

The UNIDROIT Principles on International Commercial Contracts and Sustainable Development

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I. Introduction

Contract regulation has become an integral part of transnational economic transactions lately, by the use of contracts and codes of conduct in their organization.² Global value chains try to focus on the observance of sustainability goals by either including sustainability clauses in their contracts or making reference to Codes of Conduct.³ These clauses usually demand that the contractual partner in the supply chain adheres to certain sustainability production requirements relating to the environment, workplace conditions and human rights.⁴ The European Commission has recently adopted a proposal on corporate sustainability due diligence in order to promote an active approach by companies relating to ESG risk management.⁵ With the increasing climate-related and sustainability disputes brought before courts, companies are currently faced not only with the reputational risk that their activities may not be in line with the sustainability agenda, but also a litigation risk.⁶

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² H. W. Micklitz “Contract Law under Regulatory Siege – Revival of Contract Law? Standardisation, Regulation and Consent” in S. Grundmann, M. Grochowski, *European Contract Law and the Creation of Norms*, Intersentia (2021).

³ V. Ulfbeck, O. Hansen “Sustainability Clauses in an unsustainable Contract Law?” *European Review of Contract Law* 16 (2020) p. 186-205. Sustainability contractual clauses have been defined as provisions in commercial contracts that deal with social and environmental issues, not directly connected to the subject matter of the specific contract. See C. Poncibo, “The Contractualisation of Environmental Sustainability” 4 *European Review of Contract Law* 12 (2016) p. 345.

⁴ Ulfbeck, Hansen, *op. cit.* note 3, p. 187. See also K. Peterkova Mitkidis “Using Private Contracts for Climate Change Mitigation” 1 *Groningen Journal of International Law* 2 (2014). What is more, at the recent COP26 meeting investors adhered to environment, social, governance goals (ESG) for every professional financial decision which should take climate change into account. See M. Carney, UN Special Envoy for Climate Action and Finance, “Building a Private Finance System for Net Zero” available at [COP26-Private-Finance-Hub-Strategy_Nov-2020v4.1.pdf \(ukcop26.org\)](#). See also [IFRS - Global sustainability disclosure standards for the financial markets](#). Over the past years large businesses committed to reach net zero emissions across their operations by 2050 through their participation in the “Race to Zero” coalition. See Race to Zero Campaign is a global campaign for sustainable growth, for more see [Race To Zero Campaign | UNFCCC](#). See also [60% of Britain's largest businesses now signed up to Race to Zero \(edie.net\)](#).

⁵ Environment, Social, Governance (ESG). For more see Section II.

⁶ The realization that ethical behavior of companies acting on a global level has a positive impact on their business has nowadays become commonplace. See I. Schwenzer, B. Leisinger “Ethical Values and International Sales Contracts” in J. Hellner, R. Cranston, J. Ramberg, J. Ziegler, *Commercial Law Challenges in the 21st Century*, Iustus (2007). However, various examples of disregard of such reputational damage can be seen. See G. P. Calliess “Introduction: Transnational Corporations Revisited” 2 *Indiana Journal of Global Legal Studies* 18 (2011) p. 609: where he shows how Volkswagen did not stop sponsoring the 2008 Olympic Summer Games in Beijing despite popular outcry in the European market. Parella talks about public relations “greenwashing” whereby a compliance program is not actually undertaken but rather the company has more incentives to invest in a greenwashing strategy in an effort to convey a false impression on the public that the company complies with certain standards. See K. Parella “Improving Human Rights Compliance in Supply Chains” 2 *Notre Dame Law Review* 5 (2019).

Sustainability clauses in international commercial contracts have become commonplace whereas codes of conduct similarly promote protection of human rights, labor conditions and the environment.⁷ Since this involves the application of contract law principles, the question turns to the extent that contract law can be viewed as a tool in promoting the sustainability agenda. This would arguably require a reimagining of the conventional principles of contract law since enforcement of sustainability clauses may be rejected due to vagueness or of the contract not being a third-party beneficiary contract.⁸ Similarly, codes of conduct are seen as unilateral declarations. At a point where technical fields are being called to the task,⁹ contract law - which aims at effectuating the objectives of parties to promissory transactions under a proper *policy and moral structure*¹⁰ - is probably better situated. Effectuating the intent of parties requires the enforcement of sustainability clauses, since this will ensure the reliability of contracting as an institutionalized form to create legal obligations.¹¹ This will benefit transnational commercial actors, due to the compliance effect on contracting partners in the supply chain, promoting simultaneously the reputational incentives of the parties in the entire chain,¹² shielding also against legal repercussions.¹³

The 2030 Agenda for Sustainable Development,¹⁴ while extremely ambitious, fails to mention private or commercial law.¹⁵ The focus is rather on public international law making only indirect reference to contract law.¹⁶ In general, questions are often raised as to the appropriateness of contract law to respond to the sustainability agenda. Given that international commercial contracts are

⁷ See Peterkova Mitkidis *op. cit.* note 4, p. 70: where she lists empirical studies investigating the usage of supply chain contracting for sustainability purposes which seems to be the majority of contracts between multinational companies and their suppliers.

⁸ Ulfbeck, Hansen, *op. cit.* note 3, p. 188.

⁹ R. Michaels, V. Ruiz Abou-Nigm, H. van Loon (eds) *The Private Side of Transforming our World – UN Sustainable Development Goals 2030 and the Role of Private International Law*, Intersentia (2021). See N. Hatzimihail contribution “SDG 7: Affordable and Clean Energy” p. 233: where he suggests that private international law can provide tools to prevent a regulatory race to the bottom and create a regulatory race to the top, through a company adopting uniformly a higher standard. For a property law discussion see A. Parise “Preliminary Reflections on Paradigms, Ownership, and Ecology” in B. Akkermans, G. van Dijck (eds) *Sustainability and Private Law*, Eleven International Publishing (2020). See also B. Akkermans “Sustainable Property Law: towards a revaluation of our system of property law” in Akkermans, van Dijck (2020).

¹⁰ M. A. Eisenberg, *Foundational Principles of Contract Law*, Oxford University Press (2018) p. 21 [emphasis added].

¹¹ Ulfbeck, Hansen, *op. cit.* note 3, p. 189.

¹² *Ibid.*

¹³ See *Milieudefensie et al. v Royal Dutch Shell Plc*, Rechtbank Den Haag, ECLI:NL:RBDHA:2021:5339: the Dutch Court in this case found that Shell has an individual responsibility to reduce carbon dioxide emissions that are under its control and influence. See for an analysis G. te Winkel, X.P.A. van Heesch “The Shell judgment – a bombShell in private international law?” *The Netherlands Journal of Private International Law* (2021).

¹⁴ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development (2015) available at [United Nations Official Document](#).

¹⁵ Michaels, Ruiz Abou-Nigm, van Loon, *op. cit.* note 9, p. 9.

¹⁶ See *ibid.*, p. 11. Reference to contract law may be seen, for instance, by Target 2.b whereby freedom of contract is promoted through the prevention of trade restrictions and distortions in world agricultural markets, but also limiting the freedom of contract in cases of forced labor, modern slavery and child trafficking (Targets 8.7, 16.2).

increasingly becoming regulatory vehicles, the design of international principles of commercial law is similarly challenged.¹⁷ Hence, the underlying question for this essay is the extent to which the UNIDROIT Principles¹⁸ may play a role in contributing towards the sustainability agenda.¹⁹ A hypothesis underlying this essay is that the UPICC, as presently constructed, can indeed promote the sustainability agenda.

II. Efforts at ensuring compliance with sustainability goals

Since 1987, when the United Nations Brundtland Commission defined sustainability as “meeting the needs of the present without compromising the ability of future generations to meet their own needs”, the concept requires an integrated approach that takes into consideration environmental concerns along with economic development.²⁰ Thus, sustainability encompasses not only issues pertaining to the environment but also democracy and good governance.²¹ States have traditionally been the exclusive promoters of social and environmental objectives; however, globalization has given rise to a blossoming private regulation.²² Indeed, a great number of companies have responded through the insertion of sustainability clauses into their contracts.²³ This reflects the growing need for contractual governance within companies’ value chains in order to secure protection of human and labor rights and protect the environment.²⁴ The values that are promoted by the sustainability concept are, thus, increasingly becoming an integral part of the transnational commercial contract, not only through the

¹⁷ F. Cafaggi, “The Regulatory Functions of Transnational Commercial Contracts: New Architectures” *Fordham International Law Journal* 36 (2013), p. 1618.

¹⁸ UNIDROIT Principles of International Commercial Contracts (2016) henceforth UPICC.

¹⁹ See also Center for International Legal Cooperation “The Hague Rules on Business and Human Rights Arbitration” (2019) which provide a set of procedures for the arbitration of disputes related to the impact of business activities on human rights.

²⁰ See Report of the World Commission on Environment and Development: Our Common Future, available at [Our Common Future: Report of the World Commission on Environment and Development \(un.org\)](#).

²¹ See Akkermans, van Dijck, *op. cit.* note 9.

²² Often achieved through standards, certification schemes, codes of conduct, covenants and other forms of transnational private regulation. See also R. van Gestel, P. van Lochem “Private standards as a replacement for public lawmaking” in M. Cantero, Gamito, H. W. Micklitz, *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes*, Elgar (2020) p. 27. Various non-governmental organizations and industrial associations, for instance, have promulgated standards for greenhouse gas emissions’ reporting. See e.g. Sustainability Accounting Standards Board [About Us - SASB](#).

²³ Ulfbeck, Hansen, *op. cit.* note 3. Micklitz talks about public regulation interfering directly with contracts through mandatory rules, while private regulation involves the insertion of technical standards into contracts via consent. See Micklitz (2021), *op. cit.* note 2, p. 204.

²⁴ See K. Mitkidis, S. Perkovic, P. Mitkidis, “Tendencies in contractual governance to promote human and labour rights in transnational supply chains” 4 *Competition & Change* 23 (2019) 397-419. See also M. R. Miller “Corporate Codes of Conduct and Working Conditions in the Global Supply Chain: Accountability through Transparency in Private Ordering” in J. Martin, K. E. Bravo, *The Business and Human Rights Landscape: Moving Forward, Looking Back*, Cambridge University Press (2015).

sustainability contractual clauses but also as warranties incorporated by reference to a company's code of conduct.²⁵ Regardless, a legal gap is created concerning compliance.²⁶

In attempting to solve the compliance issue various methods have been elaborated usually involving the outsourcing of regulatory duties.²⁷ Persisting scandals, though, gave rise to legislation at state and regional level.²⁸ As a response, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence aiming to promote sustainability goals in global value chains.²⁹ Article 7(2) of the proposed Directive provides that companies shall seek contractual assurances from business partners with whom they have direct business relationships that the latter will ensure compliance with the company's code of conduct.³⁰ Failure to take these measures may result in liability.³¹ Therefore, the introduction of due diligence legislation promotes contractual regulation. Companies in global value chains should actively ensure compliance with the standards adhered to in their codes of conduct, or the contractual clauses themselves, which are not to remain aspirational anymore.³²

²⁵ Poncibo, *op. cit.* note 3, p. 346. See, e.g., Wal-Mart's standards for suppliers which evaluates suppliers' employment and environmental practices, available at [Standards for Suppliers - English \(walmart.com\)](https://www.walmart.com/standards-for-suppliers).

²⁶ K. Peterková Mitkidis, *Sustainability Clauses in International Business Contracts*, Eleven International Publishing (2015) p. 4. On the difficulty to apply and enforce state laws to transnational conduct see *Kiobel v Royal Dutch Petroleum* (2013) 569 U.S. Supreme Court. See also *Nestle USA Inc. v Doe et al.* (2021) 593 U.S. Supreme Court: where the judgment in *Kiobel* was followed regarding the refusal to accept the extraterritorial application of the Alien Tort Statute regarding violations of human rights from business partners in the supply chain.

²⁷ Van Gestel, van Lochem, *op. cit.* note 22, p. 29-30. One example of private regulation through third party audits comes from the Coca-Cola System whereby in order to strengthen sustainability practices the Coca-Cola Company leverages EcoVadis – a recognized global provider of business sustainability ratings – across its system. See the following link for more [What is The Coca-Cola System? – EcoVadis Help Center](#).

²⁸ See e.g. Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (Lieferkettensorgfaltspflichtengesetz - LkSG) adopted by the Bundestag, July 2021. Official translation provided at [Act on Corporate Due Diligence Obligations in Supply Chains Germany \(bmas.de\)](https://www.bmas.de/Act-on-Corporate-Due-Diligence-Obligations-in-Supply-Chains-Germany). See also the French law, Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. See also D. Fuchs, A. Kalfagianni, M. Arentsen "Retail Power, Private Standards, and Sustainability" in J. Clapp, D. Fuchs, *Corporate Power in Global Agrifood Governance*, MIT Press (2009), p. 52: who argue that public actors are better placed to develop sufficiently stringent social criteria instead of private actors.

²⁹ Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final.

³⁰ The latter should also seek contractual assurances from its partners to the extent that their activities are part of the company's value chain (contractual cascading). Paragraph 4 provides that the contract shall be accompanied by the appropriate measures to verify compliance by either referring to industry initiatives or independent third-party verification.

³¹ See Article 22 of the Directive. On civil liability as one of the more robust tools of private law to promote sustainability see M. Faure, S. Yayun "Environmental Liability as a Tool to Promote Sustainability" in Akkermans, van Dijck, *op. cit.* note 9, p. 85 *et seq.* Liability from damages caused by an adverse impact as a result of the activities of an indirect partner is limited if the company has taken the required actions related to contractual assurances. For a discussion on tort law principles and whether responsibility should be shifted upstream the chain see R. A. Epstein "The Perils of Posnerian Pragmatism" *The University of Chicago Law Review* 71 (2004). However, if in the circumstances of the case having such contractual assurances could not have prevented, mitigated, ended or minimized the extent of the adverse impact, then liability lies still with the company.

³² Therefore, the inclusion of sustainability clauses will not "lull governments and the public into a false sense of security that the problems have been dealt with" since active steps to ensure compliance are needed. See Peterkova Mitkidis (2015)

III. The potential role of the UPICC in the promotion of the sustainability agenda

The UPICC have been seen as being imbued with a strong sense of party autonomy and individual freedom of choice, assuming also a competitive market economy.³³ Be that as it may, Henry Gabriel argues that the Principles actually nudge parties towards ethical behavior.³⁴ Such behavior may be extended to include sustainability obligations which are often described as non-legal obligations due to the nature of the interests which they aim to protect.³⁵ The general presumption is that under conventional contract law sustainability obligations are viewed with skepticism, since their legal character is questioned.³⁶ For that reason, a number of scholars have argued for a sustainability adjusted contract law.³⁷ This essay does not purport to support a radical change of the existing ethics that surround contract law, but rather claim that the UPICC are already employed with the tools which can be utilized to promote sustainability.

For instance, in cases where the buyer realizes that the purchased products were produced under certain conditions that violate either human rights or environmental standards the question is to be resolved by applying the law governing the contract.³⁸ In an international context, it is very likely

op. cit. note 26, p. 98. These developments are not limited to the European continental area. Already from 2010, California has enacted the Transparency in Supply Chains Act which imposes an obligation on companies to disclose their efforts to eradicate slavery and human trafficking. California Civil Code, Sec. 1714.43. The UK has similarly adopted the Modern Slavery Act providing for the prevention of modern slavery and the protection of modern slavery victims. Modern Slavery Act 2015 c. 30. See also the Dutch Child Labor Duty of Care Act (Wet zorgplicht kinderarbeid) Staatsblad 2019, 401. See also the Australian Modern Slavery Act 2018 No 30. In relation to contract law, the American Bar Association has developed Model Contract Clauses to Protect Workers in International Supply Chains. American Bar Association Section of Business Law, “Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0”. Section 1.1 provides that both buyer and supplier establish human rights due diligence process in order to address the impacts of their activities on the human rights of individuals directly or indirectly affected by their supply chains. Therefore, the effort in various countries is to impose obligations for parent companies in multinational groups in order for them to prevent serious human rights violations or environmental harm, even if such harm was not caused directly by their activity but by their business partners over which they exert some form of control. T. Marzal, G. Pavlakos “A Relations-First Approach to Choice of Law” forthcoming book chapter in *Philosophical Foundations of Private International Law*, Oxford University Press.

³³ H. D. Gabriel “Ethics in the UNIDROIT Principles of International Commercial Contracts” *Uniform Law Review* (2017) p. 132.

³⁴ *Ibid.* Nudge refers to the theory credited mainly to Richard Thaler and Cass Sunstein who based their work on the behavioral science first elaborated by Daniel Kahneman and Amos Tversky. See R. H. Thaler, C. R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness*, Yale University Press (2008); D. Kahneman, P. Slovic, A. Tversky (eds) *Judgment under uncertainty: Heuristics and biases*, Cambridge University Press (1982).

³⁵ Ulfbeck, Hansen, *op. cit.* note 3, p. 193.

³⁶ *Ibid.* According to this interpretation, the pursuance of sustainability goals would be regarded as an ordinary task of contract law.

³⁷ *Ibid.*

³⁸ Therefore, process-related obligations regarding the production of the good in terms of their intangible attributes are not complied with in such a scenario. See also UNIDROIT, FAO, IFAD “Legal Guide on Contract Farming” (2015) p. 160. The legal guide provides that in cases of non-compliance with process-related obligations remedies are mainly aimed at restoring compliance while preserving the relationship (*ibid.*).

that the Convention on Contracts for the International Sale of Goods might be applicable,³⁹ however, the UPICC are gaining popularity as the governing law.⁴⁰ Apart from their application as governing law of the contract, they can also be used to interpret and supplement the interpretation either of domestic law,⁴¹ or, indeed, the CISG itself.⁴² In case the Principles are applicable, the question then is whether such sustainability standards have become part of the contract in the first place and, if answered in the affirmative, what remedies does the aggrieved party have.⁴³ Article 3.3.1 provides that where a contract infringes a mandatory rule of national, international or supranational origin the effects of that infringement upon the contract are the effects prescribed by that mandatory rule.⁴⁴ The commentary gives a clear illustration of how sustainability standards can be maintained and preserved through the application of this rule when it refers to a buyer of a product that was manufactured with child laborers.⁴⁵ In this case, the contract by its performance infringes mandatory rules and it should lead to the effects that the mandatory rule prescribes.⁴⁶

Article 1.4 of the UPICC provides that nothing in the Principles restricts the application of mandatory rules which are applicable in accordance with the relevant rules of private international law. The notion of “mandatory rules” is meant to be broad and encompass both specific statutory provisions as well as unwritten general principles of public policy.⁴⁷ It can, thus, be maintained that sustainability standards⁴⁸ would reach the level of general principles of public policy in the near future.⁴⁹

³⁹ Schwenger, Leisinger, *op. cit.* note 6, p. 261.

⁴⁰ S. Lake “An Empirical Study of the UNIDROIT Principles – International and British Responses” *Uniform Law Review* (2011).

⁴¹ See national reports in A. Garro, J. A. Moreno Rodriguez, *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Contract Law*, Springer (2021).

⁴² See particularly Court of Cassation of Belgium, *Scafom International BV v Lorraine Tubes s.a.s.*, C.07.0289.N, available at: www.unilex.info/case.cfm?id=1456. On the important role of the UNIDROIT Principles as supplementing international instruments such as the CISG see A. M. Garro, “The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG” *Tulane Law Review* 69 (1995) 1152 et seq.

⁴³ Schwenger, Leisinger, *op. cit.* note 6, p. 261.

⁴⁴ Article 3.3.1, UNIDROIT Principles 2016.

⁴⁵ Commentary (2010), p. 126.

⁴⁶ Alternatively, if such effects are not prescribed, the parties may exercise such remedies that are reasonable in the circumstances of the case.

⁴⁷ Commentary (2010), p. 12-13.

⁴⁸ As developed by SDG agenda.

⁴⁹ Hatzimihail “SDG 7” in Michaels, Ruiz Abou-Nigm, van Loon *op. cit.* note 9, p. 234: where he illustrates how private international law can deal with the situation where regulatory norms may be characterized as mandatory rules. In general, current developments are extending the notion of overriding mandatory rules to cover duties of care for parent or buyer companies that protect potential victims from the formers’ activities overseas. This is bound to change approaches to issues of choice-of-law since historically such questions were cemented by a general impunity using doctrines such as the *forum non conveniens*. See also Marzal, Pavlakos, forthcoming: the authors refer to the use of the doctrine to cement such claims against parent companies, *In re Union Carbide Corp Bhopal Gas Plant Disaster*, (1986) 634 F Supp 842.

Their application, when the Principles come into play, will depend on their nature as either ordinary mandatory rules of domestic law or overriding mandatory rules.⁵⁰

The question about the method of determination of the applicable mandatory rules is left to the relevant conflict rules for each given case. Conflict rules will also determine the application of the Principles themselves. The traditional view in conflict of laws is to nationalize cross-border transactions.⁵¹ Arbitral tribunals, however, enjoy larger flexibility as to the choice of applicable law, due to their ability to apply sources from the wider range of ‘rules of law’.⁵² Given the criticism of the traditional conflict-of-law approach - as far as its limited contribution to the global governance debate⁵³ - the UPICC are seen as a valid alternative that can garner better results.⁵⁴ Therefore, the Principles can contribute to the sustainability agenda in cases that go to arbitration, particularly investment arbitration,⁵⁵ or as a guide to national law interpretation for issues arising out of an international commercial contract.⁵⁶

⁵⁰ Commentary (2010), p. 13. The latter are more likely to be applied by an arbitral tribunal since the validity and enforceability of the award will depend on the forum state or any other country with which the case at hand has a significant connection with. See also J. M. E. Tramhel “SDG 2: Zero Hunger” in Michaels, Ruiz Abou-Nigm, van Loon, *op. cit.* note 9, p. 70 *et seq.* Additionally, the tribunal may also apply sustainability standards in case it considers them as overriding mandatory rules that reflect principles widely accepted as fundamental in legal systems throughout the world. *Ibid*, p. 14. What is has been termed as “transnational public policy”.

⁵¹ See *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48 para. 47; M. Joachim Bonell, “The law governing international commercial contracts and the actual role of the UNIDROIT Principles”, *Uniform Law Review* 23 (2018) p. 16. The case from the UK Supreme Court reaffirms the statement by Joachim Bonell that a reference to the UNIDROIT Principles will be treated by national courts as a mere agreement to incorporate them into the contract and is, thus, binding only to the extent that it is not contrary to the *lex contractus*. However, the flexibility offered by the rules on frustration within the Principles was seen as a benefit to dealing with the COVID-19 pandemic and the resulting problems in the performance of contracts and a justification for a potential exception to the traditional conflict-of-law approach. See the recommendation by Instituto Hispano Luso Americano Derecho Internacional, “COVID-19 and Frustration of International Contracts: Ihladi Recommendations”, p. 2, available at [COVID-19-and-frustration-of-international-contracts.pdf \(ihladi.net\)](https://www.ihladi.net/COVID-19-and-frustration-of-international-contracts.pdf).

⁵² G. Cordero-Moss, D. Behn “The relevance of the UNIDROIT Principles in investment arbitration” *Uniform Law Review* 19 (2014) p. 571. The Principles have been considered as reflecting the practice in international trade and have been even interpreted as a codification of the *lex mercatoria*. See A. Garcia Sanjur “UNIDROIT Principles and the COVID-19 Economy” *Uniform Law Review* (2022) p. 2. See *Kabab-Ji SAL v Kout Food Group*, para. 41: where the Court pointed out that the reference to “principles of law generally recognized in international transactions” is to be understood as a reference to the UNIDROIT Principles of International Commercial Contracts.

⁵³ Due to its disconnectedness from the macro-perspective (i.e. the social and political context of the law(s) involved). See H. Muir Watt, “Private International Law Beyond the Prism” (2011) 2 *Transnational Legal Theory* 3, p. 347-428. Muir Watt criticizes the dogma of neutrality and its effects on environmental protection (*ibid*, p. 388). In contrast to this traditional dogma of private international law, the Rome II Regulation is seen by the author as a better way of dealing with environmental issues, since it allows for the most pollution-repellant law to apply.

⁵⁴ See, Tramhel, *op. cit.* note 50, p. 90. On the role of optional instruments in contributing towards the achievement of sustainability goals see W. Bull “Sustainability and Optional Regimes: A Legislative Means of Empowering Private Individuals in the Development of Socially Beneficial Activities?” in Akkermans, van Dijck, *op. cit.* note 9.

⁵⁵ See G. Cordero-Moss, D. Behn “The relevance of the UNIDROIT Principles in investment arbitration” *Uniform Law Review* 19 (2014).

⁵⁶ The UNIDROIT Principles may be applied when there is an express choice by the parties. See to that effect Article 3(1) of the Principles on Choice of Law in International Commercial Contracts, Hague Conference, approved in 2015. For an analysis see R. Michaels “Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts”

i. Enforcement of terms imposing sustainability obligations

Courts may, to a certain extent, imply terms which are not expressly formulated in the contract.⁵⁷ The system of the UPICC provides that the agreement may be supplemented by terms that may be implied as a result of the practices between the parties.⁵⁸ Obligations which can be seen as linked to sustainability goals may be either expressly or impliedly incorporated as warranties.⁵⁹ Implied warranties incorporate standards which are either legislatively or judicially developed, while express warranties are usually related to market standards which are sector-specific.⁶⁰ Other than such market standards, the parties may also make an express reference to mandatory laws such as labor and environmental laws.⁶¹ Within the Principles themselves, such a reference is seen as an intention by the parties to clarify what their respective obligations should be. By allowing the contracting parties the freedom to craft their agreements as they deem fit, the UPICC remain ethically neutral on the substance of those choices.⁶² However, the Principles, through the implication of terms, nudge parties towards ethical behavior in their agreements.⁶³

in K. Purnhagen, P. Rott (eds) *Varieties of European Economic Law and Regulation*, Studies in European Economic Law and Regulation vol. 3, Springer (2014). The UPICC may also apply when the parties refer to general principles of law as the applicable law to their contract. See Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, Arbitral Award no. 261 (2005) abstract available at www.unilex.info/principles/case/2038. They may even apply in the absence of such express choice by way of an implied choice, when the contracting parties intended to exclude the application of any domestic law. See Commentary (2010) p. 4. The Principles, however, may be also used as a means of interpreting and supplementing uniform law instruments such as the CISG. See to that effect the decision by the Court of Appeal of Rio Grande do Sul in *Noridane Foods S.A. v Anexo Comercial Importação e Distribuição Ltda* (2017) summary available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=2035&step=FullText>. As mentioned above, they may also assist in the interpretation and supplementation of domestic law. See the decision by the Belgian Court of Cassation in *Scafom International BV v Lorraine Tubes s.a.s.* (2009) C.07.0289 N, available at: www.unilex.info/case.cfm?pid=1456. For a commentary on that decision see A. Veneziano, “UNIDROIT Principles and the CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court” *Uniform Law Review* (2010). See also Garro, Moreno Rodriguez *op. cit.* note 41. See also I. Bantekas “Transplanting the UNIDROIT Contract Principles into the Qatar Financial Center: a fresh paradigm for wholesale legal transplants?” *Uniform Law Review* 26 (2021): on the Qatar Financial Center Contract Regulations being largely predicated on the UNIDROIT Principles. Lastly, the principles may be incorporated by reference. See *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48.

⁵⁷ Ulfbeck, Hansen, *op. cit.* note 3, p. 194.

⁵⁸ Gabriel, *op. cit.* note 33, p. 134. See Article 5.1.2, UNIDROIT Principles 2016.

⁵⁹ See See Micklitz (2021), *op. cit.* note 2, p. 214. As Micklitz points out, private regulation which takes public policy concerns into account could be the product of individual or collective negotiations, either at the level of contractual practice or of contract law. Therefore, the element of consent requires the enforcement of such (private) regulation. See also G. P. Calliess, P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, Hart Publishing (2010).

⁶⁰ Cafaggi, *op. cit.* note 17, p. 1586.

⁶¹ Such clauses may be accompanied by stabilization clauses whereby the application of new social and environmental regulations is limited or frozen during the life of the contract. See A. Shemberg, “Stabilization Clauses and Human Rights” (2008) United Nations Office of the High Commissioner for Human Rights.

⁶² Trade usages, and other rules that are enshrined by the Principles such as good faith and fair dealing and reasonableness also nudge parties towards ethical behavior. Gabriel, *op. cit.* note 33, pp. 133-134.

⁶³ Gabriel, *op. cit.* note 33, p. 134. Terms may be implied either as a result of the nature and purpose of the contract, or the practices established between the parties.

Codes of conduct have become a tool for companies to fulfill a regulatory role by setting their standards autonomously.⁶⁴ One can expect that the new wave of corporate due diligence legislation will render the codes an integral part of the regulatory landscape while also creating binding obligations upon multinationals to monitor and audit suppliers. The standards enshrined within these codes quite often include fundamental societal interests such as human rights, labor standards and/or environmental protection.⁶⁵ The parties may make a reference into their contract to a company's code of conduct or they may make reference to an industrywide standard.⁶⁶ For contract law, the question is whether the document was expressly incorporated terms into the contract,⁶⁷ with the contractual term referring to it being either a condition, warranty or innominate term.⁶⁸ Given that these codes are unilateral declarations, the element of reciprocity is lacking. Moreover, they are carefully written so as to avoid the risk of creating liability.⁶⁹ Hence, their enforcement under traditional contract law principles might be rejected. Nonetheless, new developments in national contract law provide valuable insights. In particular, an Australian court found the failure to comply with certain provisions of a banking code as a breach of warranty resulting in an award of damages.⁷⁰

When deciding whether a code of conduct was incorporated by reference, the general rules on interpretation of the parties' intention will apply.⁷¹ The UPICC do not establish a hierarchy among contract terms.⁷² Moreover, Article 4.5 aims at giving effect to all the terms contained in the contract. With regard to the interpretation of the parties' intention, the Principles provide that statements and other conduct of a party shall be interpreted according to that party's intention.⁷³ Preliminary negotiations between the parties as well as established practices, usages, conduct subsequent to the

⁶⁴ A. Beckers, "Regulating Corporate Regulators through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct" EUI Working Papers MWP 2016/12 (2016) p. 8. This has become an established practice nowadays. See e.g. L. Preuss "Codes of Conduct in Organisational Context: From Cascade to Lattice-Work of Codes" *Journal of Business Ethics* 94 (2010) 471-487.

⁶⁵ *Ibid.* Codes of conduct usually address wages and benefits, working hours, child labor, forced labor, health and safety, discrimination, disciplinary practices, free association and principles of monitoring. See also Miller *op. cit.* note 24, p. 447.

⁶⁶ See e.g. Amazon's Supply Chain Standards Manual, at p. 13 available at [Amazon Supply Chain Standards Manual \(aboutamazon.com\)](https://www.aboutamazon.com/supply-chain-standards).

⁶⁷ Alternatively, it could be seen as a reference document. See e.g. the complaint by Rivers, Waldman and Duke against Google for a violation of the company's Code of Conduct, which is incorporated by reference into the written employment contracts with the complainants, available at: [google complaint filed.pdf \(documentcloud.org\)](https://www.documentcloud.org/documents/100000000-google-complaint).

⁶⁸ See also V. Ulfbeck, A. Andhov, K. Mitkidis (eds), *Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap*, Routledge (2019).

⁶⁹ Miller *op. cit.* note 24, p. 451.

⁷⁰ See *National Australia Bank Ltd v Rice* [2015] VSC 10, Supreme Court of Victoria.

⁷¹ Poncibo, *op. cit.* note 3, p. 347.

⁷² See Article 4.4, Commentary p. 145.

⁷³ Article 4.2, UNIDROIT Principles 2016. Conduct includes post-contractual conduct which is admissible as an aid to interpretation based on Article 4.3. See also *Franklins Pty Ltd v Metcash Trading Ltd* (2009) Supreme Court of New South Wales, available at www.unilex.info/principles/case/1520#SUPPLY_CONTRACT.

conclusion of the contract will, *inter alia*, determine the intentions of the parties.⁷⁴ Therefore, based on the interpretation of the relevant provisions of the UPICC, contractual terms aiming at incorporating a company's code of conduct should be interpreted so as to give effect to the parties' intention.⁷⁵

ii. Trade usages as incorporated terms

Trade usages have been characterized as genuine engines driving harmonization and unification of commercial law.⁷⁶ The UPICC have been seen as being underlined by a general openness to usages.⁷⁷ Article 1.9 of the UPICC provides that the parties in an international commercial contract are bound by any usage and any practice to which they have agreed and have established between themselves (subjective element). This includes usages that are widely known and regularly observed in international trade by parties in the particular industry (objective element).⁷⁸ Various standards regarding the method of production and services rendered evolve in order to be in line with labor and environmental standards. These may be considered trade usages under Article 1.9 of the UPICC, thus, translating them into implied terms of the contract that bind the parties. Article 4.3(f) of the Principles, lists usages as being among the relevant circumstances to be considered in the interpretation of contract terms.⁷⁹

In situations where both parties agreed to certain standards on a broader scale, they are presumed to have incorporated those standards implicitly as a usage in their individual contracts.⁸⁰ Under the system of the UPICC certain standards may be incorporated into the contract through the previous conduct of the parties, whereby the parties will be presumed to have individually agreed to a certain usage.⁸¹ For example, where both parties may participate in private initiatives for the protection of human rights or the environment, this participation could be seen as an international trade usage

⁷⁴ Article 4.3, UNIDROIT Principles 2016. Comment 3 provides that such practices established between the parties and conduct subsequent to the conclusion of the contract should be particularly relevant in the interpretation of long-term contracts due to their complex performance and evolutionary nature.

⁷⁵ As Miller suggests, corporate codes are often written in a non-promissory language which makes it difficult to meet the traditional requirements of contract formation. See Miller *op. cit.* note 24, p. 452. However, as noted above, due diligence legislation, in particular the Proposed Corporate Sustainability Due Diligence Directive, provides for contractual assurances from business partners that the corporate code of conduct will be complied with.

⁷⁶ Garro *op. cit.* note 42, p. 1149.

⁷⁷ L. Gama, "Usages and Implied Obligations under the UNIDROIT Principles of International Commercial Contracts" in F. Gélinas (ed.), *Trade Usages and Implied Terms in the Age of Arbitration*, Oxford University Press (2016) p. 163.

⁷⁸ Gabriel, *op. cit.* note 33, p. 135. The Principles anticipate that trade usages will develop and change over time, thus enabling them to properly capture the evolving standards under the rubric of 'trade usages' of a particular industry.

⁷⁹ Gama *op. cit.* note 77, p. 157.

⁸⁰ Schwenzer, Leisinger, *op. cit.* note 6, p. 265. See also *Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd* [2008] FCA 1591, Federal Court of Australia: for the threshold that trade usages need to reach in order for terms to be implied in the contract.

⁸¹ Schwenzer, Leisinger, *op. cit.* note 6, p. 265. See also Article 4.2, UNIDROIT Principles 2016.

under Article 1.9.⁸² Such standards might still become part of the contract if they are regarded as international trade usage which the parties knew or ought to have known, as a regularly observed practice by other actors in the sector.⁸³ A number of authors have suggested that environmental sustainability shall be considered as a trade usage for multinational enterprises given the fact that environmental protection and sustainability are now an integral part of corporate social responsibility.⁸⁴ In case of violation, Article 7.1.1 may be applicable due to the failure by one party to perform any of its obligations under the contract.⁸⁵

iii. Good faith and fair dealing – The importance of the duty to renegotiate

Contract negotiation and compliance control over sustainability clauses and codes of conduct has been seen as a best practice for ensuring their enforceability.⁸⁶ Such a practice will maintain a relational attitude towards enforcement that will be characterized by mutual transparency while also preserving the leverage in the form of the possibility to terminate the business relationship in case of on-going non-compliance.⁸⁷ The UPICC promote a cooperative ethic between the parties especially in relation to long-term contracts.⁸⁸ Cooperation,⁸⁹ good faith⁹⁰ and best efforts⁹¹ are terms implied in all contracts. A cooperative agreement as a remedy for breach of warranty concerning regulatory provisions is seen as a radical departure from the traditional logic of contract law, since it involves the collaboration among parties which might be outside the bilateral contract that resulted in the primary breach.⁹² The UPICC may promote such remedies and enable the use of contract as a regulatory vehicle

⁸² See *ibid* for CISG.

⁸³ *Ibid*.

⁸⁴ Poncibo, *op. cit.* note 3, p. 343-344.

⁸⁵ Which also includes defective or late performance. See Article 7.1.1, UNIDROIT Principles, 2016.

⁸⁶ Peterkova Mitkidis *op. cit.* note 4, p. 72. See e.g. Article 6.2.3 of the UNIDROIT Principles whereby in case of hardship the disadvantaged party is entitled to request renegotiations.

⁸⁷ *Ibid*. The leverage for such multinational companies in relation to their suppliers stems from the economic asymmetry between the two, while the legal leverage is facilitated through the possibility to enforce agreed terms of cooperation before courts (*ibid*, p. 73).

⁸⁸ Article 1.11 defines a long-term contract as “a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties. See Comment to Article 7.1.7 where it is pointed out that contracting parties may have an interest in continuing rather than terminating their business relationship in long-term contracts. See also R. F. Zuniga Peralta “Long-term contracts and the UNIDROIT PICC: towards a realistic regulation” *Uniform Law Review* (2021) p. 1-40.

⁸⁹ Article 5.1.3, UNIDROIT Principles 2016.

⁹⁰ Article 1.7, UNIDROIT Principles 2016. This provision is mandatory, since the parties may not exclude or limit the duty to act in accordance with good faith and fair dealing.

⁹¹ Article 5.1.4, UNIDROIT Principles 2016.

⁹² *Ibid*, p. 1588.

for implementing private and public transnational regulatory regimes.⁹³ For example, when there is an express warranty that commits the contracting parties to compliance with regulatory standards, its main purpose is to ensure compliance instead of providing compensation via damages.⁹⁴ In case of breach, one of the remedies that are suggested is a cooperative agreement between the different parties to remedy the consequences of the breach.⁹⁵

Force majeure and hardship rules found within the Principles can also assist in countering the impact of disruptions in supply chains which can lead to negative repercussions on food security.⁹⁶ Contractual performance in sectors such as food production, agriculture and other land use, energy, infrastructure and transport may be impacted by mitigation measures and adaptation to a warming climate.⁹⁷ Parties in commercial contracts affected by such measures may benefit from the flexible rules of the UPICC to renegotiate their contracts in case the price is affected by mitigation measures, for instance.⁹⁸ The Principles offer mechanisms that allow for an adequate renegotiation and proportionate allocation of losses which can eventually assist in preserving the contract and maximize the value for the jurisdiction(s) involved.⁹⁹ The openness of such rules provide much needed flexibility to contracting parties as well as adjudicators in dealing with problems in the performance of valuable

⁹³ Rules that promote the continuation of agreements such as the one found in Article 7.1.4 which enables a non-performing party to cure the defect when there has been a breach, are important in this regard. H. D. Gabriel “The Use of the UNIDROIT Principles as Neutral Law in Arbitration” 3 *Journal of Arbitration Studies* 23 (2013) p. 53.

⁹⁴ Cafaggi, *op. cit.* note 17, p. 1587.

⁹⁵ *Ibid.* The duty to renegotiate stemming from Article 1.7 is an important tool in such scenarios.

⁹⁶ Tramhel, *op. cit.* note 50, p. 73. See e.g. the recent disruption in the food supply chain as a result of Russia’s invasion into Ukraine, [Black Sea wheat prices soar on supply disruptions; futures prices rally | S&P Global Commodity Insights \(spglobal.com\)](https://www.spglobal.com/commodityinsights/news/en/energy/2022/06/01/black-sea-wheat-prices-soar-on-supply-disruptions-futures-prices-rally).

⁹⁷ See International Chamber of Commerce, “Resolving Climate Change Related Disputes through Arbitration and ADR”, Commission on Arbitration and ADR, p. 9. Mitigation measures may be a result of national or international laws, but also as a result of voluntary commitments by industry or individual corporations.

⁹⁸ See *ibid.*, hypothetical case no. 5. See also ICC International Court of Arbitration, Geneva 10351 available at www.unilex.info/principles/case/2112#SUPPLY_CONTRACT. For contract renegotiation see also *Churchill Falls (Labrador) Corporation Ltd v Hydro-Québec* (2016) Cour d'Appel du Québec (Montréal) available at www.unilex.info/principles/case/1968#SUPPLY_CONTRACT; where the Principles were used to support the solution provided by domestic law, namely, to maintain the original allocation found in the contract. See Articles 1.7 and 6.2.3 in terms of the provision of flexibility to the parties.

⁹⁹ Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis, available at: [note-e.pdf \(unidroit.org\)](https://www.unidroit.org/note-e.pdf). See to that effect *Delta Comercializadora de Energia Ltda. v AES Infenergy Ltda.* (2009) Câmara FGV de Conciliação e Arbitragem (São Paulo, Brazil) abstract available at www.unilex.info/principles/case/1530#SUPPLY_CONTRACT. See also Sanjur (2022) p. 6 *et seq.* on how the Principles can help the parties and the adjudicators in cases of unexpected events.

contracts for the parties.¹⁰⁰ Such preservation can similarly promote the sustainability goal of zero hunger by ensuring food availability.¹⁰¹

IV. Concluding remarks

Sustainability clauses in an international commercial contract can arguably be intended for the benefit of third parties such as employees, when it comes to labor standards, or even other stakeholders which have an interest in the enforcement of existing climate policies. Thus, the question is whether third parties may enforce said provisions.¹⁰² Supply chain contracts are bilateral contracts whose confidentiality is often protected by a non-disclosure provision.¹⁰³ Therefore, third parties who might be an actual beneficiary, would find it impossible to monitor their compliance.¹⁰⁴ Employees of the supplier are not in privity of contract with the transnational corporation that potentially imposes certain labor standards on its suppliers through a code of conduct.¹⁰⁵ In such scenarios, Articles 4.8(2) (b) and (d) and Articles 5.1.2(a) and (d) in cases of gap-filing are seen as valuable provisions to refer to the parties' contextual relationship.¹⁰⁶ A contextual interpretation may enable adjudicators to look beyond the four-corners of the contract and to the nature and purpose of the text itself, as well as principles such as good faith, fair dealing and reasonableness in determining the intention of the parties, assisting in the determination whether third parties were meant to be beneficiaries to such a bilateral contract.

¹⁰⁰ See Comment 5 to Article 6.2.2 mentioning the relevance of hardship in long-term contracts and, likewise, Comment 5 to Article 7.1.7 mentioning the relevance of *force majeure* to such contracts.

¹⁰¹ See also UNIDROIT, "Private Law Aspects of Agricultural Finance" (2010) available at [Private Law and Agric. Develop. - UNIDROIT](#). An international guidance document on land investment contracts might be potentially prepared taking the UNIDROIT Principles into account. See also the joint publication by UNIDROIT, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD), "Legal Guide on Contract Farming" (2015): which, through its alignment with the Principles for Responsible Investments in Agriculture and Food Systems (CFS-RAI Principles) promotes sustainability standards such as corporate social responsibility programmes.

¹⁰² See e.g. the arbitrations arising from the Accord on Fire and Building Safety in Bangladesh signed on 15 May 2013. The Accord is an agreement between global brands and trade unions created in the aftermath of the Rana Plaza building collapse. Trade unions commenced arbitrations under the Accord and the UNCITRAL Rules of Arbitration 2010. See for more Permanent Court of Arbitration, "Bangladesh Accord Arbitrations" at [Cases | PCA-CPA](#).

¹⁰³ Peterkova Mitkidis *op. cit.* note 4, p. 68.

¹⁰⁴ *Ibid.*, p. 69: knowledge of the existence of an agreement is a necessary precondition for a third party to exercise its rights (*nemo iudex sine actore*).

¹⁰⁵ Miller *op. cit.* note 24, p. 453-4. Privity of contract is a common law doctrine under which contracts can confer rights or impose obligations only on parties to the contract. See M. Trebilcock "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" *The University of Toronto Law Journal* 57 (2007) p. 269. In a case before the US Court of Appeals for the Ninth Circuit, the enforcement of standards found within Wal-Mart's corporate strategy on its suppliers was rejected since the court found that the transnational corporation did not incur a duty to monitor its suppliers. In determining the intention of the parties for the inclusion of, or reference to, such standards, courts should consider the contextual background of the contract to determine whether there was an intention to benefit a third party. See *Doe v. Wal-Mart Stores, Inc.* [2009] No 08-55706 U.S. Court of Appeals for the Ninth Circuit.

¹⁰⁶ Peralta *op. cit.* note 88, p. 34.

A contextual interpretation to such long-term contracts is seen as more fitting for determining a more realistic meaning of the clauses found in the text of the contract.¹⁰⁷

This essay attempts to present ways that the UPICC may be used in order to promote sustainability standards.¹⁰⁸ Sustainability standards are characterized by their “soft law” nature, however, rapid changes in the regulatory landscape transform these standards into hard law obligations with legal consequences in cases of non-compliance. The UPICC may similarly transform such contractual terms into binding obligations. The flexibility of the solutions found within the Principles, the promotion of cooperation between the parties that adheres to the *favor contractus* principle, as well as the recognition of the importance of trade usages, are all ways that the Principles may nudge parties towards ethical behavior.

¹⁰⁷ *Ibid*, p. 30.

¹⁰⁸ There are many other ways that the UPICC may be considered relevant in the realization of sustainable development standards. For instance, the provisions that aim at policing against unfairness may be deemed relevant in cases of suppliers with limited bargaining power agreeing to Codes of Conduct or sustainability obligations that may not fully understand. These Codes of Conduct are usually not a product of negotiation. See, for example, Article 2.1.20 on surprising terms and Article 7.1.6, UNIDROIT Principles 2016 on exemption clauses.