



*Agnese Colucci\**

## SUSTAINABILITY CLAUSES IN AGRICULTURAL MULTI-PARTY CONTRACTS

### *Abstract*

In the agricultural value chain, companies and actors respond to the general sustainability agenda by inserting sustainability clauses into their contracts. In particular, sustainability issues and the diffusion of innovative sustainable practices in the value chain may be addressed through vertical and horizontal coordination. Therefore, examples of vertically and horizontally integrated multi-party contracts in the agricultural sector will be considered. To this end, it will be questioned whether modifications to general contract law are requested in order to give consideration to the multi-party structure of certain contractual arrangements which are used in the Global Value Chain (GVC), as well as to accommodate the need to implement sustainability standards. Consequently, the nature of sustainability clauses in multi-party contracts, as well as the legal issues which arise from the enforcement of sustainability clauses, will be analysed.

**JEL CLASSIFICATION:** K12

### **SUMMARY**

1 Introduction - 2 The global need for a “sustainable agriculture” - 3 Private regulation of sustainability and promotion of innovation in the agri-food Global Value Chain - 3.1 Voluntary Sustainability Standards as a form of Transnational Private Regulation - 3.2 Sustainability provisions in private contracts - 3.3 Promoting sustainability in agriculture through innovation: the role of multi-party licensing agreements - 4 Incorporation of sustainability clauses in agricultural multi-party contracts - 4.1 Definition of multi-party contracts - 4.2 Forms of multi-party contracts - 4.3 The anatomy of sustainability clauses - 4.4 Legal nature of sustainability clauses: immaterial qualities? - 4.5 Fairness of sustainability clauses - 4.6 Fairness of multi-party contracts including sustainability provisions - 5 Violation of sustainability clauses: enforceability aspects and effects - 5.1 Chain compliance with transnational sustainability standards - 5.2 Enforceability of sustainability clauses - 5.3 Effects of the violation of sustainability clauses in multi-party contracts - 5.4 Third party beneficiaries - 5.5 Remedies for non-performance - 6 Conclusion

---

\* Junior Associate at Bacciardi Partners law firm. I wish to thank Prof. Cristina Poncibò, Prof. Alexandra Andhov, Dr. Andrea Piletta Massaro and Dr. Priscila Pereira de Andrade for their comments and research assistance.

## 1 Introduction

The present work is centred on the private regulation of sustainability in the agri-food value chains through multi-party contracts.

The increasing use of Transnational Private Regulation (TPR) to regulate sustainability, in particular through private contracts, stems from the need to supplement often inefficient international public law frameworks, which do not address sustainable development as such, but rather, environmental protection, human rights, and labour-related standards.<sup>1</sup>

Notably, the concept of “sustainable development” has been introduced in the public discourse by the report *Our Common Future* of the *World Commission on Environment and Development* (WCED), also known as the Brundtland Report, which affirmed that “*humanity has the ability to make development sustainable to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs*”.<sup>2</sup>

The Brundtland Report further emphasised that sustainable development is a process aimed at making the exploitation of resources, the direction of investments, the orientation of technological development and institutional change consistent with present and future needs.<sup>3</sup>

The reference to present and future needs made by the Brundtland Report can be found in the German *Grundgesetz* in Article 20a, which mentions the concept of responsibility towards future generations.

The concept of sustainable development was integrated in the French constitution through article 6 of the *Charte de l’environnement de 2004*, which affirms that “*public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress*”.<sup>4</sup>

At the European level, Article 11 of the Treaty on the Functioning of the European Union (TFEU) provides that “*Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development*”.

Although the concept of sustainable development has been integrated in some jurisdictions, it has not yet found full recognition at the international law level.

---

<sup>1</sup> However, soft law instruments have been provided in order to engage companies in a more sustainable behaviour. On this topic, reference should be made to UN Principles for Responsible Contracts (New York: UN, 2011) and to the OECD Guidelines for Multinational Enterprises, Commentary on General Policies <[www.oecd.org/corporate/mne/](http://www.oecd.org/corporate/mne/)> accessed 9 July 2023.

<sup>2</sup> World Commission on Environment and Development, ‘Our Common Future’ (1987), <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> accessed 10 July 2023 16.

<sup>3</sup> *ibid* 17.

<sup>4</sup> English translation is available at the following link <[www.conseil-constitutionnel.fr/en/node/17799/pdf](http://www.conseil-constitutionnel.fr/en/node/17799/pdf)> accessed 9 July 2023.



Certain instruments, such as the Paris Agreement,<sup>5</sup> are steadily contributing to the creation of an international law framework with regard to sustainability.

However, private actors involved in multiple jurisdictions, such as those of the agricultural Global Value Chains (GVCs), require a more comprehensive normative framework aimed at supporting sustainable practices in order to satisfy the consumers' request for sustainable products and processes, and to preserve their reputation at the global level.

A sustainable agri-food value chain may be defined as *“the full range of farms and firms and their successive coordinated value-adding activities that produce particular raw agricultural materials and transform them into particular food products that are sold to final consumers and disposed of after use, in a manner that is profitable throughout, has broad-based benefits for society and does not permanently deplete natural resources”*.<sup>6</sup>

Actors in the GVCs adopted private law mechanisms, such as the inclusion of sustainability contractual clauses (SCCs) in contracts and the institution of certification regimes, which are aimed at ensuring compliance with sustainability standards in the GVC.

Furthermore, TPR can also function as a gap filler in relation to public regulation regarding non-compliance, including enforcement and sanctioning, by addressing legitimacy and accountability.<sup>7</sup>

The above-mentioned private law mechanisms enhance the level of integration in the GVC. In such a context, multi-party contracts come into play as a resourceful tool for the implementation of sustainability standards and the promotion of innovative sustainable practices among suppliers of the GVC.

The evaluation of the role of private regulation of sustainability through multi-party contracts provides with the chance to rethink the traditional contract theory, based on the principle of privity of contract, in order to accommodate the contractual tendencies in the agri-food multi-party agreements. The building of a “sustainable contract law”<sup>8</sup>

---

<sup>5</sup> The Paris Agreement is an international treaty on climate change. It was adopted by 196 parties at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015. Its long-term goal is to hold *“the increase in the global average temperature to well below 2°C above pre-industrial levels”* and pursue efforts *“to limit the temperature increase to 1.5°C above pre-industrial levels”*.

<sup>6</sup> FAO, *Developing sustainable food value chains-Guiding principles* (Rome, 2014) 6.

<sup>7</sup> Fabrizio Cafaggi, ‘A Comparative Analysis of Transnational Private Regulation: Legitimacy, Quality, Effectiveness and Enforcement’ (2014) 15, EUI Department of Law Research Paper <[https://cadmus.eui.eu/bitstream/handle/1814/33591/LAW\\_2014\\_15.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/33591/LAW_2014_15.pdf?sequence=1&isAllowed=y)> accessed 9 July 2023.

<sup>8</sup> Mauro Pennasilico, ‘Sviluppo sostenibile, legalità costituzionale e analisi “ecologica” del contratto’ (2015) 1 *Persona e Mercato* 37 <<http://www.personaemercato.it/wp-content/uploads/2015/05/Pennasilico.pdf>> accessed 9 July 2023.

should develop from a new concept of contractual justice, in which the privity of contract is mitigated by the principles of fairness<sup>9</sup> and social usefulness.

With regard to the nature of SCCs, it should be questioned whether immaterial process-related qualities belong to the notion of quality. Here, Italian law and the United Nations Convention on Contracts for the International Sale of Goods (CISG) will be considered.

Indeed, businesses are called to enhance their Corporate Social Responsibility (CSR) and to further engage with the Sustainable Development Goals (SDGs)<sup>10</sup> in order to protect their reputation at the global level.

It could be argued that such a reputational profile has a market value which relates to each supplied product and service. Following this reasoning, it may be inferred that the violation of SCCs manifests itself in a product's lack of quality.

## 2 The global need for a “sustainable agriculture”

The TPR of sustainability in the agri-food value chain responds to the global need for a “sustainable agriculture”.

In order to understand this idea, we should start focusing on the concepts of food security and, subsequently, of food safety.

The concept of food insecurity is related to poverty rather than to food scarcity.<sup>11</sup> The phenomenon of poverty in agriculture is explained by the conditions of small farmers, whose livelihoods have been undermined. Subsequently, biodiversity has been impaired. In fact, the planet's diverse plant and animal species are safeguarded by small-scale farmers.<sup>12</sup>

Closely related to the concept of food security is the concept of food safety (i.e. the need for a product which does not damage human health), which started to come into play as a justification for protectionist technical barriers to trade in the aftermath of the globalisation of the economy.<sup>13</sup>

---

<sup>9</sup> Paulo Nalin, 'International Fair Trade (Fair Trade in International Contracts and Ethical Standard)', in Ingeborg Schwenzer (ed), *35 years CISG and Beyond*, (Eleven International Publishing 2016) 325.

<sup>10</sup> UN GA A/RES/70/1, 'Transforming our world: the 2030 Agenda for Sustainable Development' (New York, 25 September 2015)  
<[https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf)> accessed 10 July 2023.

<sup>11</sup> See generally Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1990); Olivier de Schutter, 'International Trade in Agriculture and the Right to Food' (2009) 46 *Dialogue on Globalization Occasional Papers*.

<sup>12</sup> Miguel Altieri, 'Linking Ecologists and Traditional Farmers in the Search for Sustainable Agriculture' (2004) 2 (1) *Frontiers in Ecology and the Environment* 35.

<sup>13</sup> Antonio Jannarelli, 'Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture' (2018) 97 (4) *Rivista di Diritto Agrario* 511, 556.



At the same time, the development of “global food value chains”<sup>14</sup> connected to the industrialisation of the agricultural sector triggered the birth of a so-called “private food law”<sup>15</sup> governed by the “Tripartite Standards Regime”, and characterised by “quality standards”, certification, and accreditation activities.<sup>16</sup> As a consequence, soft law barriers to trade also contributed to the burdening of the circulation of agricultural products to the detriment of small producers and less developed countries.<sup>17</sup>

Furthermore, the industrialisation of the agricultural sector, together with the use of monocultures, caused the production of negative externalities such as the depauperation of the soil and the development of increasingly aggressive diseases for plants and animals.<sup>18</sup> Biodiversity has further suffered from this, and the entire planet has been depauperated.<sup>19</sup> Last but not least, the stability of the climate has also been affected.<sup>20</sup>

In such a context, the issues related to food safety and food security have had to be faced through the lens of sustainable development, which naturally also involves the agricultural sector.<sup>21</sup>

As mentioned above, the concept of “sustainable development” has been introduced by the Brundtland Report. Following that, in 2015, all UN Member States adopted the 2030 Agenda for Sustainable Development (2030 Agenda) which includes 17 Sustainable Development Goals (“SDG”).<sup>22</sup> In this regard, SDGs 1 and 2 aim at fighting, respectively, poverty and hunger.

As was made evident by SDG 2,<sup>23</sup> food security and sustainable agriculture are deeply intertwined. Furthermore, food production requires a healthy environment, which depends on the protection of marine and terrestrial ecosystems (SDG 14, Life below Water, and SDG 15, Life on Land), and action to combat climate change (SDG 13, Climate Action). SDG 5, Gender Equality, also contributes to the achievement of SDG 2, as women are responsible of producing 50% of the world’s food.<sup>24</sup>

---

<sup>14</sup> Maria Emilia Cucagna and Peter D Goldsmith, ‘Value-adding in the Agri-food value chain’ (2018) 21 (3) *The International Food and Agribusiness Management Review* 293.

<sup>15</sup> Bernd MJ Van der Meulen, *Private Food Law: Governing Food Chains Through Contracts Law, Self-regulation, Private Standards, Audits and Certification Schemes* (Wageningen Academic Publishers 2011).

<sup>16</sup> Antonio Jannarelli (n 13)

<sup>17</sup> Johan Swinnen and others, *Quality Standards, Value Chains, and International Development: Economic and Political Theory* (1<sup>st</sup> edn, Cambridge University Press, 2015); Jannarelli (n 13) 519.

<sup>18</sup> Jannarelli (n 13) 550.

<sup>19</sup> *ibid.*

<sup>20</sup> Bruce M Campbell and others, ‘Urgent action to combat climate change and its impacts (SDG13): transforming agriculture and food systems’ (2018) 34 *Current Opinion in Environmental Sustainability* 13.

<sup>21</sup> Antonio Jannarelli (n 13) 548.

<sup>22</sup> United Nations (n 10).

<sup>23</sup> *Goal 2 - “End hunger, achieve food security and improved nutrition and promote sustainable agriculture”.*

<sup>24</sup> UN GA, A/70/287, Interim Report of the Special Rapporteur on the Right to Food (5 August 2015) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Food/A-70-287.pdf>> accessed 10 July 2023 para 35.

The European legislator recognised the need for a sustainable agriculture.<sup>25</sup> The new Common Agricultural Policy (CAP), which came into effect on 1 January 2023, takes into account the challenge of balancing food security with protecting nature and safeguarding biodiversity. In particular, the new CAP indicates the climate and environmental objectives as a priority for the States' strategic plans and points out the need to promote sustainability and modernity in terms of a global vision and therefore, in conformity with economic, social, environmental, and climatic sustainability.

The new CAP contributes to the objectives set by the European Green Deal, a set of policy initiatives presented by the European Commission which are aimed at making the European Union climate neutral in 2050. As part of the European Green Deal, the Farm to Fork strategy addresses the issue of food sustainability with the goal of making food systems fair, healthy, and environmentally friendly. Furthermore, the Farm to Fork Strategy incentivises the transition to a sustainable food system by means of new technologies and scientific discoveries.

In line with the above-mentioned normative framework, in 2021 the European Parliament and Council of the EU adopted an antitrust exemption in Article 210a of Regulation (EU) 1308/2013 for certain "sustainability agreements" in the agri-food supply chain.

### 3 Private regulation of sustainability and promotion of innovation in the agri-food Global Value Chain

The phenomenon of TPR in the GVC has clearly involved the agricultural supply chain,<sup>26</sup> which is notably characterised by the coordinated action of multiple actors operating in different jurisdictions.

TPR may be defined as a body of rules, practices, and processes which are made, either autonomously or by implementing delegated powers conferred by international law or by national legislation, primarily by private actors, firms, Non-Governmental Organisations (NGOs), or independent experts, such as technical standard setters and

---

<sup>25</sup> Antonio Jannarelli, 'Agricoltura sostenibile e nuova PAC: problemi e prospettive' (2020) 99 (1) *Rivista di Diritto Agrario* 23; Stefano Masini and Vito Rubino (eds), *La sostenibilità in agricoltura e la riforma della PAC* (Cacucci 2021); Irene Canfora and Vito Leccese, 'La condizionalità sociale nella nuova PAC (nel quadro dello sviluppo sostenibile dell'agricoltura)' (2022) 460 *WP CSDLE* "Massimo D'Antona".

<sup>26</sup> Kaisa Sorsa and others, 'Transnational private regulation, system level innovations and supply chain governance in the coffee sector: Evidence from Brazil, Italy and Finland' (2016) 224 *Reports from Turku University of Applied Sciences* 206 and ff.; 'Codice Etico Per La Sostenibilità Sociale E Ambientale Della Filiera Del Pomodoro Da Industria Del Bacino Del Centro Sud Italia' (30.01.2020) available at <<https://oipomodoroцентrosud.it/codice-etico/>> accessed 13 July 2022; Barbara Pancino and others, 'Partnering for sustainability in agri-food supply chains: the case of Barilla Sustainable Farming in the Po Valley' (2019) 7 (13) *Agricultural and Food Economics*.





epistemic communities.<sup>27</sup> The definition of TPR includes rule-making, monitoring, and enforcement.<sup>28</sup>

Overall, TPR of sustainability is related to a large number of firms rather than to individual entities, and underlines the role of process rather than product regulation.<sup>29</sup>

TPR of sustainability is carried out through environmental, social, and economic provisions.<sup>30</sup> Provisions for environmental protection include, among others, the use of environmental principles (e.g. polluter pays, prevention, and precautionary principle), the introduction of greenhouse gas emissions mitigation, the control of soil and water contamination, energy saving, appropriate waste disposal, and the setting up of environmentally friendly logistics.<sup>31</sup> As for the social component provisions, these often relate to child labour, working hours, freedom of association, and collective bargaining.<sup>32</sup> A GVC is generally considered sustainable, from an economic point of view, when the activities carried out by each actor are commercially viable and profitable.<sup>33</sup> In this regard, the common objectives pursued are optimisation of the inputs, better production valorisation (quality and quantity), and transaction cost reduction for farmers.

As we will see, private initiative also plays a significant role in the promotion and diffusion of innovative sustainable practices among suppliers of the GVC.

### 3.1 Voluntary Sustainability Standards as a form of Transnational Private Regulation

As a new regulatory form, an increasingly growing set of initiatives in the area of sustainability is represented by Voluntary Sustainability Standards (VSS), which are set voluntarily by wholesalers and retailers to obtain certain social and environmental standards. Compliance with these standards is ensured through certifications and labels.<sup>34</sup> Such standards and criteria are created by private sector actors – companies, business and industry associations, or NGOs – and are defined by their non-mandatory and private character, as well as by their process-based approach and other criteria

<sup>27</sup> Fabrizio Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 (1) *Journal of Law and Society* 20, 49.

<sup>28</sup> *Ibid.*

<sup>29</sup> Fabrizio Cafaggi, 'Regulation through contracts: Supply-chain contracting and sustainability standards' (2016) 12(3) *European Review of Contract Law* 218.

<sup>30</sup> United Nations (n 10). In the field of agriculture the definition provided by SAFA Guidelines issued by FAO <<https://www.fao.org/3/i3957e/i3957e.pdf>> accessed 12 August 2022, version 3.0, 2014.

<sup>31</sup> For example, see Codice Commerciale Ferrero <<https://www.ferrero.it/Codice-di-Condatta-Commerciale>> accessed 18 July 2023.

<sup>32</sup> Fabrizio Cafaggi (n 29) 225.

<sup>33</sup> FAO (n 6).

<sup>34</sup> Matteo Fiorini and others, 'Voluntary Standards, Trade, and Sustainable Development' in Cosimo Beverelli, Jürgen Kurtz and Damian Raess (eds), *International Trade, Investment, and the Sustainable Development Goals: World Trade Forum* (Cambridge University Press 2020) 177.

(such as gender equality) which make them so-called credence goods.<sup>35</sup> An example of VSS that is relevant for the purposes of the present analysis is the GlobalG.A.P.,<sup>36</sup> a farm assurance programme and certification scheme that transposes consumer requirements into Good Agricultural Practices.

It can be asserted that VSS may be a tool for economic development and achievement of the SDGs.<sup>37</sup> With regard to this, the 2018 United Nations Forum on Sustainability Standards (UNFSS) report<sup>38</sup> identified three SDGs where the contribution of VSS have had a major impact: SDG 8 (promote decent work and economic growth), SDG 12 (ensure sustainable consumption and production patterns), and SDG 15 (promote environmental sustainability and protect life on land).

### 3.2 Sustainability provisions in private contracts

Contracts represent one of the means for the implementation of sustainability standards on the private level.

The inclusion of regulatory provisions may also be associated with reference to one or more certification schemes,<sup>39</sup> which prominently refer to process standards<sup>40</sup>. Furthermore, commercial contracts may incorporate codes of conduct with the aim of including CSR policy in their terms. From such incorporation, their binding character is inferred.<sup>41</sup>

It is worth noting that the topic of sustainability and CSR are deeply intertwined. In particular, corporate regulation of sustainability may be considered a spin-off of a CSR action plan. Indeed, codes of conduct have come to be a means of auto-discipline for the management of risks related to the impact that business activities can have on individual people and on the environment. The term ‘ethics code’ was then duly acquired in order to distinguish from codes of conduct, which are more related to the organisation of the company.<sup>42</sup>

<sup>35</sup> *ibid.*

<sup>36</sup> GlobalG.A.P., General Regulations (February 2019).

<[https://www.globalgap.org/.content/.galleries/documents/190201\\_GG\\_GR\\_Part-I\\_V5\\_2\\_en.pdf](https://www.globalgap.org/.content/.galleries/documents/190201_GG_GR_Part-I_V5_2_en.pdf)> accessed 9 July 2022.

<sup>37</sup> Matteo Fiorini and others (n 34).

<sup>38</sup> Santiago Fernandez de Cordoba and others (eds), ‘Voluntary Sustainability Standards, Trade and Sustainable Development: 3rd Flagship Report of the United Nations Forum on Sustainability Standards (UNFSS)’ (2018) <<https://unfss.org/wp-content/uploads/2018/09/UNFSS-3rd-Flagship-Report-FINAL-for-upload-1.pdf>> accessed 9 July 2023.

<sup>39</sup> Fabrizio Cafaggi, ‘The Regulatory Functions of Transnational Commercial Contracts: New Architectures’ (2013) 36 *Fordham International Law Journal* 1557.

<sup>40</sup> *ibid.* 1603.

<sup>41</sup> Anna Beckers, ‘Towards a Regulatory Private Law Approach for CSR Self- Regulation? The Effect of Private Law on Corporate CSR Strategies’ (2019) 27(2) *European Review of Private Law* 221.

<sup>42</sup> Giuseppe Conte, ‘Codici etici e attività d’impresa nel nuovo spazio globale di mercato’, (2006) 1 *Contratto e impresa* 108; Giuseppe Conte, ‘La disciplina dell’attività di impresa tra diritto, etica ed economia’, in Giuseppe Conte (ed), *La responsabilità sociale dell’impresa* (Editori Laterza 2008) 3; Serenella Rossi, ‘Luci e ombre dei codici etici d’impresa’ (2008) 1 *Rivista di diritto societario* 23; Carlo Angelici, ‘Responsabilità sociale di impresa, codici etici e





In the present analysis, sustainability clauses are considered to be contractual provisions that are not directly related to the subject matter of the contract and that “*prescribe minimum social and/or environmental standards to be upheld by contractual parties when performing their business activities*”.<sup>43</sup>

The forms of sustainability clauses may be manifold. These can be included in contracts as express contractual provisions or incorporated by reference into one or more documents, such as general terms and conditions, a corporate code of conduct<sup>44</sup> or other internal policy, a global CSR initiative, or a separate agreement,<sup>45</sup> or a framework agreement.

The content of sustainability clauses may be related to environmental standards, fair commercial practices,<sup>46</sup> employment conditions, health and safety standards, human rights, and business ethics issues.

Sustainability obligations may also include the obligation to hold a human rights and environment due diligence policy that is consistent with international standards by prescribing the specific content of such policy that may encompass, among the other points, specification of salient human rights and environmental risks that the party has identified in its human rights and due diligence analysis.<sup>47</sup>

A relevant aspect that forms the private regulation discourse, and that therefore also applies to TPR of sustainability through contracts, is the impact of private regulatory strategies on the structures of GVCs. It has been shown that the regulatory strategy is an independent variable, capable of affecting the structure of the chain and its inner contractual relationships. At the same time, the chain’s structure influences, or should influence, the choice of regulatory strategy by private actors.<sup>48</sup>

It is worth noting that sustainable sourcing has effectively changed the structure of supply chains by shortening them and enhancing the level of collaboration between

---

autodisciplina’, (2011) 38(2) *Giurisprudenza Commerciale* 159; Francesca Degli Innocenti, *Rischio di impresa e responsabilità civile. La tutela dell’ambiente tra prevenzione e riparazione dei danni*, (FUP - Firenze University Press 2013).

<sup>43</sup> Kateřina Peterková Mitkidis, ‘Using Private Contracts for Climate Change Mitigation’, (2014) 2(1) *Groningen Journal of International Law: International Energy and Environmental Law* 54. See also Pace University School of Law and IACCM report ‘The Triple Bottom Line: The Use of Sustainability and Stabilization Clauses in International Contracts’ (2010), 24; Kateřina Peterková Mitkidis, ‘Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements’, (2014) 1 *Nordic Journal of Commercial Law* 1.

<sup>44</sup> Louise Vytöpil, ‘Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices’ (2012) 8(1) *Utrecht Law Review* 155; ‘Codice Etico Per La Sostenibilita’ Sociale E Ambientale Della Filiera Del Pomodoro Da Industria Del Bacino Del Centro Sud Italia’ (n 26).

<sup>45</sup> Kateřina Peterková Mitkidis *Sustainability Clauses in International Business Contracts* (Eleven Publishing 2015) 155.

<sup>46</sup> GlobalG.A.P. (n 36).

<sup>47</sup> Commission, ‘Proposal for a Directive for Corporate Sustainability Due Diligence’ COM(2022) 71 final 23 February 2022. See also Livia Ventura, ‘Supply chain management and sustainability: the new boundaries of the firm’ (2021) 26 (3) *Uniform Law Review* 599.

<sup>48</sup> Fabrizio Cafaggi (n 39) and Fabrizio Cafaggi and Paola Iamiceli, ‘Private regulation and industrial organization: contractual governance and the network approach’, in Stefan Grundmann, Florian Möslein and Karl Riesenhuber (eds), *Contract Governance. Dimensions in law and interdisciplinary research* (Oxford University Press 2015) 343.

chain leaders and suppliers.<sup>49</sup> The level of vertical integration of the firms impacts the modes of sustainability implementations and, consequently, the relationships between firms.<sup>50</sup> It has been noted that more effective collaboration among segments of the chain located in multiple jurisdictions is required by the regulatory function in GVCs.<sup>51</sup> Moreover, the connection between sustainable sourcing and governance of the supply chain affects the allocation of responsibility for monitoring contractual obligations that deal with sustainability standards.<sup>52</sup>

It follows that the implementation of sustainability standards through contracts is able to increase the level of interdependence between firms and to enhance the degree of collaboration between actors in the GVC. Such interdependence calls for contractual arrangements characterised by a high level of coordination in the design and implementation of the contracts which, as we will see, is offered by multi-party contracts.

### 3.3 Promoting sustainability in agriculture through innovation: the role of multi-party licensing agreements

Multi-party licensing agreements represent a resourceful means of enabling the diffusion of innovative practices among suppliers of the GVC. Innovative practices, which are protected by intellectual property rights (IPRs), can ultimately lead to a more efficient implementation of sustainability standards.

Innovation and sustainability are deeply intertwined. IPRs notoriously serve the purpose of incentivising investments in new technologies. An example thereof is offered by contemporary crop genetic improvements, which are largely the results of private investments in research and development in both conventional breeding and plant biotechnology.<sup>53</sup>

Such a phenomenon therefore also involves the agricultural sector. Not surprisingly, the World Intellectual Property Organization (WIPO) took into account the SDGs in its “Development Agenda”.<sup>54</sup>

Empirical studies in the Middle East and North Africa (MENA) regions show how digital agriculture represents a promising tool for addressing key challenges affecting the agri-food sector across the MENA countries, to the extent that it facilitates improvements in

<sup>49</sup> UNEP, 'Sustainability of supply chains and sustainable public procurement - a pre study' (30 June 2014) 23.

<sup>50</sup> Fabrizio Cafaggi (n 29) 226.

<sup>51</sup> Fabrizio Cafaggi and Paola Iamiceli, 'Contracting in global supply chains and cooperative remedies' (2015) 20(2-3) *Uniform Law review* 135.

<sup>52</sup> Fabrizio Cafaggi (n 29) 220.

<sup>53</sup> Jay P Kesan, 'Intellectual Property Protection and Agricultural Biotechnology: A Multidisciplinary Perspective', (2000) 44 (3) *American Behavioral Scientist* 464; Mark D Janis, 'Sustainable Agriculture, Patent Rights, and Plant Innovation' (2001) 9 *Indiana Journal of Global Legal Studies* 91.

<sup>54</sup> WIPO, *Development Agenda* (adopted by WIPO's member states in 2007) <[www.wipo.int/ip-development/en/agenda/](http://www.wipo.int/ip-development/en/agenda/)> accessed 10 July 2023.



primary production, supply chain and logistics performance, and also optimises the use of scarce natural resources.<sup>55</sup>

With regard to this, multi-party contractual schemes allow suppliers belonging to the same supply chain to adopt IPRs plurilateral licences. Furthermore, contractual networks may promote the setting up of platforms for the sharing of IPRs through licenses offered by the suppliers of the same supply chain, or by suppliers of different chains.<sup>56</sup>

Therefore, in terms of innovation, contractual networks are suited to the promotion of collaborative practices.

## 4 Incorporation of sustainability clauses in agricultural multi-party contracts

The consideration of SCCs in multi-party contracts enables an understanding of the quintessential effects of such clauses, which is to increase the level of interdependence and need for coordination among the actors of the GVC. In this regard, multi-party contracts come into play as a more suitable alternative to bilateral contracts. However, the intrinsic nature of multi-party contracts requires a redefinition of contract theory. In this respect, a definition of multi-party contracts is provided, and forms of multi-party contracts are presented. Finally, the legal nature of SCCs is investigated. To this end the possibility to qualify SCCs as immaterial qualities is explored both under the CISG and Italian law.

### 4.1 Definition of multi-party contracts

The present analysis aims at establishing a definition of multi-party contracts in terms of a comparative as well as transnational law perspective. For the purpose of the present analysis, multi-party contracts aiming at the creation of a new legal entity (ie a company, an association, etc.) will not be considered.

Multi-party contracts are characterised by the fact that for the conclusion of the contract, declarations of intent from more than two parties are required.<sup>57</sup> Furthermore, in multi-party contracts the principle of contract relativity is not fully operational.<sup>58</sup> In fact, without prejudice to the single claims against specific contractual parties, an agreement for the execution of the contract binds all contractual parties representing a

<sup>55</sup> Rachel A Bahn and others, 'Digitalization for Sustainable Agri-Food Systems: Potential, Status, and Risks for the MENA Region' (2021) 13 (6) Sustainability 3223.

<sup>56</sup> UNCITRAL Colloquium and WG I (MSMEs), 32nd New York, 25-26 March 2019, "Contractual networks in the third millennium: Transnational principles", Presentation by Fabrizio Cafaggi <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Colloquia/cafaggi.pdf>> accessed 10 July 2023).

<sup>57</sup> Michale Zwanzger, *Der mehrseitige Vertrag*, (Mohr Siebeck 2013).

<sup>58</sup> *ibid* 39, 434.

common general ground of the multi-party contract.<sup>59</sup> The agreement for the execution of the contract encompasses the schedule of duties applicable to all of the parties.<sup>60</sup> In particular, it encompasses first of all the accessory obligation to refrain from any action that could compromise the execution of the contract (cfr. Article 241 Paragraph 2 of the German Civil Code).<sup>61</sup> Sustainability clauses may be regarded as part of the schedule of duties under consideration of the reputational implications that their violation have for all members of the GVC. In particular, the respect of sustainability clauses is prodromic to the single obligations between the parties of the multi-party contract. This conclusion, as we will see in paragraph 5, is relevant for the analysis of the legitimation to enforce such clauses.

A possible way to characterise multi-party contracts is also to look at their functions. It has been noted that in multi-party contracts, the coordination function is of particular significance. In fact, the purpose of designing a contractual regulation through a multi-party contract instead of multiple bilateral contracts lies in the need to stabilise the behavioural expectations of *all of* the participants.<sup>62</sup> In this respect, multi-party contracts may fall into the following categories: i) simply coordinating contracts (characterised by the obligation of the parties to take or to refrain from a certain action without an objective service performance being involved); ii) framework contracts; iii) service procurement contracts; iv) partition agreements; v) contracts on the exchange of parties; vi) settlement agreements; or vii) contracts with neutrally participating parties (in which so-called participating parties do not undertake any obligation nor acquire any right).<sup>63</sup>

In some jurisdictions, multi-party contracts have a so called “common objective” (cfr. Article 1420 of the Italian Civil Code). In such multi-party contracts, the plurality of the contracts implies that the conflicting interests of different parties shall unify themselves in a common finality. In fact, every contractual party obligates himself to all the others and acquires rights with regard to all the others. The cooperation towards a purpose – a common objective – is therefore natural. The common objective itself involves a communion of shared interests between the parties which survive, notwithstanding possible conflicting interests between the parties.<sup>64</sup> In particular, the common objective lies in the organisation of the common additional activity. In fact, the function of the multi-party contract is not exhausted through the execution of parties’ obligations (such as in other contracts). The execution of parties’ obligations constitutes the premise for

---

<sup>59</sup> *ibid* 73 ff and 434.

<sup>60</sup> *ibid* 79.

<sup>61</sup> *ibid* 80.

<sup>62</sup> *ibid* 39.

<sup>63</sup> *ibid* 40 ff.

<sup>64</sup> Tullio Ascarelli, ‘Il contratto plurilaterale’, (1949) 9-10 *Saggi giuridici* 410, now in Tullio Ascarelli, *Studi in tema di contratti*, (Giuffrè 1952) 115.



further activity, whose realisation in turn constitutes the purpose of the contract.<sup>65</sup> In this regard, it should be noted that the presence of a common objective does not require the absence of a conflict of interests and the possibility that the parties pursue their own interest in addition to the common objective.<sup>66</sup>

Multi-party contracts having a “common objective” can then be separated into the categories of external multi-party contracts (company, association, etc.) – which, as mentioned, do not form part of the present analysis – and internal multi-party contracts (cartels, consortia agreements without external activity, etc.). In this second category, the so-called normative multi-party contracts hold particular relevance. These are characterised by the fact that the parties establish the terms according to which future contracts will (or will not) be concluded between themselves or with third parties, without necessarily creating a common organisation and/or foreseeing additional common activity.<sup>67</sup> As we will see in paragraph 5, the enforcement of multi-party contracts having a common objective is subject to peculiar rules on termination under Italian law.

#### 4.2 Forms of multi-party contracts

The agri-food GVC is characterised by multiple forms of contractual patterns that involve a various array of actors, which are not limited to producers and buyers. Ventures that take place in the agri-food GVC may be both horizontal and vertical.

Examples of multi-party contractual arrangements in the agri-food GVC may be identified in contract farming agreements, consortium contracts, and contractual networks. These evidence the relationship between private regulation of sustainability and the topic of coordination in the GVC.

In general terms, contract farming purposes are:

- i) to allow farmers to access credit to modernise their productive structures in order to make them suitable for the specific needs of industrial processes;
- ii) to transfer knowledge about contemporary manufacturing processes to farmers;
- iii) to shape farmers’ productive choices on the real needs of final consumers.<sup>68</sup>

From their side, farmers commit themselves to providing a specific commodity in quantities and at quality standards determined by the purchaser. On the other hand, agro-industrial firms’ obligation is to purchase the commodity at agreed-upon prices and

---

<sup>65</sup> *ibid* 114.

<sup>66</sup> Fabrizio Cafaggi, *Il contratto di rete. Commentario*, (Il Mulino, 2009) 27. The Author quotes Tullio Ascarelli, *I consorzi volontari tra imprenditori* (Giuffrè 1937).

<sup>67</sup> Tullio Ascarelli (n 64) 146.

<sup>68</sup> Antonio Jannarelli, ‘Contractual relationships and inter-firm cooperation in the agri-food system’, (2011) 5(4) *Rivista di diritto alimentare*.

to provide inputs (seed, fertilizers, and pesticides) or credit or technical advice (extension services) to the farmer.<sup>69</sup>

In this respect, multi-party contracts may facilitate the multi-functionality of contract farming by involving financial and insurance institutions<sup>70</sup> and having as an object the coordination of diverse aspects such as input supply, financing, and purchasing in the production segment of the GVC. Moreover, multi-party agreements serve the purposes of coordinating value chain activities.

Internal consortia constitute a prominent example of horizontal forms of multi-party contractual collaboration.

Under Italian law, consortia fall into the category of multi-party contracts having a “common objective” (see above in sub-paragraph 4.1). Through a consortium contract,<sup>71</sup> multiple businesses create a common organisation in order to impose discipline on or perform selected phases of their respective enterprises. Consortia agreements shall be stipulated in writing and shall indicate the object and duration of the consortium, the obligations and contributions of members, the cases of withdrawal, and exclusion. Internal consortia are those in which participants regulate their activities and the phases of the member firms; they don't have legal personality nor patrimonial autonomy.

Contractual networks constitute an example of both vertical and horizontal forms of multi-lateral contractual collaboration depending on how they are designed. These may be defined as a form of cooperation and collaboration between interdependent firms.

Networks of firms can have a contractual, organisational, or combined form. A variant of contractual network is characterised by the creation of a new company with the preservation of the original firms' own legal and economic independence at the same time.<sup>72</sup> It is worth mentioning that clusters differ from contractual networks by virtue of the territorial concentration which characterises them.<sup>73</sup> Namely, clusters are characterised by the absence of ownership linkages and by the territorial proximity between members, which fosters trust among participants.

For the purposes of the present analysis, only contractual networks that do not create a new entity will be considered.

Contractual networks may take the form of multi-party contracts.<sup>74</sup> In particular, multi-party contracts take the form of networks when “*the level of interdependence*

---

<sup>69</sup> *ibid.*

<sup>70</sup> See as an example a multipartite contract for seed cotton growing in Kenya involving a farmer, a bank, three companies, Cotton Development Authority, and the National Irrigations Board (8 December 2014) <<https://www.fao.org/in-action/contract-farming/toolkit/contract-links/en/>> accessed 12 August 2022.

<sup>71</sup> Articles 2602 ff. of the Italian Civil Code.

<sup>72</sup> Fabrizio Cafaggi, ‘Introduction’, in Fabrizio Cafaggi (ed), *Contractual networks, Inter-firm Cooperation and Economic Growth* (Edward Elgar 2011) 1.

<sup>73</sup> *Ibid.* 7.

<sup>74</sup> Fabrizio Cafaggi, ‘Contractual Networks and the Small Business Act: Towards European Principles?’, (2008) 15 EUI Working Papers LAW <<https://cadmus.eui.eu/handle/1814/8771>> accessed 9 July 2023; Fabrizio Cafaggi (n 72) 201-202; the need for a harmonised approach to contractual networks has been explored at a colloquium organised by the





among performances is such that the contract is not easily divisible and the purpose would be frustrated if one party does not or cannot perform and cannot be substituted”<sup>75</sup>.

Multi-party contracts shall not be considered as an extension of bilateral contracts based on the fact that they often deal with complex projects that involve joint or at least coordinated activities of multiple actors. Such contracts require the collaboration of the different players in order to define implementation strategies which could not be determined *ex ante*.<sup>76</sup>

Contractual networks may be defined as “*modes of organizing economic activities that bind formally independent firms who are more or less economically dependent upon one another through stable relationships and a complex reciprocity that is more cooperative than competitive in form.*”<sup>77</sup> Key features of contractual networks are i) interdependence, ii) stable relationships, iii) long-term duration, iv) multiplicity of relationships – both formal and informal – between the members, and v) a combination of cooperation and competition.<sup>78</sup> The interdependence also concerns the strategic decisions that will affect the network as a whole and implies a common set of objectives to be achieved among all participants, together with the fact that one contract or contractual performance is made dependent on others either unilaterally or reciprocally.<sup>79</sup>

Networks are characterised by multi-laterality, as well as by the relational and symbiotic character of the contractual relations between the parties.<sup>80</sup> The achievement of the purpose of the networks is made possible by the interaction, interdependence, and cooperation, both of members who are contractually bound to one another and members who are not immediate contractual parties.<sup>81</sup>

Cooperation is deemed to generate the contractual surplus that will be divided among the members of the network. Contractual networks embody a view of contract law according to which contractual relationships can encompass both a cooperative and a competitive dimension.<sup>82</sup>

---

United Nation Commission on International Trade Law (UNCITRAL), held in New York on 25-26 March 2019, See UNCITRAL A/CN.9/991, Report of the Colloquium on contractual networks and other forms of inter-firm cooperation (2019).

<sup>75</sup> Fabrizio Cafaggi (n 72) 88.

<sup>76</sup> UNCITRAL (2019) (n 74).

<sup>77</sup> Gunther Teubner, *Networks as Connected Contracts*, (Hart 2011) 92. Teubner borrows this definition from Jorg Sydow, *Strategische Netzwerke: Evolution und Organisation*, (Gabler 1992) 82.

<sup>78</sup> Paola Iamiceli, ‘Le reti di imprese: modelli contrattuali di coordinamento’, in Fabrizio Cafaggi (ed), *Reti di imprese tra regolazione e norme sociali*, (Il Mulino 2004) 125.

<sup>79</sup> Fabrizio Cafaggi (n 74).

<sup>80</sup> Ulješa Grušić, ‘Contractual Networks In European Private International Law’ (2016) 65(3) *International and Comparative Law Quarterly* 581.

<sup>81</sup> *ibid.*

<sup>82</sup> Fabrizio Cafaggi (n 72) 10.

What comes into play in contractual networks is the shared interest in the existence and success of the network. The question then arises as to whether modifications to general contract law are requested in order to give consideration to the multi-party structure of various contracts. In this respect, the available legal instruments are manifold. For instance, an alignment of the remedies of the parties to the various contracts in the chain may be foreseen. An alternative is the allowance of a direct claim within a chain in derogation of the general principle of privity.<sup>83</sup>

Under Italian law, contractual networks are governed by Decree Law (d.l.) No 5/2009, converted into Law n. 33/2009, which indicates as possible members of contractual networks those qualifying as entrepreneurs (ie subjects professionally selling goods and/or providing services). Article 3 Paragraph 4-ter of d.l. 5/2009 provides that with network contracts, multiple entrepreneurs pursue the objective to increase, individually and collectively, their innovative capacity and competitiveness in the market, and to this end they commit, on the basis of a common network programme, to collaborating in predetermined forms and fields relating to the exercise of their enterprises or to exchange information or performances of industrial, commercial, technical, or technological nature, or to commonly exercise one or more activities falling into the object of their enterprise. The contract can also foresee the establishment of a common patrimonial fund and the appointment of a common body charged with the management, in the name and on behalf of the participants, of the execution of the contract, or of single parts or phases of the same. Such contractual network has no juridical personality unless this has been acquired pursuant to the last part of Paragraph 4-quater of Article 3 of d.l. 5/2009.

With regards to network contracts, it is possible to identify a partially different legislative treatment in case agricultural enterprises participate to the network or in case the network trades agricultural products (cfr. Article 17 of Law 154/2016; Article 36 of d.l. 179/2012).<sup>84</sup>

Under Italian law network contracts characterise themselves as being plurilateral contracts with a common objective and, at the same time, as having an exchange function.<sup>85</sup>

Common features of contractual arrangements in the GVC are the interdependence between contracts and the chain leader's power of intervention for the completion of contracts, either by direct intervention or by promotion of chain negotiations among

<sup>83</sup> Stefan Grundmann and others (n 48) 15.

<sup>84</sup> Nicola Lucifero, 'Le reti di impresa e le relazioni di filiera nel sistema della filiera agroalimentare' (2021) 2 *Diritto agroalimentare* 355; Luigi Russo, 'Il contratto di rete tra imprenditori agricoli: un passo avanti e due indietro?' (2017) 3 *Diritto agroalimentare* 527; Luigi Russo, 'Il contratto di rete in agricoltura' (2015) 1 *Rivista di diritto civile* 181.

<sup>85</sup> Raffale Lenzi, 'Forma e pubblicità del contratto di rete' (Vincenzo Cuffaro ed, *Contratto di rete di imprese*, Giuffrè 2016) 79, 80.



parties.<sup>86</sup> The interdependence between contracts has been fostered by the increasing importance of chain compliance with, among the other factors, sustainability standards.<sup>87</sup> Such interdependence requires coordination in the design and implementation of the contracts.<sup>88</sup> The result is the limitation of the freedom of contract for the chain's participants.<sup>89</sup> Moreover, centralisation can lead to abuse in contract design and or implementation.<sup>90</sup> Lead firms, as mentioned, fill the gaps of contracts when these are incomplete. It follows that their bargaining power is higher and therefore not equally distributed among the actors in the chain. As a consequence, unequal distribution of bargaining powers has an impact on terms, both price and non-price, among multiple relationships within the chain.<sup>91</sup> The tension between coordination of contracting and preservation of uniformity on one side and protection of freedom of contract for the chain's participants on the other marks the contractual relationships in the value chain.<sup>92</sup> The outcome of such tension influences the evaluation of the fairness of the exercise of coordination power.<sup>93</sup> As we will see in sub-paragraph 4.6, it follows that the evaluation of fairness should refer not only to the single contract, but to the whole process of contracting in the chain, given that the private regulatory power is exercised by the chain leader, who is technically a third party.<sup>94</sup>

### 4.3 The anatomy of sustainability clauses

For the purposes of this sub-paragraph, it is important to preliminarily clarify the reason why in the present analysis, sustainability clauses have been considered in the context of agricultural multi-party contracts. Indeed, agricultural supply chain contractual relationships, as seen above, show very clearly the peculiar tendencies of contract practice in the supply chain and, in particular, those related to the objective of achieving sustainability goals. Such tendencies may be summarised as the relational and organisational nature of contracts, the presence of third party beneficiaries, the need for a fair allocation of responsibility to monitor contractual obligations dealing with sustainability standards, and the role of reputation for all actors of the supply chain. These tendencies require a rethinking of contract theory, with the additional aim of protecting the purpose of the insertion of sustainability clauses into contracts.

---

<sup>86</sup> Fabrizio Cafaggi and Paola Iamiceli, 'The limits of contract laws. The control of contractual power in trade practices and the preservation of freedom of contract within agrifood global supply chains', in Fernando Gomez Pomar and Ignacio Fernandez Chacon (eds), *Estudios de Derecho Contractual Europeo*, (Aranzadi 2022), 3 <<https://ssrn.com/abstract=4048571>>, accessed 9 July 2022.

<sup>87</sup> *ibid.*

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.* 5.

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid.*

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.* 6.

The building of a “sustainable contract law” shall develop from a new concept of contractual justice, based on the principles of fairness<sup>95</sup> and social usefulness. To this end, Article 41 of the Italian Constitution<sup>96</sup> mandates not only that private initiative cannot be in contrast with social usefulness, but also that the law shall provide appropriate programmes and controls so that public and private-sector economic activity may be oriented and coordinated for social and environmental purposes. This means that the privity of contract is mitigated by the social and environmental-protectionist function of private initiative.<sup>97</sup> The traditional concept of social justice under contract shall be reformed in order to include a notion of humankind that embraces both current and future generations.<sup>98</sup> This way, private autonomy will be suited for the traditional notion of sustainability which, as we have seen, is understood as the “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*”<sup>99</sup>. In fact, intergenerational justice “*is a specific variation of social justice and closely linked with environmental sustainability in both the theoretical discourse and practical application*”<sup>100</sup>. Therefore, the insertion of sustainability clauses in contracts not only constitutes the expression of the principle of the freedom of contract, but also aims at realising the objective of social justice as it is newly understood.

Sustainability clauses may be well detailed or instead, characterised by vagueness. An example of a vague sustainability clause could be the following:

*“The whole tobacco chain undertakes to constantly work to obtain, season after season, an excellent tobacco production in respect of the environment and of the people that work in it”*.<sup>101</sup>

On the other hand, an example of a sufficiently detailed sustainability clause could be the following:

*“C. Improvement of the quality of the products and definition of minimum qualitative standards – protection of the environment*

---

<sup>95</sup> Paulo Nalin (n 9) 325.

<sup>96</sup> As newly reformed by Constitutional Law n. 1 dated 1 February 2022.

<sup>97</sup> With respect to the concept of social contractual justice, see Cristina Poncibò, ‘The contractualisation of environmental sustainability’, (2016) 12(4) *European Review of Contract Law* 335 where the Author affirms that “*the article endorses the idea of including environmental sustainability into the concept of social contractual justice*”.

<sup>98</sup> Burns H Weston, ‘The Theoretical Foundations of Intergenerational Ecological Justice: An Over-view’, (2012) 34 (1) *Human Rights Quarterly* 251.

<sup>99</sup> World Commission on Environment and Development (chaired by Gro Harlem Brundtland), *Our Common Future* (n 2) 41.

<sup>100</sup> Poncibò (n 97) 339.

<sup>101</sup> Original version: “*Tutta la filiera si impegna a lavorare costantemente per ottenere, stagione dopo stagione, una produzione tabacchicola di eccellenza e nel rispetto dell’ambiente e delle persone che ci lavorano*”, *Accordo interprofessionale tabacco per i raccolti (2021-2023)* 13. <<https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/17187>> accessed 12 August 2022.



*The “product” will have to comply with mercantile provisions currently in force for the production of “products” for energetic use, be healthy, loyal, mercantile and produced in respect of the environment.*

*Parties undertake to adhere to the system of traceability provided by DM 2 March 2010 as well as to treat the “products” in accordance with selection standards that promote the products with a higher energetic content.*

*Parties undertake to give priority to forms of purveying that belong to the regional territory. For extra-territorial purveying the parties undertake to respect the CO2 avoided emissions saving values established in the provision UNI/TS 11435 “Criteria for the sustainability of the energy production chains, warming and cooling from solid and gas biofuels from biomass”.*

*Parties undertake to apply also to solid biomasses the minimum value of CO2 avoided emissions saving provided by Directive 2009/28/CE on the promotion of the use of energy produced by renewable sources specific for biofuels and bioliquids.”<sup>102</sup>*

As we will see, the level of vagueness of the SCCs impacts their enforceability. In any event, a well drafted SCC should include the relevant sustainability objective, followed by a non-exhaustive list of conditions and requirements related to such objectives that have to be met.

#### 4.4 Legal nature of sustainability clauses: immaterial qualities?

The main feature of sustainability clauses is that they are process-related. Namely, they relate to the process of production and not to the product itself. The question that arises is therefore whether the violation of such clauses results in a lack of quality of the product. It should be questioned whether immaterial process-related qualities belong to

<sup>102</sup> Contratto quadro Italian Bio Products SPA (2005) art. 3 lett. c. <<https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/8002>> accessed 12 August 2022. Original version: “C. Miglioramento della qualità dei prodotti e definizione di standard qualitativi minimi - tutela dell’ambiente. Il “prodotto” dovrà rispettare le norme mercantili attualmente vigenti per le produzioni di “prodotti” ad uso energetico, essere sano, leale, mercantile e prodotto nel rispetto dell’ambiente. Le Parti Aderenti si impegnano ad aderire al sistema di tracciabilità previsto dal DM 2 marzo 2010 nonché a trattare i “prodotti” secondo standard di selezione che valorizzino maggiormente i “prodotti” stessi a maggior contenuto energetico. Le parti si impegnano a dare priorità a forme di approvvigionamento che ricadono comunque nel territorio regionale. Per approvvigionamenti extra-regionali le parti si impegnano a rispettare i valori di risparmio delle emissioni evitate di CO2 stimate nella norma UNI/TS 11435 “Criteri di sostenibilità delle filiere di produzione di energia elettrica, riscaldamento e raffreddamento da biocombustibili solidi e gassosi da biomassa”. Le Parti concordano di applicare anche alle biomasse solide, il valore minimo di risparmio delle emissioni evitate di CO2 previsto dalla Direttiva 2009/28/CE sulla promozione dell’uso dell’energia prodotta da fonti rinnovabili specifico per biocarburanti e bioliquidi”. See also Accordo interprofessionale tabacco per i raccolti (2021-2023) Attachment 3 <<https://www.politicheagricole.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/17187>> accessed 12 August 2022.

the notion of quality. Here, the discipline of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Italian law will be considered.

#### A. CISG

With regard to the CISG, it should be verified whether the notion of quality under Article 35 (1) also encompasses immaterial process-related qualities. Case-law has recognised that the agreed origin of the goods also forms part of the quality features.<sup>103</sup> It could be argued that the origin of the product also comprises environmental, social, and ethical matters.<sup>104</sup> Indeed, the doctrine has recognised that the notion of quality includes, in addition to physical qualities, all actual and legal relationships that pertain to that between the product and the environment.<sup>105</sup> The notion of quality also includes respecting certain production standards, in particular good manufacturing practices, and ethics principles.<sup>106</sup>

Furthermore, in the case that the clause does not contain sufficient details to determine the requirements to be met in producing the goods, its violation may be regarded as non-conformity of the product to any particular purpose made known (expressly or in an implied manner) to the seller at the time of the conclusion of the contract (cfr. Article 35 Paragraph 2 b) CISG). For instance, the doctrine has affirmed that a particular purpose exists when the buyer is active in a market which gives particular emphasis to the fairness of the business and the respecting of ethics principles.<sup>107</sup> It follows that, in case of violation of an SCC, the reputational profile of the buyer would be affected. The further prerequisite laid down in Article 35(2)(b) CISG is that the buyer relied on the seller's skill and judgement and it was reasonable for him to do so.

#### B. Italian law

Under Italian law, the violation of sustainability clauses may be translated into a lack of quality of the product under Article 1497 of the Italian Civil Code. With regard to this, promised qualities are to be distinguished from essential qualities. Essential qualities relate to the substance, structure and measure of the things which are necessary for the normal use to which a product belonging to a certain *genus* is normally destined. Promised qualities are those atypical characteristics relating to a different use, or peculiar to the thing itself, or relating to the original use but to be carried out under certain conditions. Bianca, among other authors, considers both essential and promised

<sup>103</sup> Bundesgerichtshof (Germany), 3 April 1996, CISG-online 135, online at <<http://www.cisg-online.ch/cisg/urteile/135.htm>> accessed 12 August 2022.

<sup>104</sup> Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts', in Ross Cranston, Jan Ramberg, Jacob Ziegel (eds), *Commercial law challenges in the 21<sup>st</sup> century: Jan Hellner in memoriam*, (Iustus 2007) 267.

<sup>105</sup> Peter Schlechtriem and others, *Kommentar zum UN-Kaufrecht*, (CISG 7. Edition 2019), Article 35 Rn. 9.

<sup>106</sup> *ibid*; Ingeborg Schwenzer and Benjamin Leisinger (n 104) 267.

<sup>107</sup> Schlechtriem and others (n 105) Article 35 Rn. 18-23.





qualities to be related to the material characteristics of the good.<sup>108</sup> However, it is worth mentioning that in some case-law,<sup>109</sup> the categories of essential and promised qualities have been attributed to immaterial qualities. In particular, the hypothesis has been formulated, that there is a lack of essential qualities in the sale of shares of a company carrying out the indicated activity, but with a corporate asset not correspondent to the one guaranteed at the sale.<sup>110</sup> In particular, it has been specified that company shares constitute “second category” goods, in the sense that they are not completely distinct and separate from those included in the corporate assets, and are representative of the juridical positions of the shareholders in relation to the management and utilisation of those goods, which are functionally intended for the pursuit of the social activity.<sup>111</sup> It follows that the goods belonging to the assets of the company, being functionally intended for the pursuit of the social activity, cannot be considered completely extraneous to the sale contract of the shares.<sup>112</sup> The difference between the effective quantitative consistency of the social asset and that indicated in the contract has an impact on the solidity and productivity of the company, and consequently on the value of the shares, and can therefore constitute lack of essential qualities, which makes an action for termination admissible under Article 1497 of the Italian Civil Code.<sup>113</sup>

Similarly, it could be argued that the violation of sustainability clauses has an impact on the commercial value of the good, given that it affects the reputation of the company. The reputation of the company may be considered as a secondary good which is strictly connected with the commercial value of the product. In fact, the commercial value of the product not only depends on the physical characteristics but also on the reputation of the company, especially in case this operates in the supply chain. It follows that the violation of sustainability clauses may result in the lack of promised quality of the product and legitimate a termination action under Article 1497 of the Italian Civil Code.

There are further cases in which the immaterial qualities of the product have been recognised by Italian case-law as falling under the provision of Article 1497 of the Italian Civil Code. In particular, goodwill has been considered as an immaterial quality of the company which can be regarded as a promised quality under Article 1497 of Italian Civil

<sup>108</sup> Massimo C Bianca, *La vendita e la permuta* (Utet 1993).

<sup>109</sup> Cass Civ 21 June 1996, n. 5773; Cass Civ 28 March 1996, n. 2843; Cass Civ 18 December 1999, n.14287; Cass Civ 9 September 2004, n. 18181.

<sup>110</sup> Cass Civ 9 September 2004, n18181 (n 109).

<sup>111</sup> *ibid.*

<sup>112</sup> Guido Alpa and Vincenzo Mariconda (eds), *Codice dei contratti commentato*, (Wolters Kluwer Italia 2020) 1093, 1096.

<sup>113</sup> *ibid.*

Code and which justifies remedies under Articles 1453-1458 of the Italian Civil Code as recalled by Article 1497.<sup>114</sup>

#### 4.5 Fairness of sustainability clauses

Implementation of sustainability standards through contracts may raise issues in connection with the fairness of such clauses, which will be considered under the perspective of EU Directive EU/2019/633 (UTP Directive).

The scope of the UTP Directive is to tackle imbalances in bargaining power between suppliers and buyers of agricultural and food products within the agricultural and food supply chain (cfr. Recital 1). To do this, the Directive “*establishes a minimum list of prohibited unfair trading practices in relations between buyers and suppliers in the agricultural and food supply chain and lays down minimum rules concerning the enforcement of those prohibitions and arrangements for coordination between enforcement authorities*” (Article 1). The Directive distinguishes between so-called blacklisted unfair practices, which are always forbidden, and so-called greylisted unfair practices, which are prohibited “*unless they have been previously agreed in clear and unambiguous terms in the supply agreement or in a subsequent agreement between the supplier and the buyer*” (Article 3 Paragraph 2). The provisions of the Directive apply, depending on thresholds set in Article 1(2). The definition of “agricultural and food products” goes beyond the agri-food sector and includes, among food products, raw agricultural products, semi-products, food supplements, food for special medical purposes, total diet replacement for weight control, fortified food, novel food, products not intended for human consumption, etc.

For the purposes of the present analysis, it is interesting to focus on unfair practices which may occur following the implementation of sustainability standards. In particular, letter c) of Article 3 of the UTP Directive provides that the unilateral change by the buyer of the terms of a supply agreement relating to the method and quality standards is prohibited. Indeed, contract term modifications concerning quality standards and methods of production may depend on the imposition of sustainability standards, also through general terms and conditions and/or the use of ‘supplier codes’ which, as we will see, therefore have a systemic effect along the chain.<sup>115</sup>

#### 4.6 Fairness of multi-party contracts including sustainability provisions

The UTP Directive may have an impact not only on the evaluation of the fairness of SCCs but also on the structure of multi-party contracts.

<sup>114</sup> Cass Civ 8 March 2013, n 5845.

<sup>115</sup> Fabrizio Cafaggi and Paola Iamiceli, ‘Unfair Trading Practices in Food Supply Chains. Regulatory Responses and Institutional Alternatives in the Light of the New EU Directive’, (2019) 5 European Review of Private Law 1075.



Pertaining to this, as will be seen below, it is fundamental to identify in which type of chain the multi-party contract falls.

For example, a multi-party contract which allows the chain leader to unilaterally impose on the first-tier supplier terms regarding the quality and the method of production of the product in the supply chain may ultimately be regarded as fair under Article 3 Paragraph 2 of the UTP Directive. However, such an agreement may have severe consequences for the entire chain upstream.<sup>116</sup>

Therefore, another point to be examined is how the practices listed by the UTP Directive, which are relevant for the purposes of the present analysis on sustainability clauses, also may have systemic effects on the supply chain.

It has been argued that a distinction shall be made upon the type of chain. In particular, chains can be categorised as:

- 1) modular chains, “*where information is complex but easily codified and transferred, limited specific investments are required to suppliers and switching costs are relatively low since highly competent suppliers can be easily integrated or expelled*”;
  - 2) relational chains, “*where complex information needs to be shared but cannot be easily transmitted and learned, so that relations are largely based on trust, mutual dependence and high levels of asset specificity determining high switching costs*”;
- or
- 3) captive chains, “*where high economic power is held by one or few actors (mostly, final producers or big retailers), whereas small suppliers are economically and technologically dependent with high or prohibitive switching costs*”.<sup>117</sup>

It has been shown that contract term modifications concerning quality standards will generate systemic effects mainly on relational and captive chains respectively, due to the high level of interdependence along the chain for the former and to the lack of competences of suppliers which increase the level of technological dependence of suppliers on the buyers for the latter.<sup>118</sup> On the other hand, in modular chains the level of interdependence between actors is rather low due to the high codifiability of knowledge, the high competence of suppliers, and the absence of specific investments.<sup>119</sup> As a result, the unilateral imposition of new quality standards will cause distributional effects in relational and captive chains where new investments will be required to adapt to the new quality standards. Moreover, in captive chains exclusionary

<sup>116</sup> *ibid* 1096.

<sup>117</sup> *ibid* 1079. The authors quote Gary Gereffi, John Humphrey and Timothy Sturgeon, ‘The Governance of Global Value Chains’ (2005) 12(1) *Review of International Political Economy* 78.

<sup>118</sup> Gary Gereffi, John Humphrey and Timothy Sturgeon (n 117) 78.

<sup>119</sup> *ibid*; Eugenio Pomarici, ‘Food Value Chains: Governance models’ in Pasquale Ferranti and others (eds) *Encyclopedia of Food Security and Sustainability* (Elsevier 2019) 516.

effects will also be potentially generated because the need for the said adaptations may cause the exit of chain participants.<sup>120</sup>

However, the systemic effect of unilateral change of contract terms relating to quality standards will not take place if the change relates to an isolated stage of the production process.<sup>121</sup>

The main takeaway is, therefore, that only through a high level of contractual coordination along the chain and the adoption of contractual architecture that fairly allocates the tasks and costs of sustainability compliance along the chain, is it possible to set aside the risks deriving from the implementation of sustainability standards.

## 5 Violation of sustainability clauses: enforceability aspects and effects

The consequences of the violation of sustainability clauses may vary depending on the type of multi-party contract involved. These consequences, together with the enforceability of sustainability clauses in multi-party contracts, will be considered under the perspective of international and Italian law. Preliminarily, a central point is to explore how compliance with transnational sustainability standards is managed in the GVC.

### 5.1 Chain compliance with transnational sustainability standards

The need to ensure compliance with sustainability standards is making chain leaders engage directly with suppliers and, therefore, reducing the degree of delegation to intermediaries. A central role is played by contracts, in particular through the monitoring of contractual performance and sanctioning of non-compliance.<sup>122</sup>

New instruments of control and oversight have been developed in order to ensure increased supervision over the chain, which goes “*well beyond the scope of bilateral contracts*”.<sup>123</sup> The obligations provided by these instruments include: i) the duty to report on sustainability; ii) investigation of the causes of failures to comply, and iii) the proposal of action plans directed at removing the hurdles to effective regulatory compliance.<sup>124</sup> The focus of regulatory provisions is on compliance, and the occurrence of breaches calls for corrections instead of compensation for harm. The goal of those provisions is risk allocation rather than ensuring compliance with standards.<sup>125</sup>

The need to ensure compliance to sustainability standards in the supply chain has thus created new forms of collaborative chain governance, as has been illustrated by

---

<sup>120</sup> Fabrizio Cafaggi and Paola Iamiceli (n 115) 1101.

<sup>121</sup> *ibid* 1102.

<sup>122</sup> Fabrizio Cafaggi (n 29) 218.

<sup>123</sup> *ibid* 228.

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid*; Fabrizio Cafaggi (n 39) 1557.



contractual schemes related to traceability, which, together with certification, is used to provide evidence of compliance.<sup>126</sup><sup>127</sup> Traceability can be described as a “*form of information regulation that requires electronic platforms with data sharing, process requirements, and compliance controls*”.<sup>128</sup> Notwithstanding the fact that traceability regimes vary across different sectors, and within commodities in each sector, these influence the supply-chain governance in the sense that the need for ensuring high quality of information about the process along the chain calls for a stronger cooperation among participants.<sup>129</sup>

The intervention of third parties in the compliance phase of the process is evident when certification regimes are involved. In fact, certification contracts confer inspection powers to the certifiers.<sup>130</sup> More closely, “*the certifier (1) will monitor the supplier’s activity, including its relationships with the different tiers along the chain, (2) will provide certification if requirements are met, and (3) is given direct remedial power by the certification contract in case of non-compliance. This power ranges from warning to fining, to suspension or termination, which may result in decertification*”.<sup>131</sup>

In general, compliance with regulatory provisions is carried out by the buyer, by the certifier, and finally, by the regulatory body.<sup>132</sup> It becomes clear that the principle of contract relativity, which is designed for bilateral contracts, is not fully operational. It follows that multi-party contracts, because of their nature and characteristics – which transcend the principle of contract relativity as explained above – are more suited to ensuring compliance with regulatory standards. Indeed, there is a general common interest, which shall belong to the above-mentioned “schedule of duties” of all parties in the GVC, in order to adopt a mechanism that ensures compliance with regulatory standards, including through external bodies.

## 5.2 Enforceability of sustainability clauses

In general terms, the first prerequisite for sustainability clauses to be enforced is that they become a valid part of a contract. In the case of sustainability clauses being

<sup>126</sup> UNIDROIT, FAO and IFAD. Legal Guide on Contract Farming (Rome 2015) para 19; See BSR-UNGC, A Guide to traceability (New York: UNGC Office, 2014) <www.bsr.org> accessed 9 July 2023.

<sup>127</sup> BSR-UNGC (n 126).

<sup>128</sup> Fabrizio Cafaggi (n 29) 228. Also see UNEP (n 49).

<sup>129</sup> BSR-UNGC (n 126) 9: “*Companies need to have a means of verifying sustainability claims linked to their products, and traceability systems can help business follow through on attributes connected to their products. Traceability in particular provides a tool to monitor products and materials as they travel through the supply chain in order to ensure that responsible social and environmental practices are used at every step. Verifying the claims they make about these materials through mechanisms like third party audits has been an important issue for stakeholder relations. Trace- ability systems can help companies fulfill their sustainability promises by providing a means of assuring sustainability and by generating data that can be shared with the stakeholders*”.

<sup>130</sup> GlobalG.A.P. (n 36), Article 5.3.

<sup>131</sup> Fabrizio Cafaggi (n 39)1605. Also, see GlobalG.A.P. (n 36), Article 6.4.

<sup>132</sup> Fabrizio Cafaggi (n 39) 1610.

included in the contract, this prerequisite is normally fulfilled. However, problems may arise in the case of incorporation by reference, which is not sufficient in order for the conformity to such instruments to be obligatory.<sup>133</sup>

Guidance may be found regarding this in rules on standard terms and conditions. In fact, a code of conduct or any other CSR document may be regarded as standard terms and conditions<sup>134</sup> under the condition that it is drafted by one party only in advance of the contract and intended for general and repeated use.<sup>135</sup>

Looking at the form and content of the reference, it is then possible to establish, following the general rules of interpretation of the parties' intentions, whether a referenced document becomes part of a contract. Namely, under the CISG it should be questioned whether a reasonable person would comprehend that the referenced document is intended to form part of the contract.<sup>136</sup> Such a document does not need to be in writing or signed,<sup>137</sup> and its incorporation in the contract can also have been made clear during pre-contractual negotiations.<sup>138</sup> What is most important is the effective knowledge by the other party of the text of the document.<sup>139</sup>

Under Italian law, standard terms and conditions drafted by one of the parties are effective with regard to the other party if at the conclusion of the contract he/she knew them or should have known them through ordinary diligence (Article 1341 Paragraph 1 of the Italian Civil Code). Certain types of standard terms of conditions, so-called unfair terms ("clausole vessatorie"), shall be specifically approved by the other party (cfr. Article 1341 Paragraph 2 of the Italian Civil Code).

The level of specificity of sustainability clauses may influence their enforceability. However, companies may opt for vague sustainability clauses for multiple reasons, such as retaining flexibility of the contract<sup>140</sup>, the absence of concrete statutory sanction threatening<sup>141</sup>, or helping to achieve the objective of sustainable development<sup>142</sup>.

---

<sup>133</sup> Louise Vytopil (n 44) 155.

<sup>134</sup> *ibid* 166.

<sup>135</sup> Unidroit Principles of International Commercial Contracts (UPICC) Article 2.1.19. The CISG does not contain a special provision on standard terms and conditions. However, in the present case, the definition of standard terms and conditions might be found in the UPICC (cfr. Article 7 (2) CISG). Furthermore, the inclusion of standard terms under the CISG is determined according to the rules for the formation and interpretation of contracts (cfr. CISG Advisory Council Opinion No 13).

<sup>136</sup> Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP 2010), Article 14, paragraph 37.

<sup>137</sup> *ibid*.

<sup>138</sup> Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the Unidroit Principles of International Commercial Contracts (PICC,)* (OUP 2009), article 2.1.19, paragraph 13.

<sup>139</sup> *ibid* Article 2.1.19, paragraph 17.

<sup>140</sup> Doreen McBarnet and Marina Kurkchayan, 'Corporate social responsibility through contractual control - Global supply chains and 'other regulation'', in Doreen McBarnet, Aurora Voiculescu and Tom Campbell, *The new corporate accountability*, (Cambridge University Press 2009) 70.

<sup>141</sup> Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 (3) *Duke Law Journal* 557.

<sup>142</sup> Kateřina Peterková Mitkidis (n 43) 16.





### 5.3 Effects of the violation of sustainability clauses in multi-party contracts

The violation of sustainability clauses in multi-party contracts may have different consequences, depending on the type of multi-party contract involved.

For multi-party contracts having a common objective, a breach of contract by one party does not determine the termination of the contract towards the other parties unless the unperformed obligation must be regarded as essential (cfr. Article 1459 of the Italian Civil Code).

If the sustainability obligation is included in framework agreements, which are often multi-party contracts, it may be more easily regarded as essential. In fact, framework contracts provide a 'framework' for relationships that allow for their development over time. From this perspective, compliance with sustainability contractual clauses plays a central role in fostering a long-lasting "healthy" contractual relationship, to the extent that it preserves the reputational aims of the parties.

Finally, in consideration of the minimum level of cooperation which characterises multi-party contracts, a cooperative approach to remedies against breach is required.<sup>143</sup> In particular, a cooperative approach to remedies against breach in food global value chains may require, in essence, the prioritisation of corrective measures over contract termination, providing parties the possibility to renegotiate the contract after a breach in order to preserve the mutual advantages of the relationship in the long term.<sup>144</sup>

### 5.4 Third party beneficiaries

The first beneficiaries of sustainability clauses are not party to the contract – they are so-called third parties. It should be recalled that according to the principle of privity of contract, a contract may confer rights and impose obligations only on the contractual parties. However, this principle may be derogated and third parties may acquire certain rights.<sup>145</sup> From a comparative law perspective, three main requirements have been identified for the application of the contract law third-party beneficiary doctrine with respect to sustainability contractual clauses: i) the intention of contractual parties to ii) grant a specific right to iii) an identified or identifiable third party.<sup>146</sup>

Under Italian law the stipulation in favour of third party beneficiaries is valid when the third party has an interest thereto (Article 1411 Paragraph 1 of the Italian Civil

<sup>143</sup> Fabrizio Cafaggi and Paola Iamiceli (n 51) 135.

<sup>144</sup> *ibid.*

<sup>145</sup> Ingeborg Schwenzer and Mareike Schmidt, 'Extending the CISG to Non-Privity Parties' (2009) 13 *Vindobona Journal of International Commercial Law & Arbitration* 109. See also Articles 5.2.1-5.2.6 UPICC.

<sup>146</sup> Kateřina Peterková Mitkidis, 'Enforcement of sustainability clauses', in Vibe Ulfbeck, Alexandra Andhov, Kateřina Peterková Mitkidis (eds), *Law and responsible supply chain management* (Routledge 2019).

Code). The concept of interest has been interpreted by the doctrine as an economic advantage.<sup>147</sup>

Furthermore, the parties shall have agreed to perform an obligation in favour of the third party with the aim to let him acquire not only an advantage but a right.<sup>148</sup> It should be questioned whether through a sustainability contractual clause, contractual parties confer a new specific right to the third party. This is not the case when the objects of sustainability contractual clauses are absolute subjective rights, such as human rights. With regard to environmental clauses, it should be verified whether the nature of the attributed rights can fall under the notion of the right to health, which has been considered to encompass the right to a healthy environment,<sup>149</sup> and therefore qualifying as an absolute subjective right.

Furthermore, the third party must at least be identifiable at the conclusion of the contract.<sup>150</sup> Concerning the identification requirement,<sup>151</sup> this might be a difficult condition to meet in relation to environmental sustainability clauses where there is an indefinite number of third party beneficiaries, such as future generations.<sup>152</sup>

Finally, the third party may also not yet exist at the conclusion of the contract.<sup>153</sup>

In conclusion, under Italian law it appears difficult to apply the legal framework for third party beneficiaries in the context of SCCs. In fact, very often SCCs have as an object absolute subjective rights, which are not new specific rights.

The main situations when the enforcement of sustainability contractual clauses is required by/against third parties are when i) third parties try to enforce the contract between the buyer and the supplier; and ii) the buyer tries to extend the applicability of sustainability contractual clauses beyond first-tier suppliers.<sup>154</sup>

As pertaining to second-tier suppliers, difficulties arise for the buyers seeking to achieve compliance with SCCs, given the lack of a direct legal relationship with them. It has been suggested that qualifying SCCs as a kind of warranty, such as an implied warranty of merchantability and fitness for particular purposes, could be the objective of an automatic transfer, together with the goods' ownership by each subsequent buyer.<sup>155</sup> It follows that the sub-buyer would have a direct contractual claim against the

<sup>147</sup> Michele Tamponi, 'Il contratto a favore di terzo', in M Bessone (ed) *Trattato di diritto privato* (Torino 2000) 366.

<sup>148</sup> Cass Civ 22 June 2007, n.14593; Cass Civ 26 November 2003, n. 18074.

<sup>149</sup> Cass Civ (SS.UU) 6 October 1979, n. 5172; Corte Cost 28 May 1987, n. 210; Corte Cost 30 December 1987, n. 641.

<sup>150</sup> Cass Civ 17 September 2019, n. 23125; Cass Civ 18 July 2002, n. 10403.

<sup>151</sup> Article 5.2.2 UPICC according to which, "The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made".

<sup>152</sup> Cristina Poncibò (n 97) 352.

<sup>153</sup> Cass Civ, 29 July 2004, n. 14488; Cass Civ, 22 November 1993, n. 11503.

<sup>154</sup> Kateřina Peterková Mitkidis (n 43) 17.

<sup>155</sup> Ingeborg Schwenzer and Mareike Schmidt (n 145) 111, 113.



original seller.<sup>156</sup> However, this conclusion has been subject to criticism, based on the fact that SCCs do not influence the tangible quality of goods.<sup>157</sup>

### 5.5 Remedies for non-performance

Under the CISG, if the seller fails to perform any of his obligations under the contract or this Convention, the buyer may require specific performance, price reduction, and damages. The contract can be avoided only, among other conditions, if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract (cfr. Article 49 (1) a) CISG), which must also be foreseeable under the general rules on contract interpretation (Article 49 (1) and Article 25 CISG). For this, attention should be given to the language of the sustainability clause and/or how the supplier was informed of the buyer's standards regarding sustainable development.<sup>158</sup>

The remedy to specific performance is obviously not applicable in the case of violation of sustainability contractual clauses, given that these requirements do not relate to physical product quality.<sup>159</sup>

With specific regard to biofuels, it has been affirmed that the eventual violation of sustainability clauses could constitute a prejudice concerning the legitimate expectations of the other party.<sup>160</sup>

Under Italian law, a lack of quality of the product legitimates the buyer to undertake action for termination under the general rules on termination for non-performance. However, the lack of quality shall exceed the tolerance limits established by usages (Article 1497 of the Italian Civil Code). Finally, the terms of limitation and prescription as of Article 1495 of the Italian Civil Code apply.

## 6 Conclusion

Multi-party contracts are well suited for the implementation of sustainability standards to the extent that they increase the level of interdependence and collaboration of actors among the chain and allow a systematic and fair allocation of risks and costs in monitoring and compliance procedures.

In particular, the high level of interdependence offered by contractual networks permits the adoption of strategic decisions that will affect the whole network and which

<sup>156</sup> Kateřina Peterková Mitkidis (n 43) 19.

<sup>157</sup> *ibid.*

<sup>158</sup> Cristina Poncibò (n 97) 348.

<sup>159</sup> *ibid.*

<sup>160</sup> Priscila Pereira De Andrade, 'La Contribution Limitée De La Convention Des Nations Unies Sur Les Contrats De Vente Internationale Des Marchandises Pour l'Application Des 'Clauses De Durabilité' Des Biocarburants', (2016) 53 Canadian Yearbook of International Law 119.

could also relate to a systematic programme for the implementation of sustainability standards.

Moreover, multi-party contracts represent an attractive solution for the diffusion of innovative sustainable practices among suppliers in the GVC. Therefore, they incentivise private investments in research and development activities, which are key for the building of sustainable agriculture. Furthermore, in terms of innovation, contractual networks confirm their suitability for the promotion of collaborative practices.

However, the collaborative nature of multi-party contracts requires a redefinition of contract theory which shall mitigate the principles of contract relativity and of freedom of contract by introducing the principles of fairness and social usefulness as limits to the privity of contract.

As to the nature of SCCs, these can be qualified as immaterial qualities both under the CISG and Italian law. In fact, under the CISG, the notion of quality under Article 35 (1) also encompasses immaterial process-related qualities. With regard to Italian law, the violation of SCCs may be translated as a lack of quality of the product under Article 1497 of the Italian Civil Code.

In conclusion, it is strongly advised to emphasise in contracts that compliance with SCCs forms part of the obligation to deliver a conforming product/service.