

SUSTAINABLE CONTRACTUAL CLAUSES AS A WAY FOR SMALL AND MEDIUM-SIZED ENTERPRISES TO BECOME A DRIVING FORCE FOR SUSTAINABILITY IN GLOBAL SUPPLY CHAINS

CLÁUSULAS CONTRACTUALES SOSTENIBLES COMO UNA FORMA PARA QUE LAS PEQUEÑAS Y MEDIANAS EMPRESAS LLEGUEN A SER UNA FUERZA IMPULSORA DE LA SOSTENIBILIDAD EN LAS CADENAS DE SUMINISTRO MUNDIALES

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ABSTRACT

In the modern world, contracts favour social purposes by providing a good setting for the regulation of sustainability. Within this framework, this article points out the inequality in bargaining power between lead companies and their suppliers that has hitherto not been extensively explored in the literature. This is emphasised by transnational laws, whose focus is on the role of buyers for the implementation of sustainability in global supply chains. Thus, suppliers, usually small and medium-sized enterprises, are mere rule followers, which could make them vulnerable. It is postulated here that it is possible to overcome this by bottom-up activities – that is, the negotiation of sustainable contractual clauses including the input of small and

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medium-sized enterprises, and compromises by the parent company in capacity-building for them. This implies a repurposing of the contract, bringing small and medium-sized enterprises to the centre and making them aware of their power and co-responsible for the spread of sustainability. Buyers should be amenable to this change since it would allow production according to their values, opening their reach to potential new markets and also complying with law, which is more stringent every day in terms of sustainability. This rationale is complemented in the article by examination of a real case and a consideration of the anatomy of a sustainable contractual clause according to these suggestions.

KEYWORDS: small and medium-sized enterprises; sustainability; global supply chains; contracts

RESUMEN

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En el mundo moderno, los contratos favorecen los fines sociales a través de la provisión de un buen marco para la regulación de la sostenibilidad. En dicho contexto, este artículo enfatiza la desigualdad en el poder de negociación entre las empresas líderes y sus proveedores, lo cual, hasta ahora, no ha sido ampliamente explorado en la literatura. Las leyes transnacionales profundizan la situación, pues se centran en el papel de los compradores en la implementación de la sostenibilidad en las cadenas de suministro globales. Así, los proveedores, generalmente pequeñas y medianas empresas, son meros seguidores de reglas, lo cual podría hacerlos vulnerables. Aquí se postula que es posible superar esto mediante actividades de base, es decir, la negociación de cláusulas contractuales sostenibles que incluyan la participación de pequeñas y medianas empresas, y compromisos por parte de la empresa matriz en el desarrollo de capacidades para ellas. Esto implica una reorientación del contrato, para colocar en el centro a las pequeñas y medianas empresas y hacerlas conscientes de su poder y corresponsables en la difusión de la sostenibilidad. Los compradores deberían ser receptivos a este cambio, ya que permitiría la producción de acuerdo a sus valores, abriéndoles posibilidades en nuevos mercados y, además, les permitiría cumplir con la ley, cada día más estricta en materia de sostenibilidad. Este razonamiento se complementa en el artículo con el examen de un caso real y la consideración de la anatomía de una cláusula contractual sostenible, conforme a las ideas ofrecidas.

PALABRAS CLAVE: pequeñas y medianas empresas; sostenibilidad; cadenas de suministro globales; contratos

INTRODUCTION

GSCs are networks of labour and production processes, widely used across many industries and whose end result is a finished commodity¹. As the name indicates, the arrangements in GSCs relate to enterprises from different countries. The roots of GSCs, as they are known today, can be found in the mid-20th century² but they have evolved over time, with the particularity that current organisational guidelines harmonise the activity of chains according to ESG criteria³.

Despite this evolution, activity in supply chains often constitutes a paradox⁴. On the one hand, the implementation of sustainable practices in GSCs represents an attempt to impact positively on stakeholders and the environment⁵. On the other hand, to achieve this aim, lead firms impose on their suppliers –usually SMEs⁶– certain methods of production and distribution according to ESG criteria⁷. This can make SMEs vulnerable, because:

¹ See HOPKINS & WALLERSTEIN (1986), p. 159.

² See www.allthingsupplychain.com/the-history-of-global-supply-chains/?utm_source=rss&utm_medium=rss&utm_campaign=the-history-of-global-supply-chains [accessed: May 22, 2023].

³ See JADHAV *et al.* (2019), p. 112.

According to “Supply Chain Sustainability: A Practical Guide for Continuous Improvement” (second edition, 2015): “Supply chain sustainability is the management of environmental, social and economic impacts and the encouragement of good governance practices, throughout the lifecycles of goods and services. The objective of supply chain sustainability is to create, protect and grow long-term environmental, social and economic value for all stakeholders involved in bringing products and services to market”. Available in www.un-globalcompact.org/library/205 [accessed: May 22, 2023].

⁴ In general, the literature agrees on the diagnosis regarding the paradox that global supply chains represent. See WIELAND and HANDFIELD (2013), p. 22.

⁵ The Brundtland Report connects the concept of sustainability to intergenerational fairness. It understands sustainability as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. See www.are.admin.ch/are/en/home/media/publications/sustainable-development/brundtland-report.html [accessed: July 6, 2023].

⁶ Globally, there are a number of variables used to delineate the contours of SMEs. The most common are number of employees, turnover and balance sheet. The definition adopted by the EU considers the following factors: fewer than 250 employees, and an annual turnover not exceeding 50000000 or an annual balance sheet total not exceeding 43000000. EU recommendation 2003/361; see <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003H0361> [accessed July 25, 2023]. As this article offers reflections that range among different jurisdictions, the definition of SMEs is not static; rather, it varies according to the particular jurisdiction considered or the source consulted. If a common criterion must be offered, for the purpose of this article this is their relative weakness in the negotiation relationship.

⁷ Among other cases cited in this article, the German Supply Chain Law (LkSG), which entered into force on January 1, 2023, includes mandatory human rights due diligence obligations which involve the leading company’s imposition of a method of production over suppliers, in accordance with ESG criteria. See RÜHMKORF (2023), pp. 6-14.

“while it is often portrayed that producers in developing countries take upgrading for granted, some researchers have found that this is not always the case. Any kind of upgrading requires strategic intent and substantial investments. Some producers may choose to ‘downgrade’ for short-term survival at the expense of an upgrading that might have provided for long-term growth”⁸.

Generally, suppliers are small businesses that are economically dependent on the sourcing company. Therefore, the underlying problem is an imbalance of bargaining power to negotiate clauses⁹, which means that most suppliers are merely rule followers¹⁰. In fact, a study including an analysis of field cases found that in

“a representative set of each MNC’s suppliers – a total of nine top-tier and 22 lower-tier suppliers, based variously in Mexico, China, Taiwan, and the United States [...] many were violating the standards that the MNCs expected them to adhere to” (parenthesis added)¹¹.

In accordance with this underlying problem, the role of buyers in the supply chain has been highlighted and addressed by various legislations establishing a duty of vigilance for the lead company’s corporate governance. In this context, the French legislation is representative (Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre). In a similar vein, in July 2021 the Act on Corporate Due Diligence in Supply Chains was enacted in Germany¹². At the transnational level the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 was issued on 23 February 2022¹³, while the Ge-

⁸ LEE (2010), p. 2297. See also HUMPHREY & SCHMITZ (2002) and NAVAS-ALEMÁN & GUERRERO (2016).

⁹ According to BARRIENTOS (2013), p. 46: “An important reason behind the ability of lead firms to extract economic rents is their oligopolistic position in relation to a fragmented global supply base. This relationship has been described as akin to a bargaining model, in which the commercial power of buyers predominates”.

¹⁰ See WALLERSTEIN (2009), p. 86.

¹¹ VILLENA & GIOIA (2020), p. 88.

¹² According to the Federal Ministry of Labour and Social Affairs: “this represents the first time that the responsibility of German companies to respect human rights in global supply chains has been given a legal foundation”. Available at www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html [accessed: July 18, 2023].

¹³ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> [accessed 14 February 2023]. The Council’s General Approach on the Directive on Corporate

neral Approach adopted by the Council on the Directive on Corporate Sustainability Due Diligence was dated 30 November 2022¹⁴. In addition, on November 16, 2022 the Directive of the European Parliament and of the Council as regards Corporate Sustainability Reporting was issued¹⁵.

However, the duties of vigilance and corporate sustainability reporting, as enshrined in European regulations and national regimes, do not solve the underlying problem of SMEs as simple rule followers in the area of ESG criteria. Due the imbalance of bargaining power, lead companies can continue to impose their rules and also remove suppliers that are unable to fulfil their requirements in terms of ESG. In addition, the implementation of European regulation at national level, along with its repercussions outside Europe (which is very important in the ambit of supply chains whose providers are located around the world), will require consensus from political actors in each country because a law regulating sustainability aspects implies making capitalism accountable, among other reasons¹⁶.

There is therefore a research question about whether it is possible to equalise the bargaining power between parties, in order to allow suppliers to participate in the process of sustainability implementation in GSCs. The research hypothesis proposed here is that equilibrium in bargaining power could be achieved by bottom-up activities, specifically contractual activities involving the negotiation of SCCs¹⁷ between buyers and small firms¹⁸. The content of such clauses should consider the creation of capaci-

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Sustainability Due Diligence is dated 30 November 2022. Available at: <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf> [accessed: July 18, 2023].

¹⁴ On p. 74 of the Council's General Approach on the Directive on Corporate Sustainability Due Diligence a definition of SMEs is provided: "SME means a micro, small or a medium-sized undertaking, irrespective of its legal form, that is not part of a large group, as those terms are defined in Article 3 (1), (2), (3) and (7) of Directive 2013/34/EU". The future directive will not be applicable to SMEs in general. The explanatory memorandum of the Proposal states: "The Commission's recent proposal for a Corporate Sustainability Reporting Directive (CSRD), revising the NFRD, would extend the scope of the companies covered to all large and all listed companies. The sustainability reporting obligation would apply to all large companies as defined by the Accounting Directive (which the CSRD would amend) and, as of 2026, to companies (including non-EU companies but excluding all micro enterprises) listed on EU regulated markets" (p. 4 of the Proposal).

¹⁵ <https://data.consilium.europa.eu/doc/document/PE-35-2022-INIT/en/pdf> [accessed: July 18, 2023].

¹⁶ See LIPTON (2019).

¹⁷ SCCs cover: "social and environmental obligations that are not directly connected to the subject matter of a specific contract and which pursue long-term business objectives and public interests, by frequently aiming to extend their applicability to third parties and employing relational monitoring and enforcement tools". MITKIDIS (2015), p. 75.

¹⁸ In a similar vein, but reflecting on the relationship between shareholders and stakeholders: IRELAND (1999), p. 33.

ties in these firms¹⁹, which would contribute to the effectiveness of national and transnational regulations on sustainability as well as the avoidance or amelioration of potential harmful consequences deriving from the imposition of ESG obligations on SMEs. These companies should be considered in the drafting process, and urged to introduce clauses foreseeing capacity-building into the contract as well as being made aware of this possibility. In this vein, the role of universities should be highlighted.

It is clear that for this strategy to work there is a need for a cooperative approach among GSC participants²⁰. Thus, the lead company should preferably allow the participation of SMEs in the negotiation process²¹, and also incorporate the creation of capacities for suppliers into a contractual clause²². The latter implies the creation of a buyer's obligation; this is a real challenge, and this article attempts to build a rationale demonstrating the positive consequences that adopting such a compromise could bring for the leader of the supply chain. Likewise, the cooperation of SMEs is required since small firms must be willing to integrate these practices in their daily activities. They must also be committed to replicating, to the extent possible, such contractual clauses with their own subcontractors, in order to achieve real engagement from all the multiple tiers that form a GSC.

In accordance with these theoretical arguments, the objective of this article is to highlight the role of private agreements in the implementation of sustainability in GSCs (via the embracing of SCCs, which contain a legal commitment for the leading company especially in terms of creating capacities in their suppliers) beyond the role of national and transnational law.

To present the underlying problem and the research question and to address these aspects through argumentation, the article draws on literature in law and business, as well as national and transnational regulations. Hence, there is a focus on European private law, since the most developed legal systems in the area of sustainability in GSCs come from these jurisdictions. A case is drawn from a university to illustrate the importance of putting SMEs at the centre of the implementation of sustainability along the supply chain. In this examination the socio-legal research method has been applied, which may be defined as “an approach to the study of law and legal processes which covers the theoretical and empirical analysis of law as a social phenomenon”²³.

The article is structured in the following way. Section I highlights the relevance of contracts in GSCs, offering some solutions to overcome the

¹⁹ KORSAKIENE & RAISIENE (2022), p. 8.

²⁰ See VILLENA & GIOIA (2020), p. 10.

²¹ VILLIERS (2020), pp. 560, 565.

²² Along the same lines, Locke proposes the concept of “capability-building”, particularly in aspects related to labour standards. LOCKE (2013), p. 78. See also TEUBNER (1993), p. 212.

²³ COWNIE & BRADNEY (2018), pp. 40, 42.

underlying problem from a theoretical perspective. Section II addresses the hypothesis emphasising the importance of the cooperation of different parties to a contract for the implementation of sustainability. The final part of this section provides a real example of a SCC that was drafted to take into consideration the feasibility of suppliers complying with ESG criteria, and which foresees the potential for capacity-building for them. It also provides for the buyer's assumption of extra costs that sustainable production might generate. It is argued that this clause could be useful as a model for leading companies endeavouring to incorporate sustainability in their supply chains. The final section offers some conclusions.

I. PRIVATE AGREEMENTS INCORPORATING SMALL AND MEDIUM-SIZED ENTERPRISES' INPUT AND PROVIDING FOR THE CREATION OF CAPACITY

Global supply chains are characterised by stable and long-term relationships and a high level of interdependencies and coordination among companies located in different jurisdictions²⁴. In this context, contracts are critical²⁵. Nowadays the regulation of mutually exchanged promises –that is, regarding the production and circulation of goods and services– is far from the sole aspect tackled by contracts²⁶. In fact, there has been an evolution of contract as a way to favour social purposes²⁷. Through SCCs, contracts are creating room for relational, organisational and regulatory effects²⁸ and, as Zumbansen points out²⁹, this leads to a de-legalisation of contracts, while contractual governance proliferates through virtually “all sectors of societal life”³⁰. This approach shifts the common paradigm from top-down regulation (*i.e.* stemming from governments, national legislation or international treaties) to a bottom-up (*i.e.* contractual) perspective in the governance of sustainability.

The solution to sustainability issues lies in private agreements, rather than in major regulations of international reach, due to the limitations of legal

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²⁴ CAFAGGI & IAMICELI (2015), p. 135

²⁵ “Perhaps the deepest attraction of markets and contracts as institutions for organising and coordinating social life is that they provide a solution to a problem of loss of confidence in institutionalised structures giving direction to persons’ lives”. COLLINS (1999), p. 19.

²⁶ BROWNSWORD *et al.* (2017), p. 2.

²⁷ COLLINS (1993), pp. 301 ff; MITKIDIS (2015), p. 153 ff. Specifically, on caring for working conditions: GEREFFI *et al.* (2016), p. 33.

²⁸ A relational contract’s aim is, fundamentally, the parties’ relationship, rather than securing the parties’ interests at all costs in the event of breach. See MACNEIL (2000), pp. 877-908; ERWIN (2011), pp. 535-548.

²⁹ ZUMBANSEN (2007), p. 185.

³⁰ MITKIDIS (2015), pp. 99-100.

rules caused by the fact that the direct regulation of production by national laws in different jurisdictions raises problems of sovereignty³¹. This means that the weight of social transformation towards sustainable commerce is moving from governments to commercial agents. In this sense, the law of contracts is assuming a regulatory function, which is emphasised in the area of sustainability; via contract law, companies are embracing obligations or commitments that are determining the way forward towards sustainable development. Even if directives set out the framework for sustainable practices, they should be shaped by contracts, as it will be seen.

The problem is that:

“so far, the creation and promotion of socially responsible supply chains have been, by and large, left to the buyers, the Western companies at the head of the supply chain. The voluntary inclusion of CSR standards into the private contracts between buyer and supplier and their enforcement solely depends upon buyers. They have a choice as to the clauses that they incorporate, how they monitor the compliance with these clauses, how they report about their commitment to responsible supply chains and how they act upon violations of CSR principles by suppliers”³².

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As has been discussed, this situation is seen as a weakness in the implementation of the sustainability model, because suppliers may find themselves unable to fulfil sustainability-related obligations³³. Often such obligations are incorporated into contracts by a reference to a buyer’s sustainability policy contained in a code of conduct, which constitutes a new type of private regulation setting standards for different areas such as labour, finance and sustainability³⁴. Reference to a code of conduct makes it even more difficult to regulate the interaction between parties, since the content of such a code is generally applicable to all suppliers indiscriminately³⁵.

Instead, a negotiated SCC incorporated into a contract (or in a code of conduct) would permit buyers to know the supplier’s real situation and to incorporate reachable obligations, preventing the cancellation or avoidance

³¹ See SALMINEN & RAJAVUORI (2019), p. 610.

³² RÜHMKORF (2015), p. 215.

³³ The purchasing volume of global buyers grants them significant power over suppliers, allowing them to leverage their position. In response to these demands, suppliers often choose to establish their firms in low-cost locations, where their upstream suppliers lack legal protection.

³⁴ Lorena Carvajal theorises on the possibility that sustainability standards integrate the *lex mercatoria* –which the author calls the “*lex sustinendi*”– and as such are considered binding by members of the business community. CARVAJAL (2021a), p. 465 ff.

³⁵ See MAMIC (2004).

of contracts and the consequent removal of the supplier from the chain should its obligations with regard to sustainability not be fulfilled³⁶. Negotiated clauses would bring parties “on board” and into the sustainability process³⁷. Thus, businesses could last and be profitable, and, more importantly, environmental and human resources could be preserved. Therefore, a key aspect that this article attempts to examine is how to incorporate negotiated SCCs into contracts. The rationale for this is examined here, while its anatomy is addressed in the next section.

Even if a buyer would be willing to introduce such a clause into an agreement, the extension of global supply chains impedes their dealings with lower tiers of the chain. Thus, due diligence reviews demonstrate difficulties in the implementation of SCCs because of the number of tiers. For example:

“Philips explains that, for electronic components, the supply chain can easily be 50 tiers deep, many of which may provide us with limited or no information”³⁸.

Furthermore, there is often a lack of willingness from buyers to compromise with suppliers on the implementation of sustainable practices³⁹. Buyers may impose sustainable policies on suppliers, but choose to adopt vague contractual terms for themselves⁴⁰. Regarding this last aspect, although

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³⁶ Example of a clause which describes the removal of a party in breach: [Cancellation.] [Avoidance.] Noncompliance with Schedule P [substantially impairs the value of the Goods and this Agreement to the Buyer] [is a fundamental breach of the entire Agreement] and Buyer may immediately [cancel] [avoid] this entire Agreement with immediate effect and without penalty and/or may exercise its right to indemnification and all other remedies. Buyer shall have no liability to Supplier for such [cancellation] [avoidance]. SNYDER & MASLOW (2018), p. 1099.

³⁷ As regards sustainability as a process or as a continuum, see: “Defining sustainability: a process and strategy focus”, available at <https://sustainablebrands.com/read/marketing-and-comms/defining-sustainability-a-process-and-strategy-focus>. “A supplier assessment should not be a unique event. Rather, suppliers should be evaluated on a regular basis and be required to report values for the metrics on a daily, monthly, or yearly basis – depending on their relevance to the supply chain. Standards like SA8000 and ISO 26000 can help to find a common understanding between buyers and suppliers regarding acceptable behaviour and policy, and suppliers should be required to adopt these standards”. WIELAND & HANFIELD (2013), p. 25.

³⁸ VILLIERS (2020), p. 553.

³⁹ BECKERS (2018), p. 49.

⁴⁰ The following is a summary of the ways in which the buyer’s CSR policies become “part” of the contract:

- a) incorporation through the buyer’s terms and conditions;
- b) incorporation through an expressly negotiated contract;
- c) incorporation through an invitation to tender (See ULFBECK *et al.* (2019), p. 50, n. 14) and
- d) incorporation through signing up to the buyer’s code of conduct.

For further discussion, see RÜHMKORF (2015), p. 88.

the economic motivation of commercial contracts pushes parties towards avoiding the costs and risk of litigation by formulating contractual terms as precisely as possible, there are reasons why companies may choose to adopt vague contractual terms. They may wish to retain the flexibility of the contract, or they may wish to communicate goals and values to their business partners rather than to future judges⁴¹. In addition, the lead company may do this because it knows that its suppliers have very limited power to bring them to court, or because there is no concrete statutory sanction threatening the company⁴². However, it should be noted that the recent 2022 Directive of the European Parliament and of the Council as regards corporate sustainability reporting is a game changer in this sense. Nevertheless, based on an analysis of SCCs' features and the underlying regulatory framework, Mitkidis states that SCCs would not be enforceable by courts in most cases⁴³. Lead companies generally do not commit to provide educational resources or financial assistance to suppliers, even to longterm suppliers with whom it would be possible to build capacity, instead applying a sharp compliance strategy⁴⁴.

Sometimes it is possible to find collaboration enshrined in contracts. However, this is usually as a remedial action. For example, the BT Code of Conduct states⁴⁵.

You must immediately report to BT any material breaches of this summary and the Standard. BT will work collaboratively with you to implement

⁴¹ See MATUS (2018), p. 45.

⁴² Chile is taking a big step in this direction, as on May 31, 2022 a Draft Law to prevent greenwashing was presented to Parliament (*Boletín* n.º 15.044-12), with the aim of inhibiting false information from being offered by companies seeking an environmentally responsible public image when their production processes do not correspond to such an image. Interestingly, the Commission for the Environment and Natural Resources commented (January 11, 2023) that: “although it seems that this draft only imposes a sanction, the truth is that it must provide incentive to those who make an effort to trade in sustainably friendly products”. In this latter sense, companies that are working more closely with their providers –as this article proposes– must be recognised. The Draft Law is available at www.camara.cl/legislacion/ProyectosDeLey/tramitacion.aspx?prmID=15551&prmBOLETIN=15044-12 [accessed: October 23, 2023].

⁴³ MITKIDIS (2014). p. 1.

The following is an example of a clause which is vague in content; this pertains to the Code of Conduct of Bombardier: “The supplier shall strive to reduce the impacts of its activities and products on the environment and work towards a ‘total life-cycle’ view in product design, while maintaining its competitiveness”. Available at www.bombardier.com/content/dam/Websites/bombardiercom/supporting-documents/BInc/Bombardier-Supplier-Code-of-Conduct-en.pdf [accessed: July 20, 2023].

⁴⁴ Nonetheless, in agri-food businesses chain leaders provide services and goods to the chain's participants on a centralised basis. See CAFAGGI & IAMICELI (2015), p. 6; APPELYARD (2002), p. 383.

⁴⁵ SCCs could be included verbatim by reference (usually the reference would be to a *Code of Conduct*). Of course, SCCs presents a spectrum of drafting possibilities, see n. 39.

remedial actions. However, we will also take action, which may include terminating the contract, if you are unwilling to make appropriate changes⁴⁶.

This strategy may prove inefficient, in the sense that the lack of observance of SCCs by suppliers may have an effect on the whole chain, ultimately affecting the buyer itself. A simple case to illustrate this is the specific area of human rights. Here, independent research has demonstrated that the imposition of clauses followed by compliance audits are not sufficient to ensure better conditions for workers⁴⁷. This could affect the reputation of buyers, as it has happened in a number of occasions⁴⁸. Furthermore, the threat of terminating a contract could stimulate fraud in the implementation of sustainable standards. Therefore, companies are moving away from models based only on compliance auditing, and moving closer to cooperative approaches in the area of sustainability⁴⁹.

Setting up sustainability in a collaborative manner is interpreted here as: first, allowing the intervention of suppliers at the time of drafting SCCs; and second, those clauses should foresee the need for capacity-building resources for suppliers, such as training or assistance for the incorporation of sustainable practices in the production of goods and services⁵⁰.

The first aspect, *i.e.* instilling sustainability into contracts in a tailor-made fashion through negotiated clauses, remains challenging, mainly because of scattered production sources which mean that to getting to know the lower tiers of a supply chain requires real effort from the lead company⁵¹. In addition, as subcontractors are not parties obliged by the contract, and also because international supply chains cross two or more jurisdictions⁵², it is necessary to determine whether each particular domestic contract law accepts the standards set by the lead company⁵³. In some countries where sustainable standards are very low, SMEs only stand a chance of promoting and applying ESG criteria in their production of goods and services if the

⁴⁶ <https://groupextranet.bt.com/selling2bt/downloads/GS20%20Standard%20final%2024%20aug%202017.pdf> [accessed: July 20, 2023].

⁴⁷ LOCKE (2013); SINKOVICS *et al.* (2016), pp. 617-649. The results of this study point to the existence of a number of unintended consequences that leave workers even worse off than before. See also ISLAM *et al.* (2018), pp. 190-224.

⁴⁸ See the Rana Plaza's case in VYTOPIL (2015), p. 1.

⁴⁹ RUGGIE & SHERMAN (2015), p. 460.

⁵⁰ See CAFAGGI & IAMICELI (2015), p. 140.

⁵¹ VILLIERS (2020) points out at p. 551: "According to EY, companies consistently recognise that they are less advanced in their supply chain sustainability efforts than their direct operations due to the complex nature of sustainability in their supply chain".

⁵² WALLERSTEIN (2009), p. 83: "The primary feature of almost every commodity chain is that it crosses national frontiers".

⁵³ "For employees and suppliers within transnational corporate groups or across international supply chains, the parent company's domestic company law generally does not apply extraterritorially". ZHAO (2020), p. 29. See SALMINEN & RAJAVUORI (2019), p. 608.

buyer is active in the political sphere via lobbying to install more human and environmentally-friendly business models. Where setting up ESG criteria is feasible, e.g. where a solid institutional infrastructure already exists⁵⁴, the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence states that leading companies shall be required to take actions in order to:

“provide targeted and proportionate support for an SME which is a business partner of the company, where compliance with the code of conduct or the prevention action plan would jeopardise the viability of the SME”⁵⁵.

Thus, it appears that the challenge of knowing, setting up and implementing sustainable standards along an international supply chain can be tackled via cooperation⁵⁶. The first step is, therefore, for a lead company to understand the reality of its suppliers through negotiation.

The second aspect, that is, the construction of capacity for suppliers enshrined in the contract as a compromise for buyers, remains challenging. In order to avoid liability some firms claim the need for flexibility and do not incorporate such clauses. Considering that GSCs are similar to hybrid organisations, in the sense that the parent company operates as a centralised decision-maker for different units connected by contractual links, the construction of capacity in SMEs permits the creation of a network of companies that, as long as they remain within the network, produce their goods according to the values and guidance of the leader. This seems like an excellent opportunity to target sustainability in different market areas.

However, this argument on its own is not enough, mainly because of the expenditure that building capacity in suppliers involves. Therefore, a number of other variables may be influential, such as the actions of shareholders or stakeholders (*e.g.* workers, consumers, NGOs, national governments or intergovernmental organisations). Among those variables, laws and legal institutions clearly exert a great deal of pressure. Regulation is relevant in cases where companies have no strong conviction towards sustainability, perhaps because they do not consider their role to be contributory towards

⁵⁴ BRAMMER *et al.* (2012), pp. 3-28.

⁵⁵ This corresponds to article 7 of the Council’s approach.

⁵⁶ “Supporting measures will be necessary to help SMEs build operational and financial capacity. Companies whose business partner is an SME are also required to support them in fulfilling the due diligence requirements, in case where such requirements would jeopardize the viability of the SME”. Available at https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en [accessed: July 21, 2023], p. 14.

society⁵⁷. The European Directives and sub-section (1) of s.172 of the UK Companies Act (2006) mandate the role of the board to bring about such a contribution, involving the duty to promote the success of the company:

- 1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:
 - a) the likely consequences of any decision in the long term,
 - b) the interests of the company's employees,
 - c) the need to foster the company's business relationships with suppliers, customers and others,
 - d) the impact of the company's operations on the community and the environment,
 - e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - f) the need to act fairly as between members of the company⁵⁸.

Along the same lines, in terms of human rights, the UK Modern Slavery Act (2015) section 54 on "Transparency in supply chains" requires:

"a slavery and human trafficking statement for a financial year [which is: a.) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place i. in any of its supply chains, and ii. in any part of its own business; or b.) a statement that the organisation has taken no such steps" (parenthesis added)⁵⁹.

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⁵⁷ Beate Sjaafjell warns about the need for a reassessment and rethinking of the relationship between the environment, the economy and society, since it seems that there is no sense of any kind of understanding that there may be a conflict with economic growth, as we know it today, and sustainable development; this will involve "changing the corporation, this vital component of our economies, from within". SJAFFJELL (2018), pp. 29-30.

⁵⁸ See PALOMBO (2019), p. 48, who suggests placing purpose at the heart of UK company law, with a particular focus on changing the text of Section 172. The problem s.172 of the UK Companies Act creates is that it does not permit directors to further the interests of stakeholders at the expense of shareholders, and it does not provide protection to companies that promote purposes beyond shareholder value. In the same vein, in the context of Chilean law, Zuloaga suggests that directors should take into account the interests of stakeholders other than shareholders. Nonetheless, as a voluntary behaviour driven by motives of good corporate governance and sustainability. For the author, this is the correct interpretation of norms such as Articles 78 and 79 of the *Reglamento de Sociedades Anónimas*. ZULOAGA (2021), p. 41.

⁵⁹ The Modern Slavery Act came into force on July 31, 2015. Available at www.legislation.gov.uk/ukpga/2015/30/contents/enacted [accessed: July 21, 2023]. The Act has been criticised because "Section (54) aligns with the legislative fashion towards 'regulated autonomy' [which] may generate a discretionary regulatory framework that is tailored to the inte-

France’s legal system foresees the buyer’s responsibility along the whole supply chain. This is enshrined as a duty of vigilance in charge of the company’s corporate government⁶⁰. The law requires the implementation of reasonable due diligence measures to identify risks and prevent serious harm to human rights and fundamental freedoms, human health and safety, and the environment, as well as risks and attacks that would result from the activities of the company and those of the companies it controls (within the meaning of Article L. 233-16 II of the *French Commercial Code*), but also from the activities of subcontractors or suppliers with whom the company maintains an established commercial relationship, when these activities are attached to this relationship.

On July 22, 2021 the Act on Corporate Due Diligence in Supply Chains was published in the German Federal Law Gazette, entering into force on January 1, 2023. The objective of the Supply Chain Due Diligence Act is to safeguard human rights and the environment more effectively. It obligates companies with 3,000 or more employees in Germany to take “appropriate measures” to respect human rights and the environment within their supply chains, with the goal of preventing or minimising risks or ending the violation of duties related to those areas (Supply Chain Due Diligence Act art. 1, §§ 1, 3.).

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A parent company’s supportive approach is a good strategy, since SMEs are strong agents of sustainability in the lower tiers of supply chains due to their direct contact with subcontractors. At the same time, they are in close contact with stakeholders, such as workers and the community. As a consequence, their sustainable performance impacts directly on society. In the same vein,

“smaller firms have the ability to respond with greater vigour to stakeholder pressure due to scarce resources, simplified decision making processes, and propensity to innovate”⁶¹.

Direct input in education and health, the right price for goods and services and the avoidance of just-in-time orders are also ways for buyers to compromise. The GSC literature also stresses the role played by GSC leaders in transferring knowledge along the chain; for small firms in less developed countries, participation in value chains is a way to obtain information on global markets’ needs and gain access to those markets.

rests of parties that possess the greatest social and economic power, mostly MNEs in the case of the MSA” (parenthesis added). ZHAO (2020), pp. 33-4.

⁶⁰ Loi No. 2017-399 du Mars 27, 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre.

⁶¹ KORSAKIENE & RAISIENE (2022), p. 8.

Instruction and capacity-building involve compromise, but they also involve the lead company's responsibility for the activities of its suppliers. They can therefore be seen as a source of risk to the former. For this reason, monitoring suppliers in terms of sustainability is important, and requires the fixing of independent, rigorous global standards for nonfinancial information for companies' environmental, social, and governance (ESG) performance as well as their external impact⁶². Boards should determine firm-specific metrics against which the fulfilment of purposes beyond minimum legal and regulatory standards can be evaluated. Then:

“these metrics should translate into key performance indicators that drive behaviour in different parts of a business, and employees should be evaluated, rewarded and promoted against the fulfilment of them”⁶³.

The enforcement of standards of sustainability should also be accomplished at different tiers of subcontractors. This refers to the “traceability” of sustainability. However,

“the absence of a credible threat of the State-supported enforcement may seriously compromise the regulatory potential of non-state private means”⁶⁴.

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In addition, even the existence of private regulatory means supported by a distinctive State compromise with sustainability does not remove the possibility that a buyer will opt to apply relational enforcement tools⁶⁵ rather than strict enforcement through judicial process, due to the unsuitability of the remedy preventing harm from occurring in the future and also due to the importance of business relationships. Relational enforcement tools are also important due to the impossibility of enforcing court decisions in countries that are not prepared to engage with measures related to sus-

⁶² Specific metrics are essential, since non-financial reporting currently exists in many jurisdictions. However, a lack of clarity regarding the type of information that must be provided generates differences and, therefore, ineffectiveness. See Sustainability Reporting Standards at Global Reporting Initiative GRI. Available at: www.globalreporting.org/Pages/default.aspx [accessed July 6, 2023].

⁶³ ‘The British Academy Principles for purposeful business’ (London, 2019), p. 25. Available at: www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business/ [accessed: July 21, 2023].

⁶⁴ BROWNSWORD *et al.* (2017), p. 31.

⁶⁵ The aim of relational enforcement tools is to secure compliance with sustainability. MITKIDIS (2015), p. 218 ff.

tainability. For example, certain national laws prohibit unions and do not protect child labour. In these cases,

“companies also reported legal, economic and cultural factors which tend to make more rigorous demands both difficult and even counterproductive”⁶⁶.

Nonetheless, the absence or inefficiency of State enforcement in this area is favourable for the theory proposed here. This is because in these cases the parent company is constrained to apply relational contractual tools such as audits, plans of action, self-assessments or educational programmes, thereby incorporating the supplier into the process. In addition to these positive relational enforcement tools⁶⁷, companies may also rely on name-and-shame strategies, and an increasing number of CSR initiatives are setting up databases of compliant suppliers. A supplier who is removed from such a database or, worse still, who is listed as non-compliant can no longer be used by members of that specific initiative. As a final “remedy” for obtaining compliance with SCCs, there is also the “threat” that the buyer will terminate the contract. Of course, if this is applied as a first measure in response to the supplier’s non-fulfilment of its duties, this is unsustainable. Furthermore, the removal of a supplier based on private standards can potentially influence the market⁶⁸.

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GSCs are interdependent, and supply chain efficiency requires managers to foresee these kinds of recurrent risk and tackle them by good practices, such as offering suppliers, *ex ante*, conditions that favour performance⁶⁹. These good practices should be enshrined in thorough SCCs, as will be explained in the following section.

II. THE IMPORTANCE OF COMPREHENSIVE SUSTAINABLE CONTRACTUAL CLAUSES

Contracts represent promises voluntarily assumed and mutually exchanged based on self-interest and reciprocity. In order to reflect modern concerns, they should include the interests of stakeholders⁷⁰. The idiosyncratic fea-

⁶⁶ MCBARNET & KURKCHIYAN (2007), p. 71.

⁶⁷ MITKIDIS (2019), p. 67.

⁶⁸ GAMMAGE & NOVITZ (2020), p. 24.

⁶⁹ See: CHOPRA & SODHI (2014). As regards the conduct of managers, PRAKAPAVI I T & KORSAKIEN (2016), pp. 350-367, argue that the behaviour of SMEs reflects the values and attitudes of owners and managers.

⁷⁰ COLLINS (1999), p. 14.

tures of GSCs represent an evolution of the traditional concept of contracts, in the sense that modern contracts regulate aspects going beyond promises mutually exchanged⁷¹ in relation to the production or circulation of goods and services, touching on aspects related to the ways in which those goods and services are produced. In addition, they :

“may also have an organizational function in that they may, and in modern market economies very often do, constitute the basis of long-term collaboration”⁷².

According to the discussion in the previous section, the consideration of stakeholders’ interests is not a strictly voluntary matter, since the business environment compels leaders of supply chains to support their suppliers, especially SMEs⁷³. This could be done via corporate governance decisions, which are not necessarily enshrined in SCCs. Meanwhile, if SCCs are incorporated into contracts, they may be able to foresee sustainability-related obligations on the buyer’s side. This depends on the level of compromise that buyers want to assume.

It is well known that the issue of sustainability must be addressed in a preventive fashion; once a harm has occurred it is difficult to revert, since the unsustainable conduct could have affected human lives and/or the environment in an irreversible way⁷⁴. The issue, then, is how to stimulate the incorporation of sustainability into contracts as a preventive strategy, *i.e.* as a way to favour sustainable GSCs, and also how to make buyers compromise with sustainability in a tangible way. The latter does not imply minimising the role of suppliers; both parties should co-operate in the implementation

⁷¹ According to HART (1994), p. 42: “when we promise, we make use of specified procedures to change our own moral situation by imposing obligations on ourselves and conferring rights on others”.

⁷² GRUNDMANN *et al.* (2015), p. 6.

⁷³ In line with MacNeil’s position [MACNEIL (1977-1978), pp. 854-905], there has been an evolution from classical contract law –where there is a discrete exchange, limited to the object of the transaction and subject to the logic of *pacta sunt servanda*– to relational contract law, where there is a relationship between the parties. Carvajal suggests that contract law, under the influence of the principle of good faith, is in a relational phase that takes into account elements of sustainability. This is a *sustainable contract law*. See CARVAJAL (2021b), p. 252.

⁷⁴ Hart’s view applies here, in the sense that: “the principal functions of the law as a means of social control are not to be seen in private litigation or prosecutions, which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide, and to plan life out of court”. HART (1994), p. 40; COLLINS (1999), p. 104, states that: “legal sanction available for breach of contract appears to occupy only a marginal role”.

of sustainable criteria⁷⁵. Larger-scale companies can play a more compelling role in the implementation of sustainability in supply chains, but the role of suppliers is crucial, since these companies can penetrate easily into the reality of subcontractors at lower tiers of supply chains. The ideal context is a chain of “trust”, where a subcontractor at level 10, for example, can exercise control on the fulfilment of sustainable standards by a subcontractor at level 11. Setting up this chain of trust up is difficult, since subcontractors are often under pressure to respond to exigencies and last-minute orders, and, therefore might tend to turn a blind eye to abuses. Hence, real engagement by suppliers is required to build a sustainable supply chain.

The cooperation here proposed –from the perspective of the lead company, which has the resources and capacities to support its suppliers, and from the suppliers themselves who are key in the implementation of sustainable businesses– requires a repurposing of the contract. This means advancing a vision of private agreements, steering a course from the current stage, where, among other characteristics, the buyer is the centre, towards the inclusion of an active role for suppliers. SMEs acting as driving forces for sustainability⁷⁶ in the GSC is a way to infuse ESG values in society, since SMEs’ close relations with customers, employees, local communities and commercial and institutional stakeholders can help in attaining global sustainability goals⁷⁷. Along the same lines, Panwar et al. maintain that small firms must “take sustainability-oriented initiatives seriously with a clear intention to make a positive difference in their local environment”⁷⁸.

Generally, it is accepted that SMEs cannot exempt themselves from accepting private regulatory sustainable standards, although they are commonly unable to incorporate them in their everyday business⁷⁹. A refusal to accept such standards might mean the loss of clients or, worse, going out of business, depending on the importance of the matter. To prevent this scenario, it has been proposed that SMEs should be considered at the moment of drafting contracts. That means considering the feasibility of them complying as well as how they can be helped to comply. Usually, parent companies

⁷⁵ “Supplier partnerships” according to COLLINS (1999), p. 198.

⁷⁶ See CIOCCA (2019), p. 102.

⁷⁷ LAMBERTI & NOCI (2012), p. 404. These authors describe SMEs as “more *sociotropic* than MNEs and large firms”. See also VOGEL (2006).

⁷⁸ PANWAR *et al.* (2015), p. 207. To emphasise this uniqueness, LEPOUTRE & HEENE (2006), p. 67 coined the term “Small business social responsibility”.

⁷⁹ “If, on the other hand, the relationship is based on power, the stronger party will dictate its view. In such a relationship, each supply partner will try to maximize its own profit, often at the expense of another [...] If this type of relationship is translated to the CSR sphere, this would lead to CSR codes that have been dictated by the MNC while it may not even be attainable to reach the norms set out in the code”. VYTOPIL (2015), p. 39.

only consult with stakeholders through questionnaires, in order to get a sense of their suppliers' current CSR policies and practices⁸⁰. In addition, the common practice is to incorporate SCCs by reference to general terms and conditions. This means that contracts commonly refer to the buyers' sustainability policy contained in their code of conduct. Despite all this, however, it should be feasible for SMEs to intervene at the moment of drafting. The initiative could come from parent companies, but also from SMEs in the position of suppliers. A suggested path to achieve the incorporation of suppliers in the discussion and drafting of clauses, and to enshrine further obligations for lead companies, follows.

The first step in incorporating SMEs' contribution in contracts and codes of conduct should be due diligence. This must go further than disclosure and diagnosis (an exercise known as "supply chain transparency")⁸¹; it should also focus on policies that the lead company has in place to avoid risks or measure their impacts⁸². The action plan is, then, a performance of due diligence that incorporates capacity-building to permit suppliers to gain knowledge and expertise which they can pass on to lower tiers, given how long and complex GSCs usually are⁸³.

As noted, a consideration for suppliers in the drafting of SCCs is a decision that often comes from the buyer. However, it could also be driven by SMEs when they are asked about their situation during due diligence⁸⁴. For these companies to be interested in intervening in the drafting of SCCs, governmental institutions and/or universities could act as mentors to make them

⁸⁰ VYTOPIĽ (2015), p. 63.

⁸¹ GARDNER *et al.* (2019), pp. 163-177.

⁸² VILLIERS (2020), p. 560. Section 3 (1) of the German Supply Chain Law LkSG, which entered into force on January 1, 2023, lists nine different due diligence duties: 1. establishing a risk management system; 2. designating a responsible person or responsible persons within the enterprise; 3. performing regular risk analyses; 4. issuing a policy statement; 5. laying down preventive measures in its own area of business and vis-à-vis direct suppliers; 6. taking remedial action; 7. establishing a complaints procedure; 8. implementing due diligence obligations with regard to risks at indirect suppliers; and 9. documenting and reporting. See RÜHMKORF (2023), pp. 6-14.

⁸³ RUGGIE (2017), p. 3. John Ruggie explains that, in 2015, Apple had 785 suppliers in 31 countries worldwide contributing to the production of the iPhone. The German Supply Chain Law establishes due diligence duties only to direct suppliers. Due diligence obligations in regard to indirect suppliers only arise where an enterprise has "substantial knowledge". That means, "actual indications that suggest that a violation of a human rights-related or an environment-related obligation at indirect suppliers is possible". Section 9 (3) LkSG.

⁸⁴ According to AGUIRRE *et al.* (2022), p. 29: "the main driver for companies to make progress on sustainability is the interest of the CEO, investors and shareholders, cited by 75% of respondents. In contrast, pressure from other stakeholders, such as suppliers, employees or trade unions, is only marginally recognised as a driver for sustainability".

aware of their potential as active players in this area⁸⁵. This is a path that is currently being followed by a Chilean university, which is developing an action plan with its suppliers in the area of food services⁸⁶. This is currently done on a voluntary basis. However, in line with various legislations creating a duty of vigilance for the lead company's corporate governance, in Chile, there is an announcement of a draft law on due diligence in human rights and business, which is expected to be presented to the National Congress in 2024. The proposal seeks to establish a regulation that requires companies to implement mechanisms to diagnose, monitor and mitigate their direct and indirect impacts on communities⁸⁷. In this university the process followed a number of steps. First, there was an examination of extant contracts between the university and its suppliers. During this examination, clauses that could be seen as "implicit SCCs" (if the content related to sustainability) were identified and brought to light. A second step was the drafting of an ameliorated and comprehensive SCC. For that, it was necessary to prepare a guide with substantial requirements for suppliers, which allowed SCCs to make reference to such a guide. Third, meetings with suppliers took place, in order to understand their realities – fundamentally, to hear from them their needs and ability to work for sustainability. Fourth, a proposal was presented to suppliers, and discussion took place⁸⁸. Fifth, the final draft was offered, and the clause was signed. Sixth, work on capacity building will be developed using the human resources available at university (academics and professionals). Finally, the operation of clauses will be monitored.

It has been suggested that:

“the prospect for ethical CSR depends very much on the institutional context within which a particular corporation is embedded. Where shareholder primacy is the basic value, ethical CSR confronts a

⁸⁵ In the mining industry, as they need “social license” to operate, the construction of capacity on local suppliers makes them aware of their weight in the negotiation process of SCCs. See the case of Teck and Corfo, who developed a programme for local suppliers. Available at www.litoralpress.cl/sitio/Prensa_Texto?LPKey=ZLZ4NQR_QMOWV2Q_2OCRBHRXTZFJX4MH7ONFX6CXJHE5IT23O6CF2Q [accessed: July 24, 2023].

⁸⁶ The University is Pontificia Universidad Católica de Valparaíso.

⁸⁷ The information is available at www.subrei.gob.cl/sala-de-prensa/noticias/detalle-noticias/2023/08/01/qu%C3%A9-formas-han-tomado-las-regulaciones-de-debida-diligencia; www.minjusticia.gob.cl/gobierno-anuncia-que-el-proximo-ano-ingresara-proyecto-de-ley-de-debida-diligencia-en-materia-de-derechos-humanos-y-empresas/ [accessed: October 26, 2023].

⁸⁸ It is interesting that, as a Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive EU 2019/1937, this clause also includes, accompanying measures for SMEs. Among the measures, there is also potential financial support for SMEs. Available at https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 [accessed: July 24, 2023].

formidable obstacle if it seen to detract from short-term profitability. Where, instead, stakeholder value dominates, ethical CSR is more likely to gain traction”⁸⁹.

Universities (public ones and those with public vocation) are types of institutions where stakeholders’ values dominate. Therefore, it should be easy to incorporate suppliers in the discussion of SCCs, and also to encourage them to contribute and work alongside university professionals to build their capacities. Besides being a good type of institution to improve sustainability, universities are also suitable to prepare SMEs to act as driving forces for sustainability along the whole supply chain.

The clause that is incorporated as an annex to contracts with the university’s food service suppliers is as follows⁹⁰:

CLAUSE
SUSTAINABILITY CLAUSE IN SERVICE QUALITY

The food service supplier must comply with legislation and administrative measures in the matter, as well as with the provisions of the contract and the manuals, policies, and regulations on service quality issued by the University and the “Sustainable Standards for Suppliers”.

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University’s Cooperation and Capacity Building

The supplier undertakes to provide services in compliance with the best sustainability practices, as indicated in the previous paragraph, and with the collaboration of the University under the following terms:

- i. The University will, to the extent of its available resources, take measures to build suppliers’ capacity in areas such as quality of service, hygiene, food handling, employees’ rights, and the environment;
- ii. To promote the implementation of such practices, the University may assume any additional costs that arise and cannot be directly financed by the supplier given the economic conditions of the concession or service;

⁸⁹ MILLON (2015), p. 37.

⁹⁰ Along the same lines, the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence foresees that the Commission may adopt guidance, including model contract clauses, in order to provide support to companies.

- iii. The University may also apply remedies, including contract termination if the supplier is unwilling to adopt sustainability standards.

Obligations of Suppliers

The supplier is obligated to:

- i. Attend all training sessions conducted by the University; and
- ii. Implement, in the execution of the service, the sustainable practices acquired in the respective training sessions.

Monitoring and Coordination

In order to verify the sustainable development of the activity, the University may take all necessary supervisory actions, such as user opinion surveys and audits, as well as coordination activities, such as the implementation of joint work methodologies.

Third-Party Beneficiaries

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In the application of this clause, indirect beneficiaries, such as workers, consumers, and the general community, are considered third parties in relation to this agreement between the provider and the University. As such, they cannot demand any provision from the University. Claims by these third parties must be exclusively directed against the provider.

CONCLUSION

It is an apparent fact that SMEs acting as suppliers are, in general, merely rule-followers, owing to the imbalance in bargaining power in supply chain relationships and because they are economically dependent on the sourcing company.

Legal solutions highlight the role of buyers or lead companies via a duty of vigilance. Among others, France, Germany and the European Union all legislate in favour of such a duty. There is also a Directive of the European Parliament on Corporate Sustainability Reporting which accentuates the role of parent companies in the incorporation strategy of ESGs along supply chains. However, this article proposed that such a solution is only partial, since the power to impose ESG criteria continues to be in hands of the strongest party. In addition, European legislation requires a transposi-

tion of directives, making it evident that national jurisdictions must accept, at least in a small part, that capitalism must be made accountable.

The hypothesis presented here consists of promoting SMEs' bottom-up activities in order to allow them to become "driving forces of sustainability". Such activities might take the form of, on the one hand, SMEs' participation in the drafting of contracts and codes of conduct. On the other hand, lead companies should compromise in SCCs by offering capacity-building for suppliers.

Hence, the objective of this article has been to offer solutions to strengthen the role of private agreements in enhancing sustainability in GSCs. The real case of a Chilean university illustrates the theoretical findings; the particular suitability of such institutions is highlighted due to their role in making small businesses aware of their potential to be driving forces for sustainability along supply chains.

Although the anatomy of the clause offered is also applicable at the global scale, an issue that remains even at the institutional level is the incorporation of further tiers into sustainable chains. One solution would be to obtain and enforce suppliers' cooperation to disseminate sustainable practices. Of course, the lead companies' initiative and continuous cooperation is also essential.

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ACRONYMS AND ABBREVIATIONS

<i>al.</i>	<i>alii</i>
CSR	corporate social responsibility
CSRD	Corporate Sustainability Reporting Directive
ed.	editor <i>sometimes</i> edition
eds.	editors <i>sometimes</i> editores
<i>e.g.</i>	<i>exempli gratia</i>
ESG	Environmental, Social and Governance (criteria)
EU	European Union
dir.	directora
ff.	following
GSC	global supply chain
<i>i.e.</i>	<i>id est</i>
LkSG	Lieferkettensorgfaltspflichtengesetz
MNC	multinational corporation
MNEs	multinational enterprises
MSA	Modern Slavery Act
NFRD:	Non-Financial Reporting Directive
n.	note
NGOs	non-governmental organisations
No.	number
n.º	número
OIT	Organización Internacional del Trabajo
<i>op. cit.</i>	<i>opus citatum</i>
p.	page
pp.	pages
SCC	sustainable contractual clause
SME(s)	small and mediums-sized enterprise (s)
vol.	volume <i>sometimes</i> volumen
www	World Wide Web