⁵⁰ Article 7.4.1 and following PICC.

⁵¹ Article 7.1.5 PICC, see also article 7.3.1 and following PICC.

⁵² On theoretical underpinnings of such cooperation, see Mark T. Kawakami, ‘Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over’ (2017) 24(1) *Indiana Journal of Global Legal Studies* 147.

⁵³ Lyell Immunopharma, Inc. (LYEL), Form 10-K (Annual report) EX-10.16, 29 March 2022, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

⁵⁴ AMARIN CORP PLC/UK (AMRN), Form 10-K (Annual report) EX-10.67, 27 February 2018, retrieved from <<https://www.sec.gov/edgar/search/#>> accessed 12 June 2024.

Such provision contributes to legal certainty and can provide an additional deterrent from non-performance.

V. Concluding remarks

The crystallization of the concept of sustainable development, its growing societal importance, and the increasing civil society scrutiny have paved the way for reflecting sustainable development in contract clauses. Several once-voluntary commitments included in various codes of conduct are transitioning into a mandatory requirement to be met by commercial parties reflected in contract clauses. If one looks at these clauses through the lens of the PICC, one distinguishes various degrees of compliance to which parties can commit. The duty of consistent behaviour is the broadest undertaking with the lowest degree of commitment. A clause implying the duty of best efforts sets more stringent standards of compliance. It requires a party to take all the objectively reasonable steps to comply with sustainable development goals specified in the clause. The most stringent standards of performance are imposed by a clause requiring a party to achieve a specific result. Such clause may specify the exact standards of performance by reference to 'key performance indicators' or to the data provided by independent third parties. To ensure compliance, a combination of the three different types of clauses may be necessary, since not all sustainable development goals can be quantified. Furthermore, contract drafters may create contractual mechanisms to mitigate risks and ensure compliance. To conclude, contractual practice evolves, and while sustainable development finds a still more clear reflection in various contract clauses, contract law, as restated in the PICC's soft law provisions, has the tools to conceptualize this evolution.