

Uncitral Conference (4-6 July 2017)

Title

**The Law and Practice of International Sale Contracts:  
Protecting the environment for future generations**

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Professor Cristina Poncibò<sup>1</sup>

**Abstract**

The paper deals with two main research questions. The first is whether the goal of environmental sustainability is relevant (impliedly and/or expressly) for international sale agreements. The second research question discusses the role Uncitral could play in promoting the respect for environmental sustainability in the international trade community.

**1. Introduction**

The concept of environmental sustainability generally indicates the need to promote a responsible interaction with the environment to avoid depletion or degradation of natural resources and allow for long-term environmental quality<sup>2</sup>. The practice of environmental sustainability helps to ensure that the needs of today's population are met without jeopardizing the ability of future generations to meet their needs.<sup>3</sup>

The concept of sustainability found its roots in the United Nations 1987 Brundtland Commission Report 'Our Common Future' and even earlier in the 1980's World Conservation Strategy. The definition in the Brundtland Report of the World Commission on Environment and Development follows: '(...) development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. Precisely, 'In essence, sustainable development is a process of change in which the exploitation of resources, the direction of investments, the

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<sup>1</sup> Professor of Comparative Private Law (University of Turin). Scientific Director of the Master of Laws in International Trade Law, a joint-programme of the Turin School of Development, ITC-ILO, and the Department of Law of the University of Turin (Italy), in cooperation with Uncitral.

<sup>2</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43. Starting from a pure ecologically based concept in the 1970's and in the World Conservation Strategy, sustainability transformed very quickly into a more comprehensive socio-economic approach.

<sup>3</sup> On the relationship between the law and the future generations: A. Gosseries and L.H. Meyer (eds) *Intergenerational Justice* (Oxford: Oxford University Press, 2009). B. Auerbach and M. Reinhart, 'Antonin Scalia's Constitutional Textualism: The Problem of Justice to Posterity' (2012) 1 *Intergenerational Justice Review*, 17-22. E. Brown-Weiss, 'Intergenerational Fairness and Rights of Future Generations' (2002) 2:3 *Intergenerational Justice*, 1-5.

orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations'.<sup>4</sup>

While the expression 'environmental sustainability' is not explicitly defined in the Millennium Declaration<sup>5</sup>, countries concur that 'we must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'<sup>6</sup>.

Thus, there is a growing recognition at the international level that human activities are undermining the ecological systems and their resilience, and there are many indications that scholars need to develop new approaches to both understanding and managing change. Therefore, while few would deny that present generations have a moral obligation to preserve the environment for future generations, scholar's debate, in various perspectives, about the existence of a legal duty.<sup>7</sup>

This paper considers the role of private actors (often multinationals) and, in particular, it discusses whether environmental sustainability is relevant (impliedly and/or expressly) for international sale agreements. Scholars have studied the issue within the context of international investments agreements and recently with respect to international business contracts.<sup>8</sup>

Contract Law tries to satisfy the needs of the present generation efficiently, but these may not be adequate for addressing equity issues with future generations. This reference poses extraordinary problems to contract law scholarship.<sup>9</sup>

First, the liberal theories are incapable of integrating sustainability into their illumination of the basic structure of contract law. These theories combine individual autonomy and contract (corrective) justice as the two general principles of contract law, which illuminate its structure and basic rules. In such a view, contracting means exercising one's freedom, and the law, generally made to enable and to protect human freedom, makes such exercises effective. Libertarians may logically conclude that with contractual autonomy the environment will be well cared for as a beneficent 'by-product' of rational, self-serving behaviour of contractual parties. Because, no rational property owner will deliberately degrade the value of his property, private individuals are, in effect, suitable surrogates of the interests of future generations. For example, one author says that 'it is quite possible to take the needs of the future into account by permitting the establishment of markets in which assets with future values can be bought and sold. Speculation in resources with an expected large future demand automatically results in conservation. Thus the

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<sup>4</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43. Starting from a pure ecologically based concept in the 1970's and in the World Conservation Strategy, sustainability transformed very quickly into a more comprehensive socio-economic approach.

<sup>5</sup> The Declaration (September 2000) constitutes an unprecedented promise by world leaders to address, as a single package, peace, security, development, human rights and fundamental freedoms. The eight Millennium Development Goals (MDGs)—along with a set of targets and indicators—serve as milestones against which to measure international and country progress towards the overall goal of reducing extreme poverty.

<sup>6</sup> UNGA, *Road Map towards Implementation of the United Nations Millennium Declaration*, Report of the Secretary General, A1/56/326 of 6 September 2001.

<sup>7</sup> F. Capra and U. Mattei, *The Ecology of Law: Toward a Legal System in Tune with Nature and Community* (Oakland, CA: Berrett-Koehler Publishers, 2015).

<sup>8</sup> L. Cotula, *Investment contracts and sustainable development. How to make contracts for fairer and more sustainable natural resource investments* (London: IIED, 2010).

<sup>9</sup> K.P. Mitkidis, *Sustainability Clauses in International Business Contracts* (The Netherlands: Eleven Publishing, 2015). The author discusses whether sustainability clauses fit the contract paradigm by focusing on descriptive contract theories (eg promise and will theories, reliance theories, transfer theories).

Of the same author, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) 1 *Nordic Journal of Commercial Law* 1-31.

interests of the people who will live in the future are actively protected'.<sup>10</sup> It follows that, according to the libertarian theories of contract, individuals have not to concern themselves about the fate of the environment.

One may reply that this account disregards, first of all, the diminution of economic value through time (ie, 'the discount rate'), and second, that these optimistic forecasts favour abstract models over fundamental scientific facts showing that in our hands lies the fate, for better or worse, of the environment for future generations.

Second and more important, contract law often deals with the many notions of distributive and social justice,<sup>11</sup> but usually with respect to the present generations. The point here is that the notion of humankind that spans current and future generations is increasingly challenging the traditional concept of social justice.<sup>12</sup> Accordingly, the article endorses the idea of including environmental sustainability into the concept of social contractual justice.

Intergenerational justice is a specific variation of social justice and closely linked with environmental sustainability in both the theoretical discourse and practical application.

Belonging to a generation should not lead to disadvantages. The concept of 'intergenerational justice' by John Rawls and Hans Jonas focuses on this idea.<sup>13</sup> It includes both questions of social justice between different generations within the same life cycles (intra-temporal intergenerational justice) and also in a long-term perspective (inter-temporal intergenerational justice). In other words, social justice deals with conflicts of interests and demands pertaining to scarce resources and associated life chances. The different justice theories provide criteria for decisions that can be laid as a basis for solutions to this conflict. 'Generation' will either mean the specific 'phase of life' a person belongs to (generally the three phases are distinguished by childhood/education, employment, and retirement) or, through certain external characteristics (for example a generation of war, post-war generation, Baby-Boomer generation, future generations). According to this, the idea of generation is ambiguous and contextually dependent, but always a relational term that emphasizes distinct differences and can be used as the link for considering justice.

Precisely, Rawls considered political constitutions and the principles of economic and social arrangements as major institutions and defined justice as the way in which these institutions distribute fundamental rights and duties and regulate the sharing of advantages from social cooperation. Having accepted the principles of liberty, equality and fraternity, he combined them with the principles of justice. Equality then becomes equality of fair opportunity and fraternity the principle of difference. What is essential however is agreement on 'the proper distributive shares: 'The principles of justice simply are the principles for regulating distribution that will be chosen by people in a society where the circumstances of justice hold'.<sup>14</sup> Does this principle extend to the future generations? Each generation must put aside a suitable amount of capital in return for what it received from previous generations that enables the latter to enjoy a better life in a more just society. Hence, justice considerations apply to relations that are beyond the present one.

This is particularly true in the case of distributive justice. In some sense, the present generation exercises power over the future ones, and has the possibility of using up resources in such a way that it negates the rights of the future ones with respect to the environment. The future has no way

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<sup>10</sup> J.P. Martino, 'Inheriting the Earth' (1982) *Reason* 30. A libertarian approach to the issue contends that the protection of property rights and the promotion of free markets in the present will serve future generations.

<sup>11</sup> H.-W. Micklitz (ed), *The many concepts of social justice in European private law* (Cheltenham: Edward Elgar Publishing, 2011).

<sup>12</sup> B.H. Weston, 'The Theoretical Foundations of Intergenerational Ecological Justice: An Overview' (2012) 34 *Human Rights Quarterly* 251–266.

<sup>13</sup> The pioneer in the field from an International Law perspective is E. Brown-Weiss, *Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York and Tokyo Dobbs Ferry, 1988-1989).

<sup>14</sup> J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

of controlling the present. Moreover, the present generation even has power over the very existence of the future ones. This could be an even greater influence than that on the current generation, where the influence would at most affect the survival of the people.<sup>15</sup>

Third, the rights-based theories justify contract law on the ground that contract law vindicates or upholds citizens' rights. According to this view, contractual obligations are obligations not to infringe the rights of others, and contract law gives force to such rights either directly, by ordering that they not be infringed, or indirectly, by enforcing in case of infringement duties to repair losses. In principle, rights-based theories can be distinguished according to how they understand the rights that contract law has to respect and protect. In particular, contract law scholars tend to agree in saying that contract law deals, through the regulation of market transactions, with a set of values enshrined in to the ideals promoted by constitutional values. Consequently, contract law should operate in the shadow of constitutional law that, in some cases, protects the environmental sustainability.<sup>16</sup>

## 2. The CISG and Environmental Sustainability

The previous paragraph prompts a question whether environmental sustainability could represent an implicit term of an international sale contract under the United Nations Convention on Contracts for the International Sale of Goods ('CISG')<sup>17</sup>.

According to the majority of CISG scholars, a trade usage becomes an implied term of the contract if it is widely known to, and regularly observed by the majority of traders (objective element) involved in a particular field of trade and the parties knew or ought to have known about (subjective element).

Precisely, Article 9(1) CISG states that any usage (to which they have agreed and by any practice) bound the parties, which they have established between themselves. The article refers to two situations: one is where the parties have constantly agreed on express terms to respect certain values in their business relationship; this behaviour implies the justified expectation that the parties will continue to respect these values also in the future. Consequently, although an express term is lacking, the court or the arbitration panel should interpret the agreement by following the previous conduct of the parties. The other situation occurs when the parties have specifically agreed to a certain usage. Here the usage is binding for them.

Further to Article 9(2) CISG, it is also possible to argue that international trade usages bound the parties: trade usages refer to 'practices and rules, which are observed either by the parties in their relation, or in the respective branch of activity' (Article 9(2) CISG). Precisely, 'The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the

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<sup>15</sup> Some domestic courts have applied the intergenerational argument (eg Peru, Nigeria) meaning to take in consideration the survival of future generations in in deciding cases. UNEP Division of Environmental Law and Conventions, *Advancing Justice, Governance and Law for Environmental Sustainability* (Nairobi: UNON Publishing Services Section, 2004).

With respect to the US, J.R. May, 'Not at All: Environmental Sustainability in the Supreme Court' (2009) 20 *Sustainable Development Law & Policy* 81-82.

<sup>16</sup> An example is the Art 3 (3) of the consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union stating 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

<sup>17</sup> United Nations Convention on Contracts for the International Sale of Goods (adopted 10 March to 11 April 1980, entered into force 1 January 1988).

particular trade concerned’.

However, an American Federal District Court held that ‘the usages and practices of the parties or the industry are automatically incorporated into any agreement governed by the Convention, unless expressly excluded by the parties’.<sup>18</sup> The Court construed Article 9(2) of the CISG without requiring knowledge, actual or presumed. This seems to border on a normative approach independent of party agreement. The prevailing opinion, however, still appears to be that trade usage fills contractual gaps on the basis of presumed intention as an implied term and does not function by operation of law *per se*.<sup>19</sup>

On such basis, some authors consider the observance of ethical standards may amount to an international trade usage.<sup>20</sup> The point here is whether environmental sustainability, being a principle of the great majority of the corporate codes of conduct, could be conceived as an emerging trade usage, either within a particular industry or globally.<sup>21</sup>

### 3. Contractual Clauses to promote Environmental Sustainability

Sustainable development may also be expressly relevant in contracts when the parties agree to contractualise certain values and to respect them as contractual obligations. Indeed, certain economic, social and environmental values are not only ‘behind’ the contract,<sup>22</sup> but, sometimes, the agreement between the parties expressly protects them.<sup>23</sup> In these cases, the parties define their own interests and, in affirming this, it may accommodate parties’ willingness to contractualise a set of values, such as environmental and human rights protection aiming at preserving our world for future generations, by imposing them as contractual obligations.

The United Nations Global Compact (UNGC),<sup>24</sup> expressly requests companies to extend their influence in the area of environmental protection throughout their supply chains. The UNGC practical guide on supply chain sustainability advises companies to clearly formulate their expectations towards their suppliers in a code of conduct and subsequently implement the principles of Code through their ‘integration (...) into supplier contracts’.<sup>25</sup> In 2011, the UN Special Representative of the Secretary General for Business and Human Rights presented the ‘Principles for Responsible Contracts’: a guide for negotiators and others on how to ensure the management of human rights risks is integrated into State-investor contract negotiations.<sup>26</sup>

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<sup>18</sup> *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc.*, Federal District Court New York, USA, 10 May 2002 (CLOUT Case No 579).

<sup>19</sup> J. Coetzee, ‘The role and function of trade usage in modern international sales law’ (2015) 20 *Unif Law Review* 243–270. V. Mak, ‘According to Custom...? The Role of ‘Trade usage’ in the Proposed Common European Sales Law (CESL)’ (2014) *ECLR* 64-84.

<sup>20</sup> I. Schwenzer and B. Leisinger, ‘Ethical Values and International Sales Contracts’, in R. Cranston, J. Ramberg and J. Ziegel (eds), *Commercial Law Challenges in the 21<sup>st</sup> Century: Jan Hellmer in memoriam* (Uppsala, Sweden: Iustus Förlag 2007) 249.

<sup>21</sup> Sjäfjell and Wiesbrock, *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (London: Routledge, 2015).

<sup>22</sup> H. Collins, *The Law of Contract* (Oxford: Oxford University Press, 1987).

<sup>23</sup> The Institute of Commercial Law and International Association for Contract and Commercial Management at Pace University School of Law published some data about the use of SCCs in the Report ‘*Triple Bottom Line: The Use of Sustainability and Stabilization Clauses in International Contracts*’ (New York: Pace University, 2011).

<sup>24</sup> UNGC, Commentary to Principle 5 and Principle 8.

<sup>25</sup> UN Global Compact Office and Business for Social Responsibility, *Supply Chain Sustainability: A Practical Guide for Continuous Improvement* (New York: UN, 2010), 23.

<sup>26</sup> UN Principles for Responsible Contracts (New York: UN, 2011).

See also, John Ruggie’s Report to the Human Rights Council, Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators, A/HRC/17/31/Add.3, 25 May 2011. Accessed January 2017 at

Similar proposals emerge from the OECD Guidelines for Multinational Enterprises (2011) stating that ‘enterprises can also influence suppliers through contractual arrangements’.<sup>27</sup> Also interesting in this respect is the wording of ISO 26000 Guidance on social responsibility that expects companies not to contract with risky partners and to influence suppliers by imposing these values upon them. For instance, ISO 26000 states that ‘(...) to promote social responsibility in its value chain, an organization should: integrate ethical, social, and environmental and gender equality criteria, and health and safety, in its purchasing, distribution and contracting’.<sup>28</sup>

In promoting such goals, both the UN and OECD are indeed favoring a limitation of the liberal or autonomy-based perspective of contracting that emphasizes the individual as opposed to the collective interest.<sup>29</sup>

Precisely, ‘sustainability contractual clauses’ (‘SCCs’) may be defined as ‘provisions in commercial contracts that cover social and environmental issues, which are not directly connected to the subject matter of the specific contract’.<sup>30</sup> Frequently, these clauses will integrate CSR principles provided for by corporate codes of conduct in order to give the codes the form of binding commitments according to contract law. Private law scholarship has only recently started to explore the relationship of CS, codes of conduct and private law.<sup>31</sup> An example of such clause follows ‘(...) the Supplier hereby undertakes to manage its activities in compliance with: all principles, values and commitments as expressed in the ‘Values and Ethical Code’, the ‘Code of Conduct’ and the Policy about ‘Social Responsibility for Occupational Health, Safety and Rights, and Environment’ publicly adopted by the company. In addition the Supplier undertakes to use the material resources responsibly, in order to achieve sustainable growth that respects the environment and the rights of future generations (...)’.<sup>32</sup>

SCCs show a ‘mixed nature’: they do not fall neatly into the domain of public or private law scholars.<sup>33</sup> In addition, this practice goes against our traditional understanding of supply chain agreements as tools regulating companies’ behaviour regarding the exchange of goods and money between two parties, and thus dealing with the sole economic interests of the contracting parties.<sup>34</sup>

A survey held in 2011 confirmed the increased used of these contractual clauses, when eighty percent of the companies confirmed they imposed sustainability related requirements upon their business partners.<sup>35</sup>

SCCs appear in a contractual provision or by reference to another document such as standard terms and conditions, codes of conduct, internal policies, global or domestic initiatives concerning social corporate responsibility. They have different contents, most often related to environmental standards, employment conditions, health and safety standards, human rights and business ethics

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<<http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>>, para 1.

<sup>27</sup> OECD, *The OECD Guidelines for Multinational Enterprises, Commentary on General Policies*, para 21, available online at <[www.oecd.org/corporate/mne/](http://www.oecd.org/corporate/mne/)> (accessed January 2017).

<sup>28</sup> ISO 26000, paragraphs 6.6.6.2.

<sup>29</sup> R.E. Barnett, ‘A Consent Theory of Contract’ (1986) 86(2) *Columbia Law Review* 269-321.

<sup>30</sup> K.P. Mitkidis see the monograph at note 4.

<sup>31</sup> A. Beckers, *Enforcing Corporate Social Responsibility Codes On Global Self-Regulation and National Private Law* (Oxford: Hart, 2015). A. Rühmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chain* (Cheltenham, UK: Edward Elgar, 2015). A.L. Vytopil, *Contractual Control in the Supply Chain On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven, The Netherlands, 2015).

<sup>32</sup> The full text of the sustainability clause of Pirelli Group has been accessed at <https://www.pirelli.com/asset/index.php?idelement=59887> (January 2017).

<sup>33</sup> M.P. Vandenbergh, ‘The private life of public law’ (2011) 105 *Columbia Law Review* 2029, 2096, 2041-2042.

<sup>34</sup> L.W. Lin, ‘Legal transplants through private contracting: codes of vendor conduct in global supply chains as an example’ (2009) *American Journal of Comparative Law* 711-744, 717.

<sup>35</sup> Pace University School of Law, see at footnote 22.

issues. Their scope of applicability varies to a great extent; many of them extend beyond a bilateral agreement and impose or drive the obligations to further members of the supply chain.

To be precise, the values that fall under the umbrella concept of sustainability become an integral part of a contract in different ways. These clauses are written in the contractual text directly and they are qualified as (fundamental or non-fundamental) contractual obligations. For example, warranties are incorporated into the agreement *by reference* to another document, often a company's code of conduct. According to an author, these codes can be conceived as ('...') unilateral self commitments by companies to respect fundamental societal interests, such as human rights, labour standards or environmental protection'. The author discusses their role and argues in favour of a stronger role for contract law in enforcing and regulating corporate codes.<sup>36</sup>

The incorporation by reference to the code of conduct that promotes, among other things, sustainability goals can sometimes raise concerns as to whether the referenced document becomes a valid part of the contract. Private international law does not provide any specific rules in this respect.<sup>37</sup> Therefore, the general rules on interpretation of the parties' intentions will apply. Thus, in such a case, the judge has to look into the form and content of the reference. Evidently, reference must be made in such a form and language that a reasonable person would comprehend that the mentioned document is intended to form part of the contract.<sup>38</sup> Pre-contractual negotiations may also be relevant to ascertain the intentions of the parties.<sup>39</sup>

#### 4. Remedies under the CISG

The parties undertake to fulfill to the specific obligations inserted into SCCs that are often repeating all or part of ethical values stated in their codes of conduct.<sup>40</sup> Nevertheless, it is not very clear what happens in case of lack of compliance to such contractual obligations by the company's suppliers. Supply agreements often imply long-term contractual relationships between the parties.<sup>41</sup>

The infringement of SCCs does not influence the tangible quality of goods so that the legal consequences of their infringement do not follow the usual reasoning according to the Article 35(1) CISG requiring the seller to deliver 'goods which are of the quantity, quality and description required by the contract'. Whilst Article 35(1) deals with what the contract actually requires, Article 35(2) sets out a series of objective criteria used to determine conformity. It is a subsidiary definition, which only applies to the extent that the contract does not contain any, or contains only insufficient, details of the requirements to be satisfied under the said provision. Thus, the primary consideration is whether the contract requires the goods to be produced by safeguarding certain sustainability goals. If these goals are not required by the contract, the Article 35(2) requirements can then be considered. Indeed, the way of producing the goods influences their values on the market: a buyer may be willing to pay a higher price for goods manufactured and traded by respecting the environment and other values. Following the reasoning, one may say that the goods produced under conditions violating these goals are not of the quality impliedly asked under the

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<sup>36</sup> A. Beckers, 'Regulating Corporate Regulators Through Contract Law? The Case of Corporate Social Responsibility Codes of Conduct' *EUI Working Papers* - Max Weber Programme 2016/12. Beckers, n 41 above.

<sup>37</sup> Particularly, the above-mentioned United Nations Convention on Contracts for the International Sale of Goods (CISG).

<sup>38</sup> I. Schwenzer and P. Schlechtriem (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: Oxford University Press, 2010) art 14, para 37.

<sup>39</sup> S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2009) art 2.1.19, para 13.

<sup>40</sup> The issue also concern the companies' clients, and the consumers who assume to purchase goods manufactured under the respect of certain values. The article does not address this issue.

<sup>41</sup> S. Grundmann, F. Möslin and K. Riesenhuber, *Contract Governance Dimensions in Law and Interdisciplinary Research* (Oxford: Oxford University Press, 2015).

contract (Article 35(1) - (2) CISG).

In the case of non-conforming goods, the buyer may resort to the usual remedies, namely avoidance of the contract, damages and price reduction; all such remedies raise special questions in connection with the violation of ethical standards

Avoidance of the contract is possible only in cases where the non-conformity amounts to a fundamental breach of contract (Article 49(1) and Article 25 CISG). Does the non-compliance with SCCs constitute a fundamental breach of the agreement? Usually, a fundamental breach is found when the main obligation under a contract is not fulfilled. Nevertheless, a breach of ancillary obligations can also result in a fundamental breach, but most probably not if those obligations were not connected to the goods' non-conformity. If it comes to a formal disagreement about the right to terminate, the court would have to establish whether the breach in question amounted to a fundamental breach. Furthermore, a fundamental breach must also be foreseeable according to the general rules on contract interpretation. The main aspect to examine in this respect will once again be the language of the SCCs and/or the manner in which the supplier was informed of the buyer's standards with respect to sustainable development. Therefore, it can be concluded that the possibility of contract termination plays a role in the use of SCCs, but the role relates more to the deterrence function of such a provision, than its actual use.

Indeed, usual contractual remedies for the non-conformity of the goods under the CISG – specific performance, price reduction and damages – play a limited role in the enforcement practice of SCCs. For example, specific performance cannot be used in relation to SCCs, since, as said, these requirements do not relate to the *physical* product quality. In order to claim damages under international contract law the buyer then has to prove a breach, damage that was foreseeable and a causal relationship between the two (Article 45(1) and 74 CISG). All aspects may pose problems in relation to SCCs. Firstly, a breach can occur only where there is a binding obligation. As discussed earlier, the binding nature of SCCs is dependent on the relevant provision's form and specificity. Secondly, if an SCC is breached, most likely a non-pecuniary damage occurs, usually reputational harm. Whereas UPICC and PECL expressly provide for the possibility of recovering non-pecuniary loss,<sup>42</sup> the same is the subject of an academic discussion and contradicting court decisions under CISG.<sup>43</sup>

The causal relationship between breach of an SCC and relevant damage will often be a controversial matter and it will be even harder if a buyer claims a future loss, which must be proved with reasonable certainty. It may be impossible to reach reasonable certainty, unless the buyer, for example, faces litigation by third parties due to the breach in question and expects to lose it.

Some companies have also tried to enforce suppliers' breach to comply with SCC indirectly using the tools of labour law, and, when applicable, consumer law, with particular focus on misleading advertising. For example, one author refers a case where a German company promoted its products on the basis that they were produced in compliance with certain minimum social standards: the practice has been considered an infringement of Section 5(1)(2) of the German Act against Unfair Competition.<sup>44</sup>

Scholars report some interesting examples.<sup>45</sup> Recently, in the US, in addition to the federal regulatory actions, the owners of the supposedly 'Clean Diesel' automobiles manufactured and

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<sup>42</sup> UPICC art 7.4.2(2). PECL art 9:501(2)(a).

<sup>43</sup> P. Schlechtriem, 'Non-Material Damages – Recovery Under the CISG?' (2007) 19 *Pace International Law Review* 89.

<sup>44</sup> E. Kocher, 'Codes of Conduct and Framework Agreements on Social minimum Standards. Private regulations?', in O. Dilling, M. Herberg and G. Winter (eds), *Responsible Business. Self-Governance and Law in Transnational Economic Transactions* (Oxford and Portland Oregon: Hart 2008) 67.

<sup>45</sup> A. Carlsson, *Corporate Social Responsibility: the Lex Mercatoria of Corporate Governance in the 21<sup>st</sup> century*. Thesis (Stockholm: University Press, 2010) 60. S. Piciotto, 'Rights, Responsibilities and Regulation of International Business' (2003-2004) 42 *Columbia Journal of Transnational Law* 131-146.



distributed by Volkswagen have filed lawsuits based on violations of federal and state consumer protection and anti-deception laws. Individual consumers were harmed by being deceived into buying what they thought were environmentally friendly, socially responsible, and sustainable vehicles.<sup>46</sup>

Generally, the goal to pursue the goal of protecting the environment for the future generations seems to favour the assessment of contractual obligations under a 'cooperative ethics' approach – that is, one in which contracting parties are expected to cooperate. This approach is central to the relational theory of contract.<sup>47</sup> It views the formal legal infrastructure governing the contractual relationship as being of secondary importance compared to informal norms of decency, solidarity and cooperation. Under this conventional understanding, resorting to the formal law of remedies upon breach misses the mark: instead of reflecting the parties' on-going commitment to promoting their goals through cooperation and mutual agreement, such a move reflects a diametrically opposed set of values.

To provide an example, SCCs often precise that 'The Supplier acknowledges that the company has the right, at any time, to verify, either directly or through third parties, compliance by it with the obligations herein undertaken. The Parties hereby agree that the company may terminate the Contract/s and/or the Order/s in the event that the Supplier should be held responsible for any breach of any of the provisions. The Supplier may report any breach or suspected breach of the 'Values and Ethical Code', the 'Code of Conduct' and the Group policy, or any applicable laws'.<sup>48</sup>

First of all, monitoring, because non-compliance is not detectable after the goods are delivered. For example, we cannot see from the goods' appearance that children were used to produce it. The majority of MNEs use suppliers' self-assessment to start with. It is often required during the suppliers' selection process as a part of risk assessment and due diligence, as well as during the contractual term. As a cheap although highly subjective alternative, self-assessments can be conducted often and commonly serve as detecting 'red flag' issues, which are then further followed up by suppliers' audits. A variety of audits exists, including internal and external, announced and unannounced audits on site, audits coordinated among groups of firms and according to different audit standards. Indeed, MNEs are becoming more transparent about the audit results.<sup>49</sup> This information, despite its possible incompleteness, is essential for implementing any practical change in suppliers' behaviour through various soft and hard remedial strategies. If non-compliance is discovered, the buyer will usually work with the supplier to find solutions. For example, the most common tool that companies use is a 'corrective action plan', under which the parties agree what the supplier must do to remedy the breach. Sometimes, the buyer will even provide a supplier with capacity building resources, such as training or assistance.

Relational remedies are essential in promoting sustainability goals through contract law and that they are also available when these goals are not enforceable by traditional remedies. However,

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<sup>46</sup> A. Goel, 'Volkswagen: The Protagonist in Diesel Emission Scandal' (2015) 11 *South Asian Journal of Marketing & Management Research* 32-40. Civil suits have also been filed based on the common law torts of fraud and strict liability for defective products. Individual consumers, the owners of the diesel vehicles, have paid up to \$ 6000 more for what they thought was a green diesel compared to a gasoline-fuelled model. They thus could seek compensation for their vehicles declining resale.

<sup>47</sup> Y. Adar and M. Gelbard, 'The Role of Remedies in the Relational Theory of Contract: A Preliminary Inquiry' (2011) 7 *European Review of Contract Law* 399-424. J.M. Feinman, 'Relational Contract Theory in Context' (1999-2000) 94 *Northwestern University Law Review* 737 and I. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72 *Northwestern University Law Review* 854.

<sup>48</sup> The full text of the sustainability clause of Pirelli Group has been accessed at <https://www.pirelli.com/asset/index.php?idelement=59887> (January 2017).

<sup>49</sup> MNEs also adopt 'name-and-shame strategies', practically consisting in the establishment of a database of compliant suppliers: the members of the specific initiative can no longer use a supplier, who is erased from such a database or, worse still, listed as non-compliant.

although neither companies, nor regulators stress it, the effectiveness of the relational tools is grounded in the threat of formal legal sanctions. This reliance on the indirect enforcement power of formal legal sanctions is evident from the frequent reservation of the right to terminate a contract if the supplier's non-compliance status is not remedied. In addition, these remedies are alternative to litigation and this practice helps in explaining why the case law about SCCs appears limited in quantity if compared with the relevance of sustainability clauses.<sup>50</sup>

## 5. Which role for Uncitral in these scenarios?

Having considered the sections before, a fundamental question is whether Uncitral has to include the goal of environmental sustainability in the work's agenda of the organisation.

The official website of Uncitral states: 'Most Uncitral texts are not directly relevant to environmental concerns. However, where environmental concerns are relevant to a particular topic, due recognition is given to environmental protection'<sup>51</sup>. For example, The Uncitral Legislative Guide on Privately Financed Infrastructure Projects, a legislative text intended to acquaint domestic legislators with issues to be considered when drafting laws governing private infrastructure investment, makes it clear that 'It is widely recognized that environmental protection legislation is a critical prerequisite to sustainable development' (PFIP Chap. VII, para. 42)<sup>52</sup>.

More interesting, Uncitral confirmed its support for the Millennium Development Goals (MDGs) indicated in Section 1, including, among the others, the aim of combating climate change, and protecting oceans and forests<sup>53</sup>.

The paper argues that, by affirming its support, the organisation should be ready to include environmental concerns in the discussion about the modernization of international trade law. Particularly, this has some consequences in the field of international sale agreements.

First, it is possible to question whether the text of the CISG could represent a vehicle to integrate environmental protection and sustainability into international sale agreements. Such a perspective is not easily feasible by considering the difficulties related to any integration or modification to the original text ratified by a number of countries.

Second and more promising, it is possible to argue the text of the CISG should be interpreted in the light of the growing system of supra-national laws that directly and indirectly seeks to safeguard the environment for the future generation. The CISG explicitly excludes legal issues pertaining to the validity of contracts. This means considerations of duress, fraud and unconscionability (among others) fall outside the CISG framework.

However, despite the omission of validity, it is possible to say that the interpretation of CISG, as it stands, could advance environmental protection and sustainability in the international sale of

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<sup>50</sup> A. Beckers, above at 30. The author presents some cases concerning the infringement of the provisions of the codes of conduct.

<sup>51</sup> The paragraph is accessible, as to January 2, 2017 at the following address within the official website: [http://www.uncitral.org/uncitral/en/about/work\\_faq.html](http://www.uncitral.org/uncitral/en/about/work_faq.html)

<sup>52</sup> The Legislative Guide discusses the practice recognized in some States of public participation in environmental licensing, and states: 'Adhering to treaties relating to the protection of the environment may help to strengthen the international regime of environmental protection. A large number of international instruments have been developed in the past decades to establish common international standards. These include the following: Agenda 21 and the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in 1992; the World Charter for Nature (General Assembly resolution 37/7, annex); the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 1989; the Convention on Environmental Impact Assessment in a Transboundary Context of 1991; and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992. Id. para. 44.

<sup>53</sup> UN Resolution, *Transforming our world: the 2030 Agenda for Sustainable Development*, 25 September 2015.

goods. Two provisions are worth noting.

First, Article 7(2) of the CISG provides that ‘questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based’. As a matter of treaty interpretation, these ‘general principles’ may be interpreted with reference to UN instruments dealing with environmental sustainability. Precisely, the United Nations and other international efforts have attempted to grapple with this problem by creating non-binding, soft-law standards or rules of law such as the OECD Guidelines, the UN Global Compact and the UN Guiding Principles on Business and Human Rights (Section 1). Businesses have a responsibility to respect environmental sustainability. This responsibility is set in the UN Guiding Principles. This means that businesses have to prevent or mitigate adverse impacts on the environment that are directly linked to their operations, products or services through their business relationships. The Guiding Principles recognise that business has the capacity to impact all human rights and that violations can take many forms, including pollution affecting living conditions and future generation. They may be soft law but increasingly there are sanctions for businesses that fail to respect human rights. Sanctions may include civil litigation or criminal prosecution (Section 1). More important, there can be heavy reputational sanctions, international organisations and banks may withdraw financing, shareholders may take action; or environmental disasters may disrupt business operations. Increasingly, companies are experiencing sanctions and censure in the courts of public opinion – that is, from the communities they operate in (Section 4).

Second, Article 35, the fit-for-purpose/conformity provision, arguably provides some protection: where the parties have drafted sustainability contractual clauses into the agreement, their violation may mean that the goods supplied under the contract are not fit for purpose, are not delivered in conformity with the conditions stated in the contract. Section 4 notes that the increasingly common practice to integrate environmental protection and sustainability as a standard in commercial transactions is to include clauses in contracts. Standards that refer to environmental obligations are ‘immaterial’ or social standards. In the sense that they do not relate to the physical characteristics of the goods. A breach of this clause would not affect the physical appearance of the product, but it may of course affect consumers’ perceptions and therefore the value of the product. This offers a potential opportunity to safeguard environmental protection in the international sale of goods.

To conclude, Uncitral may play a fundamental role in advancing the proposed interpretation of the existing CISG provisions taking into consideration the UN Guiding Principles, among the international trade community. For example, Uncitral may pursue this goal by advancing the state of knowledge through research and dissemination and adopting soft-law instruments, such as guidelines and recommendations. In particular, the Commission usually deals with contract drafting techniques by providing internationally recognized and up-to-date solutions to specific issues. Thus, the Commission may propose one or more model clauses for environmental sustainability with the aim to favor the global and regional standardization of such clauses and their diffusion in international sale contracts<sup>54</sup>.

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<sup>54</sup> To provide an example, a list of contractual texts adopted by UNCITRAL is included in Annex VI of the UNCITRAL Arbitration Rules (1976, revised in 2010) and the UNCITRAL Conciliation Rules (1980).