LCF Studies in Commercial and Financial Law 1

Mads Andenas
Maren Heidemann *Editors*

Quo vadis Commercial Contract?

Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice of Global Commerce

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The London Centre for Commercial and Financial Law

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LCF Studies in Commercial and Financial Law

Volume 1

The aim of the series is to provide a forum to discuss specifically commercial law subjects focussing on the needs of merchants, their advisers and clients. Topics cover all areas of national, international and transnational commercial law broadly conceived and including issues in corporate law and financial law taken from both private and public regulatory law, private international law, international commercial arbitration, investor-state dispute settlement and international tax law. The series showcases research carried out by the London Centre for Commercial and Financial Law (LCF) and its affiliated researchers and authors. The editors further invite proposals especially welcoming novel theories including on non-state law or on new technologies and their treatment in the law such as "artificial intelligence" and the digital economy as well as issues of sustainability and ecological reforms. Further details can be found on www.lcf-academic.org.

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Editors

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Preface

The LCF Studies in Commercial and Financial Law

This is the first volume in the book series of The London Centre for Commercial and Financial Law. The series is appropriately named *The LCF Studies in Commercial and Financial Law.*

The advisory board for the series has nine members:

- Professor Guido Alpa
- Professor Freya Baetens
- Professor Jan H Dalhuisen
- Professor Iris Chiu
- Professor Olha Cherednychenko
- Professor Paul Craig
- Professor Ettore Lombardi
- Professor Michele Papa and
- Professor Michael Schillig
- Maren Heidemann and I are the general editors.

This series showcases research carried out by the London Centre for Commercial and Financial Law and scholars associated with it. Topics cover national, international, and transnational commercial law broadly conceived, and including corporate law as well as issues in financial law taken from both private law and public regulatory law. The scope also includes private international law and international commercial arbitration and investor-state dispute settlement. The Centre is especially interested in comparative viewpoints and innovative legislative reform. The aim of the series is to give its authors a forum to discuss commercial law subjects both from a theoretical and a practical perspective. The broader enquiry aims at exploring the legal nature and use of non-state law, as well as new technologies and their treatment in the law such as AI and the digital economy, and also issues of

sustainability and ecological reforms and supply chain management and human rights compliance issues.

One particular interest of the LCF lies on the interface between public and private law. In fields such as financial market regulation and contracts, this remains a largely unresolved area of academic research, legislation, and judicial practice. Private commercial law is often directly influenced by public regulation. At the same time, public regulation of commercial law matters often fails to achieve its goals due to the lack of a working interface between the administrative law sphere and that of traditional private law. This is becoming a pressing issue in EU law. The same applies to public international law more generally, where treaties are aimed at achieving results in the private law or commercial law sphere or in private law governed areas of life such as improving human rights by means of regulating global supply chains, double taxation, women's equality rights.

The books and contributions to edited volumes are blind peer reviewed.

This book has the title *Quo vadis Commercial Contract? Reflections on Sustainability, Ethics and Technology in the Emerging Law and Practice of Global Commerce*. The title has the elements at the core of the Centre and its book series. The commercial contract. Global commerce. Sustainability. Ethics. Technology.

The London Centre for Commercial and Financial Law

The London Centre for Commercial and Financial Law goes back to 1996. That year saw the foundation of the Centre for Corporate and Financial Law (CCFL) at the Institute of Advanced Legal Studies, School of Advanced Studies (IALS), University of London.

In its current form, The London Centre for Commercial and Financial Law (LCF) was formed in 2016 as an independent and free-standing academic institution. It hosts academic events and legal research projects focusing on commercial and financial law.

I was the founding Director of the IALS Centre back in 1996, and for that Centre's first 5 years, and then returning to the post in 2007. Dr. Maren Heidemann served first as a Visiting Fellow and then in the final 10 years of the IALS Centre (CCFL), as an IALS Associate Fellow, CCFL Professorial Fellow and with research and PhD supervision as her main tasks.

The IALS Centre undertook research, research supervision of PhDs, assisted with the teaching on the LLM in corporate and financial law, policy discussion fora, and cooperated over the years with the British Institute of International and Comparative Law, the Centre of European Law at King's College, and The UCL Centre for Commercial Law. Among the outcomes of the research activities at the IALS Centre were the monographs, *European Comparative Company Law* (Cambridge University Press, 2009) by Professor Frank Wooldridge and myself and *The Foundations and Future of Financial Regulation: Governance for Responsibility* (Routledge 2014) by Professor Iris Chiu at University College London and myself, and the edited collection by Professor Gudula Deipenbrock and myself, *Regulating and*

Supervising European Financial Markets: More Risks than Achievements (Springer, 2016), Maren Heidemann and Joseph Lee, *The Future of the Commercial Contract in Scholarship and Law Reform* (Springer, 2018), Maren Heidemann *Transnational Commercial Law* (Bloomsbury / Macmillan International Higher Education, Red Globe Press, London, 2019).

From 2016, The London Centre for Commercial and Financial Law has provided the basis for continuing the mission of the IALS Centre. The IALS Centre was formally abolished in 2019. The London Centre for Commercial and Financial Law is under the direction of Dr. Maren Heidemann and myself. The LCF has continued the series of annual conferences on *The Future of the Commercial Contract in Scholarship and Law Reform*, and different research projects that provide several of the prospective titles for this new book series. This includes the work done by scholars involved in the 2021 conference series on 'Contract Law in Common Law countries—a Study in Divergence' conducted by the LCF in co-operation with O.P. Jindal University, The Jindal Global Law School in India, and Professor Manasi Kumar. A special issue of the Liverpool Law Review in 2022 will publish some of the papers resulting from the 'Contract Law in Common Law countries' series.

The Sixth Annual Conference on *The Future of the Commercial Contract inScholarship and Law Reform* took place in 2021, and was the first of the annual conferences that did not take place at the IALS.

These annual conferences are important events complementing the LCF research project of the same name.

Another research project is coordinated by the Contractual ICSID Arbitration Working Group. It explores the use of ICSID arbitration clauses in contracts between private investors and state parties. Also this enquiry draws on work previously undertaken at IALS and aims to combine academic, empirical, and practical analysis in order to work towards a framework for the use of the ICSID system in contractual dispute resolution. The project involves stakeholders from all stages of the investment and dispute settlement process.

Quo vadis Commercial Contract?

The title *Quo vadis commercial contract? Reflections on sustainability, ethics and technology in the emerging law and practice of global commerce* places the current book in the middle of the LCF research activities. It contains some of the papers presented at the fourth and fifth annual conferences in the research project of 'The Future of the Commercial Contract in Scholarship and Law Reform'. The LCF has been exploring new developments and trends in commercial contracts and contract law at these annual conferences since 2016. While the fourth annual conference on 11th October 2019 focused on new technologies in contracting and arbitration, the fifth annual conference on 16th October 2020 centred on sustainability and the running up to the United Nations' conference in Glasgow that year ('Conference of the Parties', COP26). The following is a brief summary and overview of the

contents and context of this book introducing its authors and emulating some excerpts.

The first of the book's two topics is technology in commercial contracts. The book addresses the law governing applications of blockchain technology in contracting and contract performance. Blockchain is also discussed in the development of new financial products and currencies, and one article reaches out far beyond contract and placing it in context with the wider society: does blockchain enable a more democratic form of contracting?

The second of the two topics is sustainability in commercial contracts. Sustainability has been a recurring theme in the research and the conference series. Sustainability must be understood in a broad sense in the context of commercial contracts and commercial contract law. Both socio-ethical components of contract theory and commercial practice as well as environmental and innovation related concerns and objectives emanate from the broader concept of sustainability as it is used in contemporary legal research and legislative policies. Sustainability includes good faith in commercial contracts and practice, ethical contracting as in the debate around supply chains, the development of innovative financial instruments such as green bonds, and the treatment of sharp commercial practices in the courts as in the manipulative use of arbitration clauses. Regulators' policy measures can impact on commercial contracts through rules seeking to foster the circular economy and trading platforms. At the same time, and by way of such regulatory law, contracts themselves can be used to increase environmental sustainability in commerce.

With each special aspect we select as a focus for our annual conferences, we explore its role in commercial contracts, contracting, and contract law. We distinguish this sub-discipline from general contract law and regulatory law in order to offer a supplementary viewpoint for researchers in the wider fields of the law governing new developments in law and technology and sustainability.

As with previous LCF volumes and academic events, our contributors hail from many different jurisdictions and have a cosmopolitan background. The resulting collection represents a contemporaneous cross section of global commercial contract law.

In her introductory chapter, Dr. Maren Heidemann sets out the focus and research mission of the book in her introduction under the title 'Ethics in global commerce through contract and regulation'. She introduces the regulatory perspective and its relationship to the contractual in pursuing ethical standards in commercial dealings. These are not only postulated by the international community but also considered an important and inherent component of successful trading. The regulatory perspective explores avenues outside the contract. How and to what extent this works is the subject of the chapter's analysis which covers the new German Supply Chain (Due Diligence) Act of 2021 in detail and compares it with the 2015 UK Modern Slavery Act and the 2020 reforms in the Swiss Obligationenrecht. Dr. Heidemann draws some conclusions about the legality and prospects of this new approach to giving legal effect to international guarantees assumed under the UN Global Compact and the OECD responsible business guidelines as well as the role of public international law in global supply chain laws.

The book falls in three parts: Part I: Law and Technology, Part II: Sustainability in Commercial Contracts, and Part III: Supervening Events and Contractual Ethics.

The first chapter in Part I: Law and Technology, under the title 'The Role of the Court of Justice of the European Union on the Interpretation of Platform Operators and Business Users' Contracts', is by Despina Anagnostopoulou who is an Associate Professor and Jean Monnet Chair at the University of Macedonia, Thessaloniki, Greece. She shows how the CJEU has interpreted contractual terms of platforms as Google, eBay, Uber, and Airbnb in e-advertising, e-market places, in private transport of passengers, and in short-term accommodation sharing. She also addresses the impact of the CJEU judgments on national case law and on the EU legislative process. The criteria established by the Court of Justice determine platform liability, and liberty to continue their business models, and form the basis for the proposed EU legislation.

The second chapter, 'Freedom to Contract and Democracy in the Age of Blockchain and Smart Contracts', is by Cristina Poncibò and Benedetta Cappiello, an Associate Professor of Comparative Law, Department of Law, University of Turin and a Research Fellow at the University of Milan, respectively. They scrutinize whether and how blockchain technology can democratize relationships for private users. They study the new blockchain-based platforms, such as the CmaaS, and the case of smart contracts. They ask, will it enhance contractual freedom and the democratic processes within the blockchain?

The first chapter in Part II: Sustainability in Commercial Contracts is by Katarzyna Południak-Gierz, a Researcher at the Civil Law Department, Jagiellonian University in Kraków.

The title is 'Eco-reasonableness. Possibilities of Incorporating Green Principles into General Private Law Clauses', and it explores the promotion of ecological sustainability through contract law and contracting. Her focus is on the introduction of the ecological standard by way of the general private law clause of reasonableness criterion. She analyses how the criterion of reasonableness intermingles with the legitimate consumer expectations standard under EU sales law. Ecological concerns are introduced into legitimate consumer expectations standard in EU sales law and Directive 2019/771. It remains a challenge to establish the point of reference for eco-reasonableness. Contract interpretation could be based on the expectations of the consumer, either objective and standardized or subjective and with individual elements; consumer expectations, daily experience, and standard factual circumstances; or the applicable normative framework. She assesses critically the overall effectiveness of incorporating ecological standards into contract law by way of the use of a general reasonableness clause.

The second chapter in Part II is by Katarzyna Kryla-Cudna, an Assistant Professor at the University of Bristol. Her title is 'Right to Cure: The Odd One Out? The CISG's Remedial Scheme and the Circular Economy'. She first examines the interplay between the seller's right to cure and the remedies available to the buyer under the CISG from the perspective of policy choices made by the Convention's drafters. She then turns to the effects that the remedial scheme adopted in the CISG may have on environmental protection. She claims that the scheme of remedies

regulated in the CISG can contribute to the circular economy, an economic system in which the value of products and materials is maintained for as long as possible. While this outcome can be achieved through the remedies available to the buyer, the seller's right to cure does not have the potential to contribute to sustainability goals.

The third chapter in Part II is by Federica Agostini, who is a Research and Teaching Associate in Corporate and Financial Law at the University of Glasgow School of Law. Her title is 'From "Green Bond Principles" to "Green Bond Clauses": Mitigating Greenwashing Through Contract Law'. She asks what makes green bonds 'green'. A growing body of national, EU, and market regulatory initiatives has sought to categorize the projects which could be developed through these bonds and the best practices for issuers. They predominantly operate on a non-binding basis, leaving it to issuers and bondholders to define the 'green' credentials of bonds. Contractual clauses tend to be ambiguous on environmental objectives. Federica Agostini compares how green bond documentation articulates environmental standards. The 'greenwashing' risk may be reduced by the development of standard clauses along the lines of Master Agreements for derivatives. She concludes that adjustments to green bond Covenants and Events of Default could make environmental targets binding for issuers and expand the judicial remedies available to investors.

The first chapter in Part III: Supervening Events and Contractual Ethics, is by Muriel Renaudin who is a Lecturer in Law at the School of Law and Politics, Cardiff University. Her title is 'The Consequences of Brexit for Regulatory Competition and the Approximation of Commercial Law'.

She discusses the legal consequences of Brexit for the future of legal reforms of the laws governing cross border commercial transactions for both the United Kingdom and the European Union. She investigates the extent to which Brexit may impact the key dynamics of European economic integration and the extent to which it may affect future commercial law reforms in the EU and the UK. She contends that while Brexit may reduce opportunities for legal innovation by weakening legal competitiveness and approximation of law within Europe, it may also create an impetus for law reforms both in the UK through regained regulatory sovereignty and, in the EU through a facilitated approximation of law. She envisages different scenarios in the light of relevant economic, legal, and geopolitical factors as well as regional and global international regulatory contexts. She concludes with a general discussion of the extent to which Brexit has fundamentally challenged the transnationalisation of commercial law and may mark a significant turning point in its future trajectory.

The second chapter in Part III is by Sepideh Harrasi, a Lecturer at City, University of London, and with the title 'A New Approach to Contracts Breached by COVID-19'.

Non-performance of commercial contracts due to the COVID-19 and the imposed restrictions may make it difficult for businesses to perform contractual obligations. Failure to perform will breach the contract, in such situations the innocent party can either complete its contractual obligations and claim damages or repudiate the contract and also obtain damages. The breaching party will wish to avoid paying

damages and might claim that an intervening event occurred, beyond its control and say that it should therefore be absolved of responsibility because the contract had been frustrated. When frustration is established, future contractual obligations will be automatically terminated. However, there is a high threshold to establish frustration.

Sepideh Harrasi argues that it is possible that COVID-19 would be considered as a frustrating event. The reason for such argument is that other common law jurisdictions such as Singapore seem more easily accept COVID-19 as a frustrating event, and it is an argument in favour of English law may following this lead.

The third chapter in Part III, is by Chee Wai Terry Wong and Tat Chee Tsui, a solicitor and Senior Lecturer at Hong Kong Metropolitan University, and an Assistant Professor, Beijing Normal University & Hong Kong Baptist University, respectively. They discuss the case of the 'Hong Kong's Insurance Industry in Response to COVID-19'.

Wong and Tsui examine the various means adopted by the Hong Kong insurance industry to contain its own exposure to provide the necessary means to allow the insured to maintain a reasonable possibility not to go under. They are aware that these two objectives are conflicting. They argue there is a spectrum of possibilities for underwriters and insured, within certain margins of tolerable irritations, without seriously jeopardizing their survival.

The fourth chapter in Part III is by Bashar Malkawi who is the Global Professor of Practice in Law at the University of Arizona. His article is entitled 'Uniformity or Diversity of the Concept of Good Faith Under the CISG and UAE Law'. Professor Malkawi explains that good faith is the bedrock of sale contracts in civil law countries and is characterized by honesty, openness, and consideration for the interests of the other party to the transaction or relationship. This is less clear in the United Nations Convention on Contracts for the International Sale of Goods (CISG) and is dependent on national precedents. Professor Malkawi seeks to provide the readers with a background of the concept of good faith which is one of the most important concepts of CISG. He compares with the doctrine of good faith according to United Arab Emirates (UAE) law. Cases decided by UAE courts indicate a pattern that UAE courts will give effect to express good faith provisions in sale contracts.

The fifth chapter in Part III is by Johan Vannerom. He is an Assistant Professor, Erasmus University Rotterdam and Attorney at law at Vannerom & Partners. The title of his chapter is 'The Erosion of Contractual Freedom in Commercial Contracts. A Belgian Case-Study'. It explains the concept of socialization of the contract as practiced in Belgian civil law following law reform within the last few decades as it has emerged also from European Union law initiatives even beyond the realm of consumer contracts.

The sixth chapter in Part III (and final article of the book) is by Leonardo V P de Oliveira who is a Lecturer in Law at Royal Holloway, University of London, a qualified lawyer in Brazil and a member of the Chartered Institute of Arbitrators. His title is 'Inequality of Bargaining Power and Arbitration: The Tale of Uber'.

Oliveira sets out to evaluate the problem of inequality of bargaining power in the arbitration clause Uber used to solve disputes with its drivers. This clause was put to the test in three jurisdictions under the same challenge that the clause restricts the contracting parties' right to bargain. Such an obstacle raises questions of how appropriate arbitration can be when used to obtain an advantage over weaker parties. Assessing the link between the validity of the arbitration agreement and inequality of bargaining power, the chapter first explains what is understood by inequality of bargaining power and how that works in arbitration and then highlights how this topic has been dealt with in disputes involving Uber and its drivers.

Oslo, Norway Mads Andenas
March 2022

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This is the first volume of the book series 'LCF Studies in Commercial and Financial Law'. It has been a pleasure to work with its authors both at the conferences it originated from and throughout the preparation of this collection. The editors would like to thank all authors for their patience and co-operation during the production process. It is with great sadness that we learned of the unexpected passing of Mr Terry Wong in May 2022. His well informed, critical and comprehensive evaluations at our conferences and in previous publications are fondly remembered by all our participants and authors including his impassioned plea for co-operation of humanity across the globe. We are indebted to academic colleagues who have been long-standing supporters of the London Centre for Commercial and Financial Law including Catherine Pédamon of the University of Westminster, Dr. Joseph Lee of the University of Manchester, and Hendrik Puschmann of Farrer & Co. in London. Last but by no means least, we would like to express our appreciation and gratitude to Dr. Brigitte Reschke of Springer Nature, who has been a supportive professional contact of our work for over two decades and who sparked the idea for this series and its—at the time of writing—four volumes.

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Supply Chain Laws Update: Ethics in Global Commerce Through Contract and Regulation

Maren Heidemann

Abstract This chapter sets the content of this book into context with previous research and complements the enquiries in this volume by adding the regulatory to the contractual perspective in pursuing ethical standards in commercial dealings. These are not only postulated by the international community but also considered to be an important and inherent component of successful trading. The regulatory perspective explores avenues which leave the contractual bonds and links between obligated parties. How and to what extent this works is the subject of the following analysis. The chapter covers the new German Supply Chain (Due Diligence) Act of 2021 in detail and compares it with the 2015 UK Modern Slavery Act and the 2020 reforms in the Swiss *Obligationenrecht.* The author draws some conclusions about the legality and prospects of this new approach to giving legal effect to international guarantees assumed under the UN Global Compact and the OECD responsible business guidelines as well as the role of public international law in global supply chain laws.

1 Introduction

This volume contains some of the papers presented at the fourth and fifth annual conferences on "The Future of the Commercial Contract in Scholarship and Law Reform" which are held by the London Centre for Commercial and Financial Law (LCF). The LCF has been exploring new developments and trends in commercial contracts and contract law since 2016. While the fourth annual conference on 11th October 2019 focussed on new technologies in contracting and arbitration, the fifth annual conference on 16th October 2020 centered around aspects of sustainability. The original plan was to acknowledge the United Nations' conference on climate

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change that was going to take place in Glasgow that year ('Conference of the Parties', COP26)[1] shortly after our annual conference but was postponed due to the Covid-19 pandemic, eventually taking place from 31 October to 12 November 2021 in Glasgow.

With each special aspect we select as a focus for our annual conferences, we explore its role in commercial contracts, contracting and contract law. We distinguish this sub-discipline from general contract law and regulatory law in order to offer a supplementary viewpoint for researchers in the wider fields of the law governing new developments in law and technology and sustainability.

As with previous LCF volumes and academic events, our contributors hail from many different jurisdictions and have a cosmopolitan background. The resulting collection can therefore be regarded as a contemporaneous cross section of global commercial contract law.

1.1 Technology in Commercial Contracts

Recent years have prompted many scholars to engage in research on the law governing the use of artificial intelligence in many areas of life, including business. Examples are insurance contracts where risk assessments are performed by algorithms, so-called crypto currencies which are supported by blockchain (distributed ledger) technology and various applications of blockchain technology in contracting, contract performance and dispute settlement. Our fourth annual conference had a dedicated panel on the use of blockchain in both arbitration and financial services. Our fifth annual conference introduced the role of blockchain also in the development of new financial products and currencies.[2] Benedatta Capiello and Cristina Poncibo deal with this topic by reaching out far beyond contract and placing it in context with the wider society: does blockchain enable a more democratic form of contracting?[3]

1.2 Sustainability in Commercial Contracts

Sustainability has been a recurring theme in our work since the inception of this conference series and research forum.[4] Sustainability must be understood in a broad sense in the context of commercial contracts and commercial contract law. Both

[1] Reference is made to the twenty six signatories to the United Nations Framework Convention on Climate Change (UNFCCC) which follows a paced programme of co-operation and meetings.

[2] Recordings of many LCF conferences and seminars are accessible through the website www.lcf-academic.org.

[3] See Cappiello and Poncibò in this volume.

[4] See Heidemann and Lee (2018).

socio-ethical components of contract theory and commercial practice as well as environmental and innovation related concerns and objectives emanate from the broader concept of sustainability as it is used in contemporary legal research and legislative policies. Therefore, sustainability aspects include the topical debate around good faith in commercial contracts and practice,[5] ethical contracting as in the debate around supply chains, the development of innovative financial instruments such as green bonds[6] and the treatment of sharp commercial practices in dispute settlement as in a certain manipulative use of arbitration rules.[7] Regulators' policy measures can impact on commercial contracts through rules seeking to foster the circular economy and trading platforms.[8] At the same time, and by way of such regulatory law, contracts themselves can be used to increase environmental sustainability in commerce.[9]

2 Sustainability Defined

The notion of sustainability comprises a range of aspects including environmental standards as well as standards in human interaction, the protection of human rights and labour laws. Earlier publications in this series of conferences have dealt with aspects of sustainability in this wider sense. Authors have explored sustainability in supply chains in the context of UK regulation governing supermarket supplier contracts,[10] the role of co-operation in long term construction contracts,[11] the role of contractual remedies in keeping the contract alive.[12]

At our LCF conferences and the research project "The Future of the Commercial Contract in Scholarship and Law Reform" we have been exploring ways of finding and enforcing values which may at first sight be perceived to be external to a contract within traditional contractual theory and commercial contractual performance and enforcement. Our researchers and authors have been able to show from various angles how ethical standards and so called external policy objectives can be and are in fact achieved through contractual dealings. Examples have included the role of corporate social responsibility (CSR),[13] the protection of Small and Medium Sized Enterprises (SMEs) in supply chains,[14] the role of contract adaptation in long term

[5] See Malkawi in this volume.

[6] See Agostini in this volume.

[7] See Leonardo V P de Oliveira in this volume.

[8] See Anagnostopoulou and Kryla-Cudna in this volume.

[9] See Południak-Gierz in this volume and see further Sect. 6 below.

[10] Hourani (2018).

[11] Christie (2018).

[12] Pédamon (2019).

[13] Horváthová (2018).

[14] Hourani (2018).

contracts such as construction contracts[15] as well as in contract law reform such as the new hardship rules in the French Civil Code.[16] In the words of A. Horváthová (now Andhov):

> Hence, a contract continues to continually develop together with a society, as its values do, reflecting on the necessity of environmental and human protections and the indisputable evolution of values.

She elaborates on the degree to which European contract law is based on fundamental rights and the possible methods to enforce sustainability values such as those making up corporate social responsibility (CSR) objectives by using traditional contract law values.

The present volume continues this line of enquiry with selected contributions on environmental sustainability and supply chain ethics as well as on emerging technology and current challenges in contract law and commercial contract types including insurance contracts.

3 Sustainability in Supply Chains: A Comparative Overview

Sustainability in supply chains has become an urgent concern for campaigners and legislatures. Two supranational legal frameworks governing these have been created within the past decade. Environmental sustainability has been elevated to a legislative imperative by the United Nations in their Sustainable Development Agenda of 2015[17] and the "Paris Agreement" of 2015[18] The objective is to make businesses take responsibility for breaches of human rights and environmental standards in their supply chains, or rather their "value chains", an expression which is meant to cast a wider net. Offences may be committed in the source countries where commodities are grown and services rendered. Within the past decade, major international organisations have worked on the development of structured approaches to combatting abuses within global trade. The most prominent efforts have been made by the

[15] Christie (2018).

[16] Pédamon (2018).

[17] United Nations (UN) Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development, adopted by the General Assembly on 25 September 2015; A/RES/70/1.

[18] United Nations Framework Convention on Climate Change (UNFCC) (2015), the 'Paris Agreement'.

United Nations (UN),[19] the Organisation for Economic Co-operation and Development (OECD)[20] and the World Trade Organisation.[21]

How this responsibility can be realised legally by way of new legislation and by way of implementing these initiatives is the subject of numerous current legislative proposals and reforms adopted by national governments who recognise the international agreements and projects adopted in this field within the past decade by way of membership of these organisations and as signatories. These include the United Kingdom, Germany and Switzerland whose laws are being compared in a brief overview here with a focus on the newly enacted German Supply Chain (due diligence) Act of June 2021, the latest in the row.

This chapter thereby complements the enquiries in this volume by adding the regulatory to the contractual perspective in pursuing ethical standards in commercial dealings. These are not only postulated by the International community but also considered to be an important and inherent component of successful trading. The regulatory perspective explores avenues which leave the contractual, bonds and links between obligated parties. How and to what extent this works is the subject of the following analysis.

3.1 Supply Chain Law in the UK

In the UK, the protection of Human Rights in supply chains is pursued with the Modern Slavery Act 2015 (hereinafter the 2015 Act) paving the way. Its Art. 54 provides for a duty of businesses to provide for transparency in their supply chains by way of annual reporting on a comply-or -explain basis. Currently the threshold for this duty is a turnover of £36 million according to Regulation 2 of The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, UK Statutory Instruments 2015 No. 1833. This threshold may be subject to review after five years according to Regulation 4.

Art. 54 of the 2015 Act also provides for definitions of modern slavery and human trafficking by way of referring to sections 1, 2 and 4 of the Act and related legislation in the devolved nations and across the UK. It provides for guidance to be given to businesses by the Secretary of State (Art. 54, sections 9–11). The definition of commercial organisation is provided in section 12 of Art. 54 of the 2015 Act. It includes domestic and foreign bodies corporate as well as domestic and foreign

[19] United Nations Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework, UNHRC Resolution 17/4 of 6 July 2011 (A/HRC/RES/17/4).

[20] OECD Guidelines for Multinational Enterprises—Responsible Business Conduct Matters (version of 2011).

[21] The five WTO Principles (in the Marrakesh Agreement).

partnerships however only those who carry on a business within the UK. The term business is meant to include trades and professions for the purposes of Art. 54 (12).

Environmental standards are protected only in specific sectors of trade, including timber products and concerns about illegal logging and deforestation. A consultation was launched by the UK government (Department for Environment Food and Rural Affairs, Defra) in August 2020 to consult on a planned legislative initiative following a report by the Global Resource Initiative in March 2020. This report recommended mandatory rules for businesses qualifying for a specific threshold ('in scope') to make sure that the commodities that they use are produced in line with the laws of their country of origin.

> Agricultural and forestry supply chains are at the core of the transformation required and the UK's own import and consumption of seven key commodities – beef and leather, cocoa, palm oil, pulp and paper, rubber, soya and timber is part of the global demand for these commodities. Production of these commodities continues to drive forest loss and conversion of natural habitats [. . .].[22]

The proposed legislation contained provisions of penalties and fines for businesses who breach their duties to carry out due diligence in this respect. In the meantime, the EU regulations on timber imports remain applicable in substance post Brexit.[23]

3.2 Swiss Legislative Initiatives

In Switzerland, as in some other countries, a campaign group called "*Konzernverantwortungsinitiative*", the "responsible groups of companies initiative", or in short "responsible business initiative" had formed and started a vociferous popular campaign to initiate a rigorous and mandatory supply chain law which would be binding on Swiss enterprises. Swiss proposals eventually entered a formal stage of pre-legislative procedure. A popular vote was held in November 2020 on the *Konzernverantwortungsinitiative*'s draft. This draft developed in 2016 by the proposers was aimed at changing the federal constitution adding a provision whereby Swiss based enterprises would be liable for breaches of international human rights and environmental law standards committed by themselves or their controlled entities also outside Switzerland. The idea behind this was to create a strict obligation or legal duty within Switzerland rather than abroad so that problems of international criminal law could be resolved.

The text of the proposal to change Art. 101 of Swiss Federal Constitution read:

> Die Bundesverfassung wird wie folgt geändert:

[22] Global Resource Initiative (2020), p. 2.

[23] According to The Timber and Timber Products and FLEGT (Amendment) (EU Exit) Regulations 2020, UK Statutory Instruments 2020 No. 1315.

Art. 101a Verantwortung von Unternehmen

1 Der Bund trifft Massnahmen zur Stärkung der Respektierung der Menschenrechte und der Umwelt durch die Wirtschaft.

2 Das Gesetz regelt die Pflichten der Unternehmen mit satzungsmässigem Sitz, Hauptverwaltung oder Hauptniederlassung in der Schweiz nach folgenden Grundsätzen:

a. Die Unternehmen haben auch im Ausland die international anerkannten Menschenrechte sowie die internationalen Umweltstandards zu respektieren; sie haben dafür zu sorgen, dass die international anerkannten Menschenrechte und die internationalen Umweltstandards auch von den durch sie kontrollierten Unternehmen respektiert werden; ob ein Unternehmen ein anderes kontrolliert, bestimmt sich nach den tatsächlichen Verhältnissen; eine Kontrolle kann faktisch auch durch wirtschaftliche Machtausübung erfolgen;

b. Die Unternehmen sind zu einer angemessenen Sorgfaltsprüfung verpflichtet; sie sind namentlich verpflichtet, die tatsächlichen und potenziellen Auswirkungen auf die international anerkannten Menschenrechte und die Umwelt zu ermitteln, geeignete Massnahmen zur Verhütung von Verletzungen international anerkannter Menschenrechte und internationaler Umweltstandards zu ergreifen, bestehende Verletzungen zu beenden und Rechenschaft über ergriffene Massnahmen abzulegen; diese Pflichten gelten in Bezug auf kontrollierte Unternehmen sowie auf sämtliche Geschäftsbeziehungen; der Umfang dieser Sorgfaltsprüfungen ist abhängig von den Risiken in den Bereichen Menschenrechte und Umwelt; bei der Regelung der Sorgfaltsprüfungspflicht nimmt der Gesetzgeber Rücksicht auf die Bedürfnisse kleiner und mittlerer Unternehmen, die geringe derartige Risiken aufweisen;

c. Die Unternehmen haften auch für den Schaden, den durch sie kontrollierte Unternehmen aufgrund der Verletzung von international anerkannten Menschenrechten oder internationalen Umweltstandards in Ausübung ihrer geschäftlichen Verrichtung verursacht haben; sie haften dann nicht nach dieser Bestimmung, wenn sie beweisen, dass sie alle gebotene Sorgfalt gemäss Buchstabe b angewendet haben, um den Schaden zu verhüten, oder dass der Schaden auch bei Anwendung dieser Sorgfalt eingetreten wäre;

d. Die gestützt auf die Grundsätze nach den Buchstaben a–c erlassenen Bestimmungen gelten unabhängig vom durch das internationale Privatrecht bezeichneten Recht.

(The Federal Constitution is amended as follows:

Art. 101a Responsibility of companies

1 The Confederation takes measures to strengthen respect for human rights and the environment by business.

2 The law regulates the obligations of companies with their registered office, head office or main branch in Switzerland according to the following principles:

a. Companies must also respect internationally recognized human rights and international environmental standards abroad; they have to ensure that internationally recognized human rights and international environmental standards are also respected by the companies they control; factual circumstances determine whether one company controls another; control can actually also take place through the exercise of economic power;

b. Companies are required to exercise due diligence; they are specifically obliged to determine the actual and potential impacts on internationally recognized human rights and the environment, to take appropriate measures to prevent violations of internationally recognized human rights and international environmental standards, to end existing violations and to be accountable for measures taken; these obligations apply in relation to

controlled companies and to all business relationships; the scope of these due diligence processes depends on human rights and environmental risks; when regulating the due diligence obligation, the legislature takes into account the needs of small and medium-sized companies, which have low such risks;

c. The companies are also liable for damage caused by companies controlled by them due to violations of internationally recognized human rights or international environmental standards in the course of their business activities; they are not liable under this provision if they can prove that they have taken all due care pursuant to letter b to prevent the damage or that the damage would have occurred even if this care had been taken;

i.e. The provisions enacted based on the principles under letters a–c apply regardless of the law designated by private international law.)

Rule of law related problems arise from the use of open-textured terms in this proposal.[24] Similar problems have been dealt with in other jurisdictions by existing legislation such as the UK 2015 Act by resorting to reporting duties rather than actual civil liability for breach of ethical standards along the supply chain. In Switzerland, Parliament supported the so-called alternative proposal which was brought in to the vote as a fall-back in case the popular vote rejected the constitution change.[25] This alternative draft bill relied on the method of introducing due diligence and mandatory reporting duties rather than strict[26] and direct liability for the actual human rights breaches. Eventually, the popular vote held in November 2020 failed to support the campaigners' aims. Despite support from the electorate of over fifty percent[27] the procedure failed to return a majority from the cantons, the regional bodies whose consent is required to legally adopt such plebiscite proposals. The new Swiss law of obligations (*Obligationenrecht, OR*) implements due diligence duties in Art. 964 OR and is reinforced by Art. 325 of the Swiss Criminal Code, setting a fixed penalty for failing to file or archive a report[28] or making false representations: 100T Swiss Francs (SFr) for intent; 50T SFr for negligence. The new OR extends due diligence and reporting duties to the obligations regarding the import of a list of

[24] See further below, Sect. 4.

[25] This works by way of section IV of the draft Decision by the National Assembly in its version of 19 June 2020: *IV – 1 Dieses Gesetz untersteht dem fakultativen Referendum. 2 Es ist im Bundesblatt zu publizieren, sobald die Volksinitiative vom 10. Oktober 2016 [published in Gazette] «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt» zurückgezogen oder abgelehnt worden ist. 3 Der Bundesrat bestimmt das Inkrafttreten.*

(IV – 1 This law is subject to an optional referendum. 2 It is to be published in the Federal Gazette as soon as the popular initiative of 10 October 2016 [published in Gazette] "For responsible enterprises – to protect people and the environment" has been withdrawn or rejected. 3 The Federal Council determines when it comes into force.)

[26] The envisaged notion of liability is not qualified by the traditional distinctions of intent and negligence but by demonstrating that due diligence has been exercised or would not have prevented the harm.

[27] Hart (2020).

[28] Reports are to be kept accessible for 10 years.

"problem" metals[29] as well as CO_2 emissions and bribery.[30] Out of the human rights and labour concerns only child labour is named expressly.[31]

The scope for enterprises to qualify for the due diligence and reporting duties under the reformed OR is formed by a cumulative threshold of 500 full time jobs on average as well as either a balance of at least 20 million SFr or an annual turnover of 40 million SFr in two consecutive accounting periods. These figures are to be seen as a total resulting from the Swiss based enterprise with all those it "controls".

Overall and certainly compared to the new German supply chain law, this reform looks very compact, indeed, as will be explained in the following sections.

3.3 *The New German Supply Chain Legislation of 2021*

In Germany, the campaign group "*Initiative Lieferkettengesetz*" (initiative supply chain law)[32] pursues a much wider range of objectives and issues to be covered by due diligence and reporting obligations for businesses than the above mentioned UK law and the Swiss proposals cover. The group reminds of a wider range of offences committed against workers around the world over and above slavery, forced labour and human trafficking and describes the suffering inflicted on workers resulting from poor law enforcement, low standards in planning, environmental health and safety and corruption.[33] A legislative proposal was consulted on and its intended mandatory rules on strict liability strongly criticised by industry representatives.[34] Germany's National Action Plan 2016 (NAP)[35] based on the UN Global Compact

[29] Art. $964^{quinquies}$ No. 1 OR new.

[30] Art. 964^{ter} (1) OR new. Carbon emissions are also to be made the subject of annual reporting duties according to a draft private member's bill in the UK Parliament, Company Transparency (Carbon in Supply Chains) Bill, introduced in November 2021.

[31] Art. $964^{quinquies}$ No. 2 OR new.

[32] The group maintain their own website accessible at https://lieferkettengesetz.de (last accessed 8 Jan 2022).

[33] Initiative Lieferkettengesetz (2020b).

[34] The interest group *Bundesverband der Deutschen Industrie,* BDI e.V., issue d a joint press release on 3 Sept 2020, stating: "I*nsbesondere die Forderung für eine zivilrechtliche Haftung von Unternehmen für unabhängige Geschäftspartner im Ausland, die dort eigenen gesetzlichen Regelungen unterliegen, ist realitätsfern. Diese verkennt auch die Komplexität globaler Lieferketten, die oftmals über 100 Zulieferstufen enthalten und aus Deutschland heraus überhaupt nicht zu kontrollieren sind. Unternehmen können deshalb auch dafür nicht in Haftung genommen werden.*" (In particular, the requirement for companies to be liable under civil law for independent business partners abroad, who are subject to their own legal regulations there, is unrealistic. This also fails to recognize the complexity of global supply chains, which often contain more than 100 supplier levels and cannot be controlled at all from Germany. Companies can therefore not be held liable for this either.), BDI (2020).

[35] This was adopted by Federal Cabinet (government) on 16 December 2016. It can be read in full in a publication by the Federal Foreign Office accessible at https://www.auswaertiges-amt.de/blob/

commitments, the Ten Guiding Principles on Business and Human Rights, promoted the voluntary implementation of UN objectives on the part of businesses. Reviews in 2019 and 2020 based on the NAP showed that less than 50% of businesses are compliant with their reporting duties while only 455 of 2255 business (1/5) returned the questionnaire circulated by the Federal Ministry for Economic Cooperation and Development. It is recommended by that Ministry that the WTO should also be used to push for the enforcement of standards of sustainability.[36]

Following this review, a draft bill was eventually introduced in the Federal Parliament on 19 April 2021 under the auspices of the Federal Ministry of Labour and Social Affairs [37] and adopted on 11 June 2021 as *Lieferkettensorgfaltspflichtengesetz*—Supply Chain (Due Diligence) Act (LkSG).[38]

The new law is in line with related laws in the UK, as mentioned above (Sect. 3.1) as well as in France and in the Netherlands who had adopted similar due diligence based legislation for their domestic enterprises and their supply chains.[39] The law can essentially be grouped into four parts even though it officially consists of six Parts. It starts with the definition of its scope in §§1 and 3 and the definition of the protected legal positions in human rights and environment, §2. It then describes the actual duties that are imposed on the enterprises covered by this law in §§4, 5 and 10. The third part describes the remedial action enterprises are to take if they discover breaches or the presence of prohibited situations in §7. The fourth part contains the rules relating to monitoring and enforcement as well as sanctions on the part of the competent authorities, notably §§23 and 24.

3.3.1 The Scope

The scope of the law (§1) is made up of two components. It extends to enterprises with a formal seat, branch or head quarters in Germany. The legal nature of the enterprise is to be disregarded.[40] The second component is the number of an enterprise's employees which is 3000, reduced to 1000 from 1 January 2024.

610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf (last accessed 8 Jan 2022).

[36] The WTO principles allow some leverage in support of ethical and sustainability standards. Disputes over environmental standards forming non-tariff barriers have been settled in favour of those measures. See for instance the 'Shrimp/Turtle case' (United States—Import Prohibition of Certain Shrimp and Shrimp Products) WTO Dispute DS58, materials available from, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm [last accessed 28 Aug 2019].

[37] *Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten (d*raft bill on entrepreneurial due diligence duties in supply chains), published in the parliamentary documents series as BT-Drucksache 19/28649.

[38] Published in Federal Gazette (*Bundesgesetzblatt)* on 16 July 2021 BGBl 2021 I No. 46, p. 2959.

[39] The ministerial draft mentions expressly in its reasons the UK 2015 Act, the French "Loi de vigilance" of 2017 and the Dutch law against child labour, BT-Drucksache 19/28649, p. 24.

[40] BT-Drucksache 19/28649, p. 33.

3.3.2 The Duties

The actual entrepreneurial duties are described in §3 (1) providing that enterprises are obliged to observe due diligence in their supply chains relating to human rights and the environment

> in an appropriate manner and with the aim to prevent human rights or environmental risks or terminate breaches of human rights or environmental obligations.

There are nine subsections (litt. 1–9) setting out these duties each of which are further specified in the following §§4–10. The actual due diligence duties consist of the establishment of a risk management system and designated internal competencies; periodical risk analysis; a general declaration about its human rights strategy as set out in §6(2); the integration of preventative measures in its own business as well as in the relationship with direct suppliers; remedial measures; the establishment of a complaint procedure; observing due diligence in relation to indirect suppliers and, finally, documentation and reporting.

§3 (2) LkSG sets out what is meant to constitute the "appropriate manner" in which the obligations must be observed. It measures this by the size and degree of involvement and actual influence of the enterprise and its operations in relation to the actual or potential cause or perpetrator of the actual infringement of the protected positions (§2 LkSG).

Cornerstones of some of these duties include the obligation to archive each annual report according to §10 LkSG for at least 7 years as well as the possibility for individuals according to §9 to report risks and actual infringements of protected positions within the structured complaint procedure under §8 also when an indirect supplier is the cause for these breaches.

3.3.3 No Civil Liability

Section three of §3 expressly excludes any civil liability of the enterprises for breaches of its duties which §3 constitutes(§3 (3) first sentence). Any actual breaches or infringements of the protected positions, for example the commitment of human rights or environmental abuses, may nevertheless attract (civil, criminal or tortious) liability under other legal rules as §3 (3) second sentence confirms. I will discuss this issue further below.[41]

3.3.4 Dynamic Supervision, Public and Private Enforcement

While §11 conveys procedural standing to injured parties under §2 (1) in Germany by way of instructing a trade union or interest group, the enforcement and

[41] See Sects. 4.2 and 4.3 below.

sanctioning of the due diligence obligations against the enterprises is carried out by the competent authorities according to the remaining sections of the law, §§12–24 LkSG.[42] The legislature has equipped the authorities with a wide array of tools enabling supervision, sanctioning and co-operation in the pursuit of the realisation of the intended aims and objectives of the LkSG. A coercive fine can be up to 50T Euros according to §23. For intentional or negligent breach a fixed penalty of up to 800T Euros (persons) or up to 2% of annual turnover (enterprises) can be imposed according to §24. At the same time, the authorities are expected to offer sector specific as well as intersectoral and interdepartmental guidance according to §20 LkSG. Notably, this guidance is subject to approval by the Foreign Office, §20, second sentence. The remedy of breaking off business relations should be seen in this context, too. It is provided for in §7 (2) No. 3 and (3). This remedy can be employed by the business itself either temporarily or permanently but it can also be ordered by the competent authority in the course of sanctions under §15 LkSG. Several federal government ministries are vested with the power to issue further detailed regulation of the procedures relating to monitoring (reporting) and remedial action according to §§13 and 14 LkSG (enabling norms). These are the Federal Ministry for Labour and Social Affairs "in agreement" with the Federal Ministry for Economy and Energy.

4 Evaluation

In order to evaluate these and other legislative initiatives it is useful to set up the criteria against which they should be assessed. These are specific to the area of law and also to the potentially conflicting interests involved. One prominent feature of this area of law is the notion of extraterritoriality which is a challenge for domestic legislative technique. Lawyers and activists have struggled with this challenge for years. Infringements of the protected positions such as human rights breaches, environmental and other legal and policy related offences and assaults often do not occur in the countries where the supply chains end but where they start ("upstream"). Governments who are willing to legislate to make supply chains more sustainable and ethically acceptable therefore face the challenge that they are effectively expected to make laws that have an effect on those potential trespassers, perpetrators and culprits who cause the actual damaging actions and their effects but may be outside their remit. So, are these legal measures *ultra* vires? What does this mean for the sovereignty of those source countries? Can the trading enterprises be expected to police standards in the countries where the goods or services originate from regardless of contractual links? It may therefore be useful to start an evaluation of the expectations that are being held towards legislators and the law and then to assess

[42] The competent authority in Germany is the Federal Office for Business and Export Trade, §19 LkSG, so it is a central federal authority.

how much of these have been met by resulting laws. In the following, I am seeking to address these points in a structured way, however, some points overlap and are intertwined.

4.1 What Are the Expectations?

Expectations will clearly differ within the various stakeholders in the supply chain law initiatives. There are those of the injured parties, those of activist groups, those of the enterprises and those of legislators and scholars. Depending on these viewpoints, one would expect effective and efficient action to end and prevent harmful activity. This will include a ban and effective prevention and sanctioning of slavery and forced labour, human trafficking, child labour, rogue planning procedures and corruption leading to factory collapses (Rana Plaza)[43] or chemical accidents (Bhopal),[44] deforestation or the loss of wildlife and native habitats for humans and animals ("land grabbing")[45] and much more. It will also include a clear picture of the legal obligations to be observed, the financial and regulatory burden undertaken by enterprises and suppliers as well as cost control and competitiveness. On the part of the legislature and legal practice important aspects are legal certainty along with other constitutional and procedural guarantees.

[43] "The collapse of the complex, built on swampy ground outside the capital Dhaka, sparked demands for greater safety in the world's second-largest exporter of readymade garments and put pressure on companies buying clothing from Bangladesh to act. Duty-free access to western markets and low wages for its workers helped turn Bangladesh's garment exports into a $28bn-a-year industry that is the economic lifeblood of the country of 160 million people. The minimum monthly wage for garment workers in Bangladesh is $68, compared with about $280 in mainland China, which remains the world's biggest clothes exporter.", Reuters (2016).

[44] The accident happened on 3 Dec 1984. It killed up to 25,000 people and injured half a million many of which suffer to this day from the consequences. The corporation running the chemical plant where the accident happened was Dow Chemicals of which the US based Union Carbide Corporation owned 51%. The multinational nature of the investment at the Indian site with majority US shareholder Union Carbide Corporation contributed to the complexity and the overall unsatisfactory resolution of the disaster on the part of the victims. Reports include a promised but unfinished hospital to treat the victims and outstanding damages still to be due to victims. See the detailed information of the case on Union Carbide's own website accessible at http://www.bhopal.com/Cause-of-Bhopal-Tragedy. As in most of these cases legal attribution and the role of ownership in stock corporations remain the most disputed legal points.

[45] The expression relates to large purchases of land by foreign enterprises intended to grow so called multi purpose crops which can be used for food, fibre and energy production. With these contracts backed by governments, long standing occupants of the land are often evicted and lose their livelihood which consisted in working the land. Often, these projects collapse soon after taking possession of the land leaving it waste and depopulated.