N-EXTLAW WORKING PAPER SERIES NO1

Sustainable Contracting for a Non-Extractive Economy

Jie Ouyang

Abstract

Business runs on contracts, making them one of the most important legal vehicles compounding the effect of extractive capitalism. But the very ubiquity of contracts hides its potential to be refitted as an effective governance tool for just commercial transactions. Drawing on the theory of relational contract, this report repurposes commercial contracts as a relational governance device with a hybrid compliance mechanism that navigates the purpose-driven co-operation between the parties. It offers some guidelines on contract drafting and informal and formal enforcement for non-extractive entities who are struggling to find their way around non-extractive practices. It further unsettles some unchallenged contract law doctrines by reflecting on third-party rights and just price rule, calling for reform of contract law and adjudication to make non-extractive contracting an easier and more attractive option for all business operators. Against the broader vision of a non-extractive economy, non-extractive contracting opens the gate for us to reimagine contracts as an enabling toolkit. Contracts should no longer be solely driven by an economic engine to amplify commodifying capitalism; they should evolve into a governance vehicle that embeds and fuels non-extraction by bringing care, purpose and ethics back into our zeitgeist.

European Research Council

European Commission

N-EXTLAW

University of Amsterdam
Amsterdam Centre for Transformative Private Law

Sustainable Contracting for a Non-Extractive Economy

Jie Ouyang [1]

Introduction

Business runs on contracts, making them one of the most important legal vehicles compounding the effect of extractive capitalism. But every cloud has a silver lining: the very ubiquity of contracts hides its potential to be refitted as an effective governance tool for just commercial transactions. Contractual governance has been assuming growing prominence and gathering stronger momentum in the global Business and Human Rights (BHR) movement. Partly building upon the groundwork of the Corporate Social Responsibilities initiative,[2] BHR has spawned an avalanche of regulatory initiatives to address the legal vacuum in transnational value chains and institute accountability mechanisms to make firms answer for their wrongdoings.[3] These initiatives are mostly of soft law nature, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines). They nudge companies to leverage their economic clout to push for better supply chain practices, including through contracts.[4]

With these various initiatives in place, one might wonder if we need to channel contracts as regulatory tools at all, and if so, how contracts could do the trick. This report aims to synthesise both the leading academic insights on sustainable contractual practices and the practical input from the participants of the Participatory Action Research (PAR)[5] and thus map out the possible pathway to 'sustainable contracting' for a non-extractive economy. Particularly, this report looks at the theory of relational contract and tries to operationalise it

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[2] It should be noted, though, that the two movements come from different corners, see Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015) 14 Journal of Human Rights 237.

[3] See, for example, John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (UN Human Rights Council 2008) A/HRC/8/5 3.

[4] Peterkova Katerina Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' [2014] Nordic Journal of Commercial Law 8–9.

[5] PAR is the main methodological approach of the N-EXTLAW Project. For an introduction, see 'Action Research' (*N-EXTLAW*) <https://www.nonextractivefuture.eu/action-research/> accessed 4 September 2022. Also see Amy Lazell and Laetitia Bornscheuer, 'Discussing the Benefits and Challenges of Working with Participatory Action Research (PAR): Reflections from N-EXTLAW's PAR Workshop' (*N-EXTLAW*, 29 July 2021) <https://www.nonextractivefuture.eu/2021/07/29/discussing-the-benefits-and-challenges-of-working-with-participatory-action-research-par-reflections-from-n-extlaws-par-workshop/> accessed 20 February 2023.

in the context of non-extractive business practices. Contracts are repurposed as a relational governance device with a hybrid compliance mechanism. This report, first and foremost, is meant to provide a viable toolkit for non-extractive entities – that embrace non-extraction to orient their business – to support and mainstream sustainable economic practices, which well complements and enriches the N-EXTLAW Project's focus on the 'firm' (the legal forms and internal governance of non-extractive entities). Moreover, most existing literature approaches contractual governance in the context of global value chains where profit-driven actors such as multinational companies dominate the game. Though this is not the priority of this report, we do hope this report could also shed light on the salience of contracts as an anchor to promote good governance of global value chains.

Before moving on, it should be voiced that this report assumes that the abstract formulation of contract models is of little avail without normative directionality. Thus, this report situates the discussion of sustainable contract practices against the normative soil of 'non-extraction'. It is not the task of this report to provide a full definition, but it is helpful to flag up that 'extraction' in our understanding covers a wide range of business practices that produces pernicious effects on the (weaker) counterparty, labour and human rights, the ecological environment and beyond.[6] The relational navigation submitted here is ultimately a means for the end of non-extraction so that party autonomy is not taken captive by the powerful parties to legitimise their extraction in a way that defies that very principle. In this light, it is also hard to imagine how the BHR movement could tame corporate capitalism without fundamentally reconceptualising the 'imaginary' of the role and purposes of corporations.[7] Repurposing contracts would help indeed, but the deployment of contracts as effective regulatory tools would only work best when it is embedded into a broader vision of economic, social and legal reform.

Setting the Scene: Contracts, Why and How?

Contracts are typically tasked to facilitate exchanges and maximise efficiency.[8] However, they are increasingly mobilised and mandated to implement public and regulatory objectives.[9] Under EU law, contracts have long been the venue – under the auspices of the internal market

[6] For more discussion on the notion of non-extraction, see, for example, Kinanya, From an Extractive to a Non-Extractive Economy: Disentangling the Building Blocks of Non-Extractive Economic Practices (February 17, 2022). University of Oslo Faculty of Law Research Paper No. 2022-39, International and Comparative Corporate Law Journal, Volume 15, 2022, Issue 2, p. 13-34, Available at SSRN: https://ssrn.com/abstract=4037070

[7] Chantal Mak, 'Corporate Sustainability Due Diligence: More than Ticking the Boxes?' (2022) 29 Maastricht Journal of European and Comparative Law 301.

[8] This is especially the case in the eyes of the proponents of Law and Economics, see, for example, Richard A Posner, 'The Law and Economics of Contract Interpretation' (2005) 83 Texas Law Review.

[9] Fabrizio Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts: New Architectures' (2013) 36 Fordham International Law Journal 1557.

project – to implement consumer policies and financial regulations.[10] At the risk of reductionism, we can even view contracts as the enabler for post-welfare-state privatisation and ultimately for neoliberal policies. The view that public law and private law function in mutually exclusive realms – private law is all about interpersonal and corrective justice while social and public goals are left to public law[11] – is thus somewhat outdated and unrealistic. In international supply chains, this regulatory function of contract is usually fulfilled by the incorporation of 'sustainable contract clauses' (SCCs) that mirror the regulatory provisions. As defined by Mitkidis, SCCs cover 'social and environmental issues which are not directly connected to the subject matter of the specific contract', which means they 'do not specify the physical quality of the delivered goods, but rather prescribe how the parties should generally behave when conducting business'.[12] SCCs have enjoyed wide uptake in commercial practices.[13]

Why do we couple BHR regulation with contracts through SCCs? Firstly, the soft law nature of most BHR instruments – despite more and more of them being crystallised into mandatory legislation, especially in the field of corporate due diligence[14] – entails their non-binding effect and invites legitimacy questions of their regulatory effects. Meanwhile, contracts are the result of party negotiations, and such *consensus ad idem* confirms the binding nature of contracts. As such, before the voluntary regulatory standards are secured by national legislation, contract lends itself to 'harden' those standards with legally enforceable obligations and remedies.[15] However, this hardening effect is not really empirically proved by case law.[16] It is further paralysed by the current contract law vocabulary. For example, the notion of '(non)conformity' in sales contracts traditionally zooms in on the physical quality of the end products,[17] while applying this concept vis-à-vis the violation of ethical standards requires some stretching of its doctrinal reach. When ethically tainted goods have intact physical functions, difficulties arise in calculating damages and limiting how far along the

[10] E.g., Directive 93/13/EEC on unfair terms in consumer contracts; Directive 2011/83/EU on consumer rights; Directive 2008/48/EC on credit agreements for consumers; Directive (EU) 2015/2366 on payment services in the internal market.

[11] A classic work discussing private law as corrective justice, see Ernest J Weinrib, 'Understanding Private Law', *The Idea of Private Law* (Oxford University Press 2012). Alternatively, at least a richer conception of interpersonal justice is called for, see Hugh Collins, 'Interpersonal Justice as Partial Justice' (2022) 1 European Law Open 413.

[12] Mitkidis (n 3) 5.

[13] Kateřina Mitkidis, Sonja Perkovic and Panagiotis Mitkidis, 'Tendencies in Contractual Governance to Promote Human and Labour Rights in Transnational Supply Chains' (2019) 23 Competition & Change 397, 401.

[14] See, for example, the California Transparency in Supply Chains Act of 2010, the UK Modern Slavery Act 2015, the French Corporate Duty of Vigilance Law (Loi de Vigilance) of 2017, the Dutch Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid) of 2019, the Italian Due Diligence Laws (Legislative Decree No. 231/20016, recently amended by Legislative Decrees No. 184/2021 and No. 195/2021), the German Act on Corporate Due Diligence in Supply Chains (Lieferkettensorgfaltspflichtengesetz) of 2021 and the Norwegian Transparency Act (Åpenhetsloven) of 2022. The European Commission has also prepared a proposal for a Directive on Corporate Sustainability Due Diligence on 23 February 2022.

[15] Mitkidis, Perkovic and Mitkidis (n 13) 400.

[16] Mitkidis (n 3) 2.

[17] See, for example, Art. 35 et seq of CISG, Art. 5 et seq of the Sale of Goods Directive 2019, §2-106(2) and related provisions of the UCC and IV. A. – 2:301 et seq of DCFR.

value chain the taint could travel. As I understand, such tension reveals a fundamental discord between formal contractual remedies and non-extractive governance. Contractual remedies undergird a linear, binary and *ex-post* logic: it is only after the breach has materialised (in the non-conforming end products) that the aggrieved party could request redress to make good (as opposed to prevent or cure) the incurred loss. They are primarily past-oriented. On the contrary, maintaining a long-term business relationship takes iterative and whole-process endeavour, which is both past- and future-oriented. This clash makes the formal approach to contractual enforcement inadequate to unleash the full potential of contracts in facilitating non-extraction.

Secondly, contracts could also yield a 'spill-over' effect for BHR regulation. Contractual practices could pave the way – by lending inspiration, normalising certain conducts and easing setbacks – for the legislature to introduce hard laws.[18] The peril is, however, that outsourcing this regulatory function to contracts might further empower the powerful party to 'regulate' or 'govern' its business relationships privately.[19] It may create the illusion that the governance gap has been filled by private regulation and obviate (deceptively) the need for state intervention.[20] Moreover, the 'spill-over' effect has another layer. Countries in the downstream of global value chains (closer to retail) usually enjoy a stronger rule of law than those in the upstream (closer to production).[21] As the former usually hosts global brands with stronger bargaining power, their sustainable practices could thus transfer (or impose) rules and values of human rights protection to the latter, which has been described as 'legal transplants through private contracting in the globalisation age'.[22] One might worry, on the one hand, that the spill-over of standards would be accompanied by the spill-over of compliance costs. By aggravating price squeezing with 'sustainability costs', it would only make the Global South parties worse off. On the other hand, the indiscriminate imposition of Global North standards, with no voices from the Global South, might give rise to a form of private legal imperialism. Especially in countries that are still grappling with introducing full-fledged regulation into their emerging market, corporate giants could easily seize upon the gap and assert their transnational power. Again, these mismatches reflect the collision between the social directionality of sustainable contracting and the economic engine of corporate behaviours.

[18] M Antonio García-Muñoz Alhambra and Attila Kun, 'Soft on the inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law' (2011) 27 International Journal of Comparative Labour Law and Industrial Relations 354–355.

[19] Fabrizio Cafaggi, 'A Comparative Analysis of Transnational Private Regulation : Legitimacy, Quality, Effectiveness and Enforcement' (European University Institute 2014) EUI Working Paper <https://cadmus.eui.eu/handle/1814/33591> accessed 3 July 2022.

[20] Jennifer Bair and Florence Palpacuer, 'CSR beyond the Corporation: Contested Governance in Global Value Chains' (2015) 15 Global Networks S1.

[21] See, for example, 'WJP Rule of Law Index 2020' (*World Justice Project*) <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020> accessed 4 September 2022.

[22] Li-Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 The American Journal of Comparative Law 35.

As we can see, the contractual approach has its potential but faces some hindrances. For non-extractive entities, the problems lie more in the inadequacy of canonical contract law doctrines, including the formal approach to enforcement. It is a good sign that business actors are at least starting to be aware of the environmental and social impact of contract performance. However, it would be unpromising to merely tinker with the contract terms by adding a few SCCs as tokenism without seriously reconsidering the compliance mechanism and rethinking what contracts mean for the parties. The way how SCCs focus on business conduct and detach from the contract's subject matter does have implications for the conception of contracts as such.[23] Markedly, from enabling discrete transactions, contracts increasingly serve to set the stage for relational engagement between the parties to achieve goals beyond economic gains. This leads us to an influential strand of thought in contemporary contract theory, relational contracts.

Contract as Relational Governance

The theory of relational contract

The emergence of the relational contract theory was often credited to the work of Stewart Macaulay and Ian MacNeil.[24] Reviewing the literature, we could observe at least three widely agreed features of relational contracts.[25] Firstly, the contractual relationship usually extends over a long period of time – hence relational contracts are often contrasted with 'spot', 'discrete', 'one-off', 'one-shot' or 'transactional' contracts.[26] Admittedly, the long-term nature is merely an empirical descriptor that does not essentially define or qualify a relational contract.[27] The lengthy duration, however, does make it almost impossible for the parties to prescribe all future contingencies in advance, forcing them to confront the uncertainty and incompleteness inherent in contractual relations. Thus, secondly, while classic contract law turns on 'the goal of making a present decision about all, including future, aspects of a contractual relationship',[28] in a relational contract, the written rights and obligations are far

[23] Mitkidis (n 3) 6.

[24] For Macaulay's most influential work, see Stewart Macaulay, 'Non-contractual relations in business: a preliminary study' (1963) 28 American Sociological Review 55 and Stewart Macaulay, 'The real and paper deal: empirical pictures of relationships, complexity and the urge for transparent simple rules' (2003) 66 Modern Law Review 4. As for MacNeil, see Ian MacNeil, 'The many futures of contract' (1974) 47 Southern California Law Review 691 and Ian MacNeil, 'Contracts: adjustment of long-term economic relations under classical, neoclassical and relational contract law' (1978) 72 Northwestern University Law Review 854 and Ian MacNeil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980).

[25] See Charles J Goetz and Robert E Scott, 'Principles of Relational Contracts' (1981) 67 Virginia Law Review 1089; Melvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1997); Richard E Speidel, 'The Characteristics and Challenges of Relational Contracts Symposium in Honor of Ian R. MacNeil: Relational Contract Theory: Unanswered Questions' (1999) 94 Northwestern University Law Review 823; Hugh Collins, 'Is a Relational Contract a Legal Concept?', *Contract in Commercial Law* (Lawbook Co 2016).

[26] For example, Macneil defines a 'discrete contract' as 'one in which no relation exists between the parties apart from the simple exchange of goods', see MacNeil (n 20), *The New Social Contract*, 10.

[27] Collins (n 25) 16.

[28] David Campbell and Donald Harris, 'Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation' (1993) 20 Journal of Law and Society 166, 169.

from exhaustive and all-inclusive but are subject to evolving refinement as the project proceeds. The parties purposefully opt for indeterminate descriptions of contract terms to leave it open for future adjustment. Thirdly, such indeterminacy of contractual performance means that the success of the enterprise is ultimately left to the parties' honest commitment and loyal co-operation. It nurtures a degree of interdependence and solidarity between the parties, where their mutual trust and confidence play a more vital role than the written script. The interdependence deters opportunistic behaviours and shapes unfolding adjustment. In sum, relational contracts seek to navigate a 'breathing' relationship between the parties. It indicates a collective and social understanding of contracts, where business actors are closely embedded in a web of thick relations, on the one hand, and contracts are de-insulated from the social relations that enable them and are in turn shaped by them, on the other.

These features of relational contracts find great consonance with the philosophy behind SCCs. Instead of narrowly zooming in on the conformity of the physical quality of the end products, SCCs encompass the compliance of the entire process of production along the value chain.[29] The most common process standards covered by SCCs include the protection of human rights, labour conditions, environmental protection and anti-bribery provisions.[30] Further, SCCs are usually formulated in rather vague and broad terms, as they intend to embody the parties' mutual commitments and draw the behavioural boundary as to the parties' conduct during the contractual performance.[31] After all, 'the precise needs for co-operation cannot be described clearly in advance, but will necessarily emerge during performance of the contract'.[32] These characteristics of SCCs well confirm the indeterminacy of relational contracts and highlight the evolving and unfolding nature of contractual co-operation. If properly deployed, with a sustainable process, not only are SCCs conducive to conforming final products by specifying *how* their safety and quality should be guaranteed, but they also broaden the scope of contracts to internalise the externalities of contractual performance.[33] As we can see, SCCs are (purported to be) driven by ethical considerations rather than merely economic calculations. That being true or not, it does call forth the reflection upon the place of 'values' – especially external values such as solidarity, altruism, social good and human rights – in relational contracts. According to Macneil, relational contracts are relatively 'socially neutral', and values are created by contracts themselves, excluding external values from the relationship.[34] However, as mentioned already, it is the normative directionality that

[29] This coincides with the dismantling of regulatory barriers between product and process around the world. From a European perspective, see Hans-W Micklitz, 'European Regulatory and Private Law - Between Neoclassical Elegance and Postmodern Pastiche', *Vielfalt im Recht* (Duncker & Humblot 2021). From a US perspective, see Douglas A Kysar, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' (2004) 118 Harvard law review 525.

[30] Katerina Peterkova Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015) 166 et seq.

[31] To borrow the notions of legal standards and rules, the sustainable objectives can only be framed in the ambiguous language of 'standard' that requires *ex-post* concretisation.

[32] Collins (n 25) 17.

[33] Note, however, as discussed in the context of exporting sustainability standards to Global South, one should not overlook the risk that the costs of internalising the externalities are only borne by the weaker party.

[34] Ian R Macneil, 'Values in Contract: Internal and External' (1983) 78 Northwestern University Law Review 340.

ultimately charts the route of an abstract contract model, so we would argue that relational contracting offers an inspiring starting point to host and further develop the idea of 'non-extractive contracting' as a purpose-driven model, where internal (equality among the parties, fairness in exchange, etc.) and external (third party protection, ecological interests, etc.) harmoniously join together.

How well does the relational contract theory fit with the existing doctrines? Under this theory, the interpretation of contracts should take a contextual approach where due consideration is given to the 'implicit dimensions' of contracts.[35] It allows and invites the courts to consider the ongoing business relationships as the context for a particular dispute. Such an implication, though, is found somewhat limited to common law jurisdictions, where formal textualism traditionally dominates contractual interpretation.[36] It makes less splash in the civil law world as the contextual approach, such as the acceptance of extrinsic evidence, has long been adopted for contract interpretation. Besides, civilian systems well know other doctrinal apparatuses that accommodate relational adjustments in long-term contracts, such as the notion of continuing obligations[37] and the dichotomy of obligations of means and obligations of result[38]. Moreover, the theory of relational contract also spells the recognition of the (implied) duty of good faith (especially under English law),[39] while this duty is already widely embraced by civil law jurisdictions. Of course, these discrepancies do not undercut but confirm the traction of the relational contract theory. As such, one might sense that civil law is more congenial with the idea of relational contracting.[40] However – probably unsurprisingly – common law enjoys a much wider uptake by businesspersons in real life.[41] Finally, for both systems, the relational nature of contracts brings the impact of unforeseen circumstances to contract performance to the fore and flags up the need for adjustment to contract terms (with by judicial decisions or by re-negotiation), which to some extent unsettles the rigid reading of *pacta sunt servanda*.

[35] Collins (n 25) 20–22; Shida Galletti, 'Contract Interpretation and Relational Contract Theory: A Comparison between Common Law and Civil Law Approaches' (2014) 47 The Comparative and International Law Journal of Southern Africa 248.

[36] Galletti (n 36); Klaas Hendrik Eller, 'Comparative Genealogies of "Contract and Society"' (2020) 21 German Law Journal 1393, 1406–1407.

[37] *Dauerschuldverhältnis* in German, *duurverplichting/duurcontract* in Dutch and *contrat à exécution successive* in French.

[38] *Obligation de moyens* and *obligation de résultat* in French and *inspanningsverplichting* and *resultaatsverplichting* in Dutch.

[39] See David Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' (2014) 77 The Modern Law Review 475.

[40] More evidence is hinting at this observation in the following analysis, such as the threshold for incorporation of sustainability terms and the recognition of the duty to cooperate.

[41] It has been proposed that the global capitalism is essentially governed by two sets of law, English law and the law of New York, both common law systems, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019) 132.

It should be noted that relational enforcement is part and parcel of relational contracting. In relational enforcement, formal infrastructure and legal remedies take a back seat while informal dynamics and social norms such as solidarity and co-operation play the primary role.[42] Contractual enforcement stops being an *ex-post*, adversarial confrontation but takes the form of co-operative, amicable dialogues throughout the entire process of the contractual alliance. Particularly, the relational contract theory integrates the dispute settlement procedure into the realm of substantive contract law and governance. Parties of a relational contract aspire to resolve their conflicts without resorting to judicial enforcement.[43] This means that their dispute is not subject to formal legal requirements; rather, it is up to the parties themselves to come up with their own idiosyncratic solutions that best suit their specific purpose and relationship. We will delve deeper into the enforcement aspect of relational contracts later.

Operationalising relational contracting for non-extraction

Contract design and drafting

Commercial contract terms are notorious for being verbose, fastidious and esoteric. In business reality, it seems that they are mostly left unused in the drawers once drafted – for good reason.[44] The reliance on meticulously drafted legalese to mitigate risks gives away the deficiency of trust between the parties. Thus, to cultivate the 'breathing' business relationship, non-extractive contracting starts with contract design and drafting. The choice of plain, accessible and intelligible language itself is an olive branch to confirm that the parties truly understand and embrace the common fundamental principles of their enterprise at the onset. There are inspiring initiatives aiming to tone down the opaque legalese of contracts, such as Creative Contracts[45] and Visual Contracts[46]. Plain wording and vague principles are beneficial for the contractual parties as they promote mutual trust and accommodate the unfolding nature of relational contracts. However, when it comes to judicial review, the lack of precise and concrete meaning might lead to ambiguous interpretations, unenforceability of terms and even unavailability of remedies.[47] This tension could partially be resolved by

[42] Ewan McKendrick, 'The Regulation of Long-Term Contracts in English Law' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford University Press 1997) 309–310; Yehuda Adar and Moshe Gelbard, 'The Role of Remedies in The Relational Theory of Contract – A Preliminary Inquiry' (2011) 7 European Review of Contract Law 401.
[43] Joan MacLeod Heminway, 'The Potential Legal Value of Relational Contracts in a Time of Crisis or Uncertainty' (2022) 85 Law and Contemporary Problems 133.
[44] See Louise Vytopil, *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing 2015) 271.
[45] See https://creative-contracts.com/, accessed 4 September 2022.
[46] See https://visualcontracts.eu/, accessed 4 September 2022.
[47] Mitkidis (n 3) 16.

drafting techniques, but the problem is more deeply rooted in the formalistic approach of contract law as such. We will revisit this.

The overarching technique of non-extractive drafting is to incorporate SCCs and other purpose-driven clauses into the contract and uphold them with a relational enforcement mechanism. First of all, the parties should make sure that the SCCs and the like are indeed validly incorporated into their contracts.[48] They could be expressly inserted in full into the contract itself. They could also be incorporated as standard terms or by reference to external documents such as codes of conduct or voluntary international BHR standards. Contracting with standard terms is a common commercial practice, and incorporation by reference is generally valid as long as the reference and the referred terms themselves are clear to the other party as a reasonable person.[49] Further, the SCCs could be placed in any part of the contract, be it recitals, operative terms or final provisions, or as a separate document linked to the main contract. From a practical point of view, however, to avoid confusion, it is recommended to include them as part of the operative terms. The sustainability obligations could even be legally binding on the parties as implied terms. Pre-contractual commitments, especially under civil law, could also be the source of sustainability obligations.[50] Lastly, perhaps in an ideal world, where human-rights-related provisions and other non-extractive terms are continuously practised, they could eventually evolve into 'international trade usage' (in the sense of Article 9(2) CISG or similar national provisions) and thus become binding on the parties of a certain industry by default. [51]

As to the content of the relational terms, it might be helpful to draw inspiration from the 'formal relational contract' approach.[52] It is defined as 'a legally enforceable written contract (hence "formal") that puts the parties' relationship above the specific points of the deal'.[53] The key takeaway is to have everything *in writing*, which finds a strong echo in our PAR participants' sustainable contracting practices. At first blush, this runs afoul of the very

[48] Mitkidis (n 30) 153 et seq. It should be noted, however, that the way of incorporation still differs between civil law and common law jurisdictions – in general, common law systems have more formalistic and rigid rules for contract formation, making it more likely that the incorporation efforts by the parties could fall through for mere lack of formality.

[49] See CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG, Rapporteur: Professor Sieg Eiselen, College of Law, University of South Africa, Pretoria, South Africa. Adopted by the CISG Advisory Council following its 17th meeting, in Villanova, Pennsylvania, USA, on 20 January 2013.

[50] Mitkidis, Perkovic and Mitkidis (n 13) 414.

[51] Ingeborg Schwenzer and Edgardo Muñoz, 'Sustainability in Global Supply Chains Under the CISG' (2021) 23 European Journal of Law Reform 300; Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts', *Commercial Law Challenges in the 21st Century: Jan Hellmer in memoriam* (lustus Förlag 2007).

[52] David Frydlinger, Oliver Hart and Kate Vitasek, 'An Innovative Way to Prevent Adversarial Supplier Relationships' [2020] *Harvard Business Review* <https://hbr.org/2020/10/an-innovative-way-to-prevent-adversarial-supplier-relationships> accessed 4 September 2022; David Frydlinger, Oliver Hart and Kate Vitasek, 'A New Approach to Contracts' [2019] *Harvard Business Review* <https://hbr.org/2019/09/a-new-approach-to-contracts> accessed 4 September 2022.

[53] Frydlinger, Hart and Vitasek (n 53).

implication of relational contracting – the parties should not set out a long list of detailed obligations or pre-formulated answers. However, what is written down in the formal relational contracts are not such terms; rather, they are the 'shared goals and objectives, guiding principles, and robust relationship-management processes, which spell out how the parties will work through issues as they arise'.[54] In other words, on the one hand, in writing are the shared aspirations of the parties. They serve as a constant reminder of what brings the parties together in the first place, which of course differs from contract to contract.[55] On the other hand, procedural principles are also specified on how possible disputes should be resolved to ensure 'private due process' and a fair result. As such, the design of non-extractive contracts should already have dispute settlement in mind, but by no means is it limited to litigation or arbitration. On the contrary, the contracts should actually be drafted in a way that avoids judicial or other third-party intervention and that enables informal dispute settlement between the parties themselves under a fair procedure, such as re-negotiation. In sum, formal relational contracting strikes a proper balance between informality and enforceability. It helps align the parties' goals and expectations continuously and drives contractual behaviours towards the common goal.

One might wonder whether 'standard non-extractive terms' could speed up the uptake of non-extractive contract design.[56] The EU has taken notice of the potential of standard terms – as Art. 12 of the draft Corporate Sustainability Due Diligence Directive provides that 'the Commission shall adopt guidance about voluntary model contract clauses' that are compliant with the Directive. By doing so, it could 'facilitate companies' compliance with their due diligence requirements through their value chain' and 'limit[] shifting compliance burden on SME business partners'.[57] With a leading institution with authority and impact such as the Commission launching the standardisation process and other initiatives following suit, one could optimistically expect standard non-extractive clauses to take off and kick in. However, non-extractive contracting is highly purpose-driven and all about shared aspirations. These purposes and aspirations are *specific* to each contract and each co-operation. A standardised way of contracting could homogenise how the parties organise their venture and even make it yet another box-ticking exercise that sugar-coats extraction. Of course, this report did not mean to undercut the efforts to mainstream non-extractive contracting by standard terms but to underline what aspects of the contractual relationship cannot be standardised.

[54] ibid.

[55] One of our PAR participants, Karlijn Schuttelaar, highlighted that counterparties should be taken into account when formulating non-extractive contract and provided three types of contracts to consider: arms-length transactions, weaker party contracts and international contracts.

[56] Lomfeld proposed the idea of 'Global Standard Terms', see Bertram Lomfeld, 'Sustainable Contracting: How Standard Terms Could Govern Markets', *Reshaping Markets* (Cambridge University Press 2016).

[57] See Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 2022 < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071> accessed 4 September 2022.

Informal enforcement

Contractual 'enforcement' in this report is understood as the hybrid of formal procedures (such as litigation) and informal mechanisms (such as reputation). Informal enforcement is effective and widely resorted to in commercial practices. The parties channel their relational leverage to ensure compliance through a thick set of social norms, whereby they are incentivised to refrain from opportunism and gear towards symbiosis. The main reason for its popularity, as mentioned, is that formal procedures take an *ex-post*, remedial approach while relational enforcement seeks whole-process, preventative compliance.[58] Also, informal enforcement well complements the under-compensatory nature of contract remedies – certain types of damage such as emotional distress are mostly unrecoverable under classic contract law and other types such as reputational harm simply cannot be undone.[59] However, this very under-compensatory feature of *legal sanctions* leaves room for *social norm*s and informal measures to weigh in on relational contracts; to the extent that relational adjustment does the trick, under-compensation suffices.[60] However, informal enforcement is far from impeccable. For example, the 'end-game' problems of holding up and opportunism when relational contracts are coming to an end could hardly be well resolved without court intervention.[61] Some of the PAR participants state that they rarely enter into court proceedings in their practices, as they sincerely believe that every problem could be solved by having open conversations and 'talking it out'. Should that fail, maybe it is time to bring an end to the co-operation as opposed to making things uglier in front of a court. This is perfectly emblematic of relational enforcement, but it cannot be expected that the same approach would be taken up by everyone. As such, this report juxtaposes both informal and formal enforcement as necessary means for successful non-extractive contracting.

Informal enforcement requires concerted efforts from both parties – in different contexts, the buyer and the seller, the debtor and the creditor or the breaching party and the aggrieved party. It underwrites a general, mutual duty to co-operate.[62] This is especially important when the parties' obligations are interlinked, where one party's conforming performance hinges on the other party's compliance. For example, only when the buyer provides accurate and clear

[58] Not to mention the extractive nature incidental to some means of formal dispute resolution as such. For example, international commercial arbitration could be extractive in the sense that it leaves the settlement of disputes (which could have great impact on global justice) to a private tribunal, which is more often than not guided by business logic such as economic efficiency and is unguarded by public oversight. This is even more prominent in state-investor arbitrations, where a panel of arbitrators could single-handedly overturn the constitution of a sovereign state. See Pistor (n 41) 132 et seq.

[59] For example, Art. 7.4.2(2) of PICC and III. – 3:701 of DCFR expressly provide for the general recoverability of non-pecuniary loss, while Art. 2(fg) of CESL confines recoverable non-economic loss to 'pain and suffering' only. The texts of Arts. 74 et seq of CISG are quite open, while court decisions as well as academic opinions give contradicting interpretations.

[60] Ethan Leib, 'Contracts and Friendship' (2010) 59 Emory Law Journal 649, 722–725.

[61] Michael Trebilcock and Jing Leng, 'The Role of Formal Contract Law and Enforcement in Economic Development' (2006) 92 Virginia Law Review 1517, 1573–1575.

[62] Such duty could derive from the contractual terms, the applicable law or the principle of good faith, see Collins (n 25) 22.

instructions can the supplier produce conforming goods accordingly, and only when the breaching party timely reports non-compliance can the aggrieved party be expected to take proper actions to correct and mitigate the breach. One party should not easily break off the co-operation as long as the other is still willing to improve. Depending on applicable law, the failure to co-operate could lead to the reduction of damages or the exclusion of some remedies. In case of breach due to unexpected changes of circumstances, which is more likely to happen in long-term relationships, co-operation gives rise to the duty of re-negotiation and even serves as a ground for exemption of liability.[63] The duty of co-operation is widely accepted by civil law jurisdictions while finding relatively limited scope under common law.[64] Signs of a more co-operative approach to contract law are also emerging in the CJEU's case law on unfair terms, such as the introduction of a court-guided re-negotiation.[65] As the parties are continuously on alert under the duty to co-operate, it could further induce psychological effects (e.g. internalisation of non-extractive values) and trigger positive behavioural changes.[66]

Informal enforcement calls for co-operation throughout the contractual duration, both before the non-compliance is detected and after the breach materialises. Before the breach, the parties should engage in *preventative* activities to ensure process compliance, such as monitoring or anonymous reporting. The parties could incorporate into their contract a risk assessment and management plan, combining the suppliers' self-assessment (with assistance from the buyer) and buyers' own operations like an on-site inspection.[67] Third-party monitoring such as external auditing[68] and independent certification[69] could also be of help. The parties could also introduce negative obligations such as refraining from entering into contracts with companies that have a record of human rights violations.[70] After the breach, instead of rushing to redress, the parties should first devote themselves to *corrective* actions to make things right again. The breaching party should have a reasonable opportunity to cure the non-compliance (right to cure[71]) while the aggrieved party should act reasonably to

[63] Campbell and Harris (n 28).

[64] See Fabrizio Cafaggi, 'Creditor's Fault: In Search of a Comparative Frame', *Fault in American Contract Law* (Cambridge University Press 2009). Such duty is also directly recognised by several non-binding model law instruments, see, for example, Art. 5.1.3 of PICC, Art. 1:202 of PECL and Art. 3 of CESL, which probably all have more civil law influence.

[65] Case C-269/19 (Banca B. SA v A.A.A.).

[66] Mitkidis, Perkovic and Mitkidis (n 13) 400.

[67] See, for example, Johnson & Johnson, '2021 Health for Humanity Report', < https://healthforhumanityreport.jnj.com/
johnson-johnson-2021-health-for-humanity-report-pdf > accessed 4 September 2022.

[68] Lin (n 22) 724.

[69] Cafaggi, 'The Regulatory Functions of Transnational Commercial Contracts' (n 9) 1600 et seq.

[70] ibid 1577.

[71] The right to cure is widely recognised across different jurisdictions, especially in jurisdictions influenced by US law or CISG, see §2-508(1) of UCC, Art. 37 of CISG, Art. 7.1.4 of PICC and III. – 3:203 of DCFR. A rather comprehensive historical account, see Gakuro Himeno, 'Right to Cure under the Unidroit Principles Article 7.1.4: A Historical Analysis' (2016) 1 Jus Gentium: Journal of International Legal History 427. Also see Vanessa Mak, 'The Seller's Right to Cure Defective Performance: A Reappraisal' (2007) Lloyd's Maritime and Commercial Law Quarterly 409.

mitigate the loss induced (duty to mitigate[72]). These general guidelines could be fleshed out in a 'corrective action plan' with varying forms: the breaching party is required to propose solutions which are subject to the other party's approval or rejection; both parties can engage in a joint problem-solving procedure; an ad hoc governance device could be set up to devise and implement corrective measures.[73] Besides, the buyer could also contribute to training and capability-building for the benefit of the suppliers or rely on naming and shaming strategies to enforce the contract.[74] All in all, the proper deployment of these relational tools could secure contractual enforcement and continuation of the business relationship in a collaborative and non-adversarial manner.

Formal enforcement

If the dispute nonetheless ends up in court despite all collaborative efforts, it is up to formal contract law and judicial enforcement to make the non-extractive contracts (un)functional. It is one thing to integrate non-extractive contracting into the parties' practices, it is another to evaluate whether the existing legal and adjudication system is non-extractive friendly. Unfortunately, private law as it stands now sometimes poses itself as an obstacle to non-extractive contracting. On a technical level, though the parties have many ways to incorporate non-extractive terms into the contract, private law's allergy to vague principles may render these efforts in vain. Without binding obligations, litigation is a lost cause. Even if the parties do make it to the next stage, the *ex-post* approach and the under-compensatory nature of contractual remedies are exacerbated in the context of sustainability obligations. To give an(other) example, due to a lack of foreseeability and certainty, it could be very difficult to establish the causal link between the breach of SCCs and the loss (to be) incurred.[75] More fundamentally, the national codification movement coinciding with the take-off of modern capitalism imbued private law with a distinct liberal imaginary. Afterwards, however, the growing prominence of modern 'social state' introduces some conflicting values – such as the protection of fundamental rights– into the realm of private law, which might be overruled by the entrenched liberal grammar. For example, the 'Chicken for Tomorrow' initiative, where the participating supermarkets agreed to buy more expensive chicken to improve animal welfare, is found by the Dutch competition authority to restrict competition.[76] Despite its non-extractive purpose, namely animal welfare, it nonetheless fails to withstand the legal test

[72] The duty to mitigate is also widely recognised, either explicitly or functionally. At the international level, see Art. 77 of CISG and Art. 7.4.8 of PICC. For US law, see §350 of the Restatement (Second) of Contracts. For German law, see §254 of the German Civil Code. For Italian law, see Art. 227 of the Italian Civil Code. A comparative overview, see Cafaggi, 'Creditor's Fault' (n 63).

[73] Fabrizio Cafaggi and Paola Iamiceli, 'Contracting in Global Supply Chains and Cooperative Remedies' 45, 33.

[74] Mitkidis (n 3) 21.

[75] Mitkidis (n 3) 23.

[76] Jan Peter van der Veer, 'Valuing Sustainability? The ACM's Analysis of "Chicken for Tomorrow" under Art. 101(3)' (*Kluwer Competition Law Blog*, 18 February 2015) <http://competitionlawblog.kluwercompetitionlaw.com/2015/02/18/valuing-sustainability-the-acms-analysis-of-chicken-for-tomorrow-under-art-1013/> accessed 4 September 2022.

that prioritises the market logic. The same dilemma could also arise when one non-extractive value contradicts another, especially when the latter is enshrined as a fundamental right. It came up in one PAR workshop that a 'social media clause' – which limits the parties' freedom to make social media posts while discussing the solutions to their disputes – could foster non-extractive enforcement, but this clause will likely be struck down by courts for violation of free speech.

All these issues inflicting the current private law system call for legal reform to make private law itself non-extractive, or at least to make the lives of non-extractive actors easier. Well-devised default rules and standards could have a complementary and facilitative effect by making the prescribed behaviours effortless and an exemplary and normative effect by showing what kind of behaviours is deemed desirable by democratic legislatures.[77] A more affirmative form of non-extractive law is to outlaw extractive practices altogether, such as, in the EU law context, the Unfair Terms Directive for business-to-consumer contracts and the Unfair Trading Practices Directive for business-to-business contracts. Addressing actual inequalities among the contractual parties – instead of abstractly assuming they are formally equal – indicates an important shift away from the neoliberal imaginary of private law,[78] though later we will contest how 'fairness' is accessed under these instruments. Next to legislative amendment (or until it happens), there is also a case for adjudicative adaptation or even judicial activism. The judicial support is probably even more pivotal in catalysing non-extractive practices because the common purpose of the venture, the implicit norms of the relationship and the relational adjustment in need must be contextualised and teased out in each specific case.[79]

To be more specific about judicial support, it is already discussed that the courts should take a contextual approach when approaching relational contracts. In *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, the court sets the scene by opening the first line with that the parties 'have enjoyed a mutually advantageous business relationship involving the sale and purchase of aviation fuel for several decades'.[80] Here, the judge is telling us that relationship matters in applying contract law. Building on that, judges should consider broader admission of extrinsic evidence

[77] A comprehensive evaluation of the theories regarding default rules in contract law, see CA Riley, 'Designing Default Rules in Contract Law' (2000) 20 Oxford Journal of Legal Studies 24. On the symbolic and expressive functions of law, see Dorien Pessers, 'The Symbolic Meaning of Legal Subjectivity' in Bart van Klink, Britta van Beers and Lonneke Poort (eds), *Symbolic Legislation Theory and Developments in Biolaw* (Springer International Publishing 2016).

[78] Marija Bartl, Towards the Imaginary of Collective Prosperity in the EU: Collectivising the Corporation, 2013 (on file with author).

[79] One might wonder whether the judiciary is in the best position to do so. Critique on the judicial incompetence in contract adjudication, see Eric A Posner, 'A Theory of Contract Law under Conditions of Radical Judicial Error' [1999] Chicago Working Paper in Law and Economics. A counter-argument, see, for example, Leib (n 60) 668–672.

[80] Eastern Air Lines, Inc. v. Gulf Oil Corp., U.S. District Court for the Southern District of Florida, 415 F. Supp. 429 (S.D. Fla. 1975).
October 20, 1975

and implied terms, pay closer attention to all kinds of change of circumstances as grounds for exemptions or adjustment and embrace the duty of co-operation and even good faith.[81] We should especially note the implications of non-extractive contracting for remedies.[82] The judiciary should try to align existing legal remedies – by employing proper techniques such as the teleological one to come up with novel interpretations – with non-extractive practices and values. Thus, the courts should take into account the substantial investment the parties have made, the need to preserve the trust and confidence between the parties and other specificities of the relational context when awarding remedies.[83] For example, the courts should avoid intrusive remedies like contract termination if it is still possible to keep the relational contract together. The court should also be less stringent with allowing re-negotiation or judicial adjustment in light of unforeseeable circumstances. Such an approach of seeking norms from within the specific context and relationship, however, by no way means that the courts cannot intervene from the perspective of external public interests.

Of course, the parties should not stand idly by and wait for the state to take action. Under the aegis of party autonomy, the parties and their lawyers could creatively draft the contract to make it function under the current legal framework. First and foremost, though sustainability obligations are by nature vague and such vagueness is even helpful in some cases, it is nonetheless crucial to give the drafting language a level of specificity and precision so that the terms are binding and enforceable. Courts might be unfamiliar with the abstract notion of 'non-extraction' as such, but provisions defining what non-extraction means to the parties and clear statements of purposes would give judges a richer context, for example, to work around the contract terms in a more teleological manner. Secondly, regarding remedies, it might be helpful if the parties could expressly provide for liquidated damages clauses so that the calculation of remedies is not chained by statutory provisions.[84] The risk is that the line between a liquidated damages clause and a penalty clause is often blurred, while the latter is unenforceable in some jurisdictions. From a relational perspective, penalty clauses should mostly be avoided, because, at the very beginning of the deal, it already sets the tone of distrust between the parties and shows fear of non-compliance. Thirdly, to fully implement the idea of relational enforcement, the lack of legal bindingness of certain contractual terms does not leave them to no avail at all. They are still reflective of the parties' intentions and purposes, and the parties can choose to honour their 'social bindingness' by voluntary compliance when possible.

[81] For a summary, see Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (1999) 94 Northwestern University Law Review 805, 817–818.
[82] See Adar and Gelbard (n 42).
[83] ibid 414 et seq.
[84] Heminway (n 43) 148.

Some Cases for Reflection

So far, we have laid out a general roadmap to sustainable contracting. In this part, I will try to pit some specific contractual approaches and doctrines against the idea of sustainable, relational contracting which we have developed so far. The goal is to further reveal the challenges in prevalent contractual practices and explore some new insights from the relational perspective. From a procedural perspective, the parties could strike to secure the non-extractive goals by incorporating due diligence mechanisms into their contract, which is also becoming an increasingly standard way of regulating supply chains. Besides, this report will also examine some more substantive approaches in order to unsettle the unchallenged doctrines and unlock the untapped potentials of contracts as a vehicle to promote non-extraction. I will take two examples – third-party rights (vs. privity of contracts) and just price rule (vs. procedural control of fairness) – to discuss whether substantive approaches are way too radical, or whether they actually find chords with the current legal system as well as the relational approach. The effect of these selected cases might be more salient in the context of global value chains, but the underlying problems are besetting our economy and society in general.

Sustainability due diligence obligations

Modern contract law features procedural control as opposed to substantive policing – party autonomy is upheld as long as the contracts are the product of (fair) bargaining processes without any vitiated consent. This philosophy makes procedural approaches like sustainability due diligence less intrusive to party autonomy and less irritant to the status quo. As such, it would be easier for the parties to include such terms into their contract without difficult and lengthy negotiation, and the court would also be less allergic to such incorporation of 'external' values. Moreover, as mandatory human rights due diligence legislations are on the horizon in more and more jurisdictions, putting due diligence obligations into the contract itself is also somehow pushed by the law, be it voluntary implementation or compelled compliance.

The American Bar Association has devised a template for human rights due diligence-aligned contracts in its Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0 ('ABA MCC 2.0'). It attempts to integrate the principles contained in the UNGPs and the OECD Guidelines into international supply contracts and displays three distinct new features.[85] Firstly, while contracts conventionally stipulate representations and warranties of human rights compliance by the supplier, coupled with strict liability for their breach, ABA MCC 2.0 requires the parties to take appropriate steps to identify and address adverse human rights impacts. Such best-efforts obligations seem to be better in line with the commercial

[85] David V Snyder, Susan Maslow and Sarah Dadush, 'Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0' (2021) 77 The Business Lawyer 115.

reality and the complexity of global supply chains, compared with empty promises and unrealistic strict liability.[86] However, the very 'best-efforts' nature – due to its incompatibility with classic contract law – could give the obligee an easy way out by ambiguating and lowering the required intensity of intervention. Second, upholding human rights in supply chains is the responsibility of both the supplier and the buyer, so ABA MCC 2.0 demands co-operation from both parties. This approach disallows the buyer from contractually outsourcing human rights obligations[87] and makes sustainability due diligence more practical as the buyer usually has more resources and capacities. Third, ABA MCC 2.0 prioritises the remediation of human rights harms (making things right again) over contractual remedies like damages and termination. As we can see, ABA MCC 2.0 is largely aligned with the relational enforcement we discussed and meanwhile exposes some deficiencies of the said approach.

An interesting stipulation worth mentioning is Art. 1.3(C) on 'pricing', which requires the contract price should be sufficient to accommodate 'costs associated with upholding responsible business conduct'.[88] The rationale seems to be, in a supply chain context, when the price duly reflects the costs of raw materials, the living wages of the workers and reasonable production hours, and other procedural costs, it would be fair. In other words, the price is fair when the procedure is just, and full due diligence compliance could ultimately translate into a fair contract price. In this way, the sensitive issue of price control is 'toned down' to the combination of a series of due diligence obligations reflecting responsible business conducts and a 'bridge' provision mandating the contract price to accommodate the costs of upholding those conducts. For some, such proceduralisation is a pragmatic way of trickling a new approach into the obstinate old system. For others, mere tinkering with the status quo – without reimaging what our economy and society are fundamentally about and for – will be efforts in vain. It urges us to reflect more on just price at the end of this part.

Privity and empowering third parties

The well-established principle of privity limits the effects of contracts to their direct parties. This means that the contractual parties are legally authorised (and encouraged) to scoop profits from socially realised contracts, while disregarding the interests of those outside the four corners of the contract, who may have borne the very brunt of the contractual externalities. For example, in cases where the standard of minimum wages is not observed,

[86] As pointed out by the OECD Guidelines, enterprises should '[c]arry out human rights DD as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts', see OECD, 'OECD Guidelines for Multinational Enterprises' 31.

[87] Note that Art. 22(2) of the draft Corporate Sustainability Due Diligence Directive allows for exemption of liability by contract cascading. From a co-operative perspective, such legal exemption also runs the risk of being abused as contractual evasion of human rights obligations, making a reframing of the draft provision or a careful interpretation crucial.

[88] 'Buyer shall collaborate with Supplier to agree on a contract price that accommodates costs associated with upholding responsible business conduct, [including, for the avoidance of doubt, minimum wage and health and safety costs, at a standard at least as high as required by applicable law [and International Labour Organisation norms]].'

though the buyer, as the immediate contractual party, may suffer reputational harm, it is ultimately the workers – who might depend on such income to support themselves and breed their family – that suffer directly from the violation. These already poor, marginalised and dispossessed 'third parties' could even end up losing their lives.[89] Privity provides a legal shield for extraction.

To address this, one way is to hold the contractual parties accountable by empowering the affected third-party victims. At first sight, since the doctrine of third-party beneficiary is widely recognised across different jurisdictions,[90] there should be few obstacles in enforcing third-party claims. However, a closer look reveals that the traditional approach to third-party rights in contract law is not readily available vis-à-vis sustainability clauses.[91] This is partly because the threshold of this doctrine is very high and hard to reach: it is generally required that the contractual parties should (1) have a clear 'intention' or make a binding 'promise' to confer litigable rights (2) to an 'identifiable' (group of) third party.[92] For the first test, intention or promise might be blurred due to the general and vague wording of the non-extractive terms. As to the second one, the fuzzy line between intended and incidental third parties also makes it difficult for the victims – especially the mass victims in global supply chains – to bring enforceable claims. For example, in the Walmart case,[93] the court argues that by reserving the 'right to inspection' in contract wording, Walmart did not assume the 'duty to monitor' and did not promise to affirmatively improve the suppliers' working conditions. The workers are thus rejected by the court. The strict test is valid for a seemingly good reason – to prevent an unpredictable chain of third parties to extort the companies for remotely relevant damage that could ultimately collapse the company. But, why is it so important to protect the 'legal certainty' of *one* business that justifies the staggering cross-subsidisation by *thousands of* victims?

The efforts to overcome these shortcomings can similarly be made both by the state and by the parties. On the part of the state, the underutilisation of the third-party beneficiary doctrine (especially in supply chain contracts) is less of a legislative lacuna but more of a judicial choice, or a political choice by the judiciary. The judges are making novel interpretations all the time – with the general framing of the third-party beneficiary doctrine, they can easily come to an interpretation that lends itself to the victims (for a change). From a relational perspective, third parties who are closely wedded to the contractual relationship constitute part of its context of interdependence that enables the contract's social realisation and thus should be given due care. In this light, in the Walmart case, the court could have

[89] See the 2013 Rana Plaza factory collapse in Bangladesh.
[90] For example, for US law, see §304 of the Restatement (Second) of Contracts. For English law, see Contracts (Rights of Third Parties) Act 1999. For German law, see Art. 328 et seq of the German Civil Code. For French law, see Art. 1199 et seq of the French Civil Code.
[91] Cristina Poncibò, 'A Contract Law for Future Generations' (2020) 2 Revija Kopaonicke skole prirodnog prava 35, 46.
[92] HG Beale, *Cases, Materials and Text on Contract Law* (Third edition, Hart Publishing 2019) 1259 et seq.
[93] *Doe I v Wal-Mart Stores, Inc* (2009) 572 F 3d 677 (Court of Appeals, 9th Circuit).

attempted to rule in favour of the plaintiffs by establishing that Walmart has promised to 'support' the observance of labour standards or has 'partially assume[d]' the supplier's obligation to the workers.[94] It is not a far-fetched stretching of the contractual wording, but it would indeed be a politically sensitive decision to do so. On the private parties' part, they could unequivocally bestow rights on third parties in their contracts, though it is hard to expect the contractual parties themselves to voluntarily take on such generous and restrictive obligations. It would be more effective if private initiatives or industrial associations could spearhead the efforts. The belated Accord on Fire and Building Safety in Bangladesh offers a bitter lesson – it was only after the tragic accident that the buyers finally agree on establishing direct binding relationships with the representatives of the workers in the participating buyers' supply chains.[95]

Just price in commercial contracts

Extraction has many faces, but all the varying forms ultimately funnel to financial extraction. Companies pay workers less than living wages to lower production costs and pollute the environment to freely outsource externalities. The extraction of value – mediated by the commodification of human and natural resources into quantifiable prices, wages and other fees – is the root cause of extractive economy. This is highlighted by Melanie Rieback, one of our PAR participants, who claims that the key to a 'post-growth' economy is 'to eliminate the financial extraction out of businesses'.[96] What she meant is not an outright eradication of for-profit entities but to keep profits within reinvestment margin and avoid shareholders from extracting financial benefits for their money-spinning speculation. It is only superfluous to reiterate that global value chains reek of top-down price squeezing and inequitable value distribution.[97] Thus, it is high time to reflect on the reawakening of a just price rule to directly address the root of extraction – just price is the core of just relations. Though it is 'distinctly unfashionable' to talk about just price,[98] we can no longer take for granted 'the idea that the law is today solely concerned with the bargaining process and not with the result'.[99] Since commodification also plays on the manipulation of market prices,[100] a revival of just price is also one possible pathway to contain further commodification in modern society.

[94] Joe Phillips and Suk-Jun Lim, 'Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees' (2008) 61 Rutgers Law Review 333, 371–374.
[95] This is done with a governance contract on top of each individual contract between the supplier and the buyer, see Jaakko Salminen, 'The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66 The American journal of comparative law 411.
[96] Post Growth Institute, 'Putting Post Growth Theory Into Practice' (*Post Growth Perspectives*, 19 July 2022) <https://medium.com/postgrowth/putting-post-growth-theory-into-practice-70033f334088> accessed 4 September 2022.
[97] For the garment industry, see 'Poverty Wages' (*Clean Clothes Campaign*) <https://cleanclothes.org/poverty-wages> accessed 4 September 2022.
[98] Robert Hockett and Roy Kreitner, 'Just Prices' (2018) 27 Cornell Journal of Law and Public Policy 771, 771.
[99] PS Atiyah, *Essays on Contract* (Clarendon Press 1988) 346.
[100] Christoph Hermann, 'A Theory of Commodification' in Christoph Hermann (ed), *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021).

Historically, the idea that the contractual price has to be just and reflective of the fair exchange is not unknown. Under the Roman rule of *laesio enormis*, the buyer is entitled to rescind the contract if the purchase price paid was lower than half of the value of the thing sold.[101] Such notion of *iustum pretium* was further promulgated by Thomas Aquinas in the Middle Ages and later endorsed by natural law scholars. Islamic law[102] and Chinese law[103] also have a long history of policing prices. For example, the *Guanzi* (管子) justifies price regulation based on the 'light–heavy' (轻重, *qingzhong*) principles, arguing that the state should intervene in the market of 'heavy goods' – important, essential commodities – to stabilise the economy as a whole.[104] Private law in contemporary times attaches great importance to price justice as well. Despite the *laesio enormis* rule no longer being explicitly recognised in most civil law jurisdictions,[105] they do emphasise the requirement of reciprocity (*synallagma*) in bilateral contracts and impose mandatory rules to undo manifest disparity.[106] Common law also forbids unconscionable dealings to ensure adequate consideration.[107] Section 36 of Nordic contract law even provides a general clause to rectify 'unreasonable' contract terms, including price terms.[108] Outside general contract law, rules concerning minimum wages, rent control and maximum interest are found in most jurisdictions. EU law has mostly sidestepped the sensitive issue of price control such as the exclusion of price terms under the Unfair Terms Directive, though the CJEU has recently been dipping its toe back into this field.[109]

Although price-related rules are pervasive in history and positive law, most legal systems continue to resist the idea of a substantive just price rule. For one, doctrinally, modern contract law tends to regulate price fairness with a subjective approach: unless one party exploits in bad conscience the other party's inferiority in bargaining power, lack of experience or state of financial distress, an objectively unfair price would not in itself be automatically unenforceable.[110] In other words, as long as the price is 'freely' negotiated, the law is blind to its objective fairness. However, in an economic system that systematically runs on the economic distress of the people, it is tricky to argue, for example, that someone in dire need

[101] Alan Watson, 'The Hidden Origins of Enorm Lesion' (1981) 2 The Journal of Legal History 186, 186–187.

[102] Hussein Hassan, 'Contracts in Islamic Law: The Principles of Commutative Justice and Liberality' (2002) 13 Journal of Islamic Studies 41, 277 et seq.

[103] For example, Section 419 of Tang Code (唐律, tanglv) and its official Commentary (唐律疏议, tanglvshuyi) provides that it is deemed embezzlement if the price of the thing sold is too high or too low, as evaluated by the market officials, and distorts market price; it is deemed theft if one party holds the price difference for his own benefits.

[104] See Isabella Weber, 'China's Ancient Principles of Price Regulation through Market Participation: The Guanzi from a Comparative Perspective' [2021] Economics Department Working Paper Series.

[105] For example, Art. 934 of the Austrian General Civil Code, Art. 1674 et seq of the French Civil Code and Art. 2589 of the Louisiana Civil Code.

[106] Article 4:109 PECL, Article 3.2.7 PICC, Article II-7:207 DCFR, Article 51 CESL.

[107] Beale (n 94).

[108] See Hilde Hauge, 'The Norwegian Application of the Contracts Act Section 36' (2020) 28 European Review of Private Law 543.

[109] See infra fn 123 and accompanying text.

[110] Horst Eidenmüller, 'Justifying Fair Price Rules in Contract Law' (2015) 11 European Review of Contract Law 221–222.

of a job for survival 'freely' enters into a contract offering minimum wage. In this sense, the said provisions policing gross disparity and unfair exploitation are oblivious to structural types of inequalities.[111] For another, an institutional argument has also been made that it is impractical for courts to review all contract prices with costs borne by society, and such excessive judicial intervention will result in unbearable legal uncertainty.[112] However, legal techniques like presumption[113] or hypothetical bargains[114] provide familiar tools for operationalisation similar to unfair terms control. Legal realists and critical scholars would even argue that judges are always guided by substantive justice standards – they are already policing prices anyway.[115]

More fundamentally, the procedural approach underpins our collective 'imaginary' of a liberal market society, where autonomous parties are their own agents and should be unhampered by the state to decide what is best for themselves.[116] Thus, prices are not imposed or forced but 'just happen' spontaneously – as the result of the decentralised and uncoordinated interactions between formally equal 'price-takers' in a competitive market.[117] However, it is submitted that the just price rule actually reinforces free market and its pricing mechanism, by introducing a normative benchmark and pitting each individual price against the generally established market price.[118] Besides, we can go one step further by questioning the liberal conception of markets as such. Markets are never a natural, uncoordinated self-regulating system. Instead, they are legally constituted, and the more advanced a market is, the more convoluted legal apparatuses are needed to uphold the market 'freedom'.[119] In other words, what is considered 'freedom' is not a given but a policy reaction to market dynamics. Accordingly, prices are also engineered by collective and public institutions.[120] As such, when prices fail to facilitate self-governance and social justice, the very shaping forces of prices in the first place should regear price engineering towards justifiable goals. For example, in light of the current global cost-of-living crisis, a (re)consideration of 'strategic price controls' on

[111] Marija Bartl, 'Private Law and Political Economy' (1 February 2023) <https://papers.ssrn.com/abstract=4344615> accessed 2 February 2023. Also see, Robert L Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 Columbia Law Review 603.

[112] MW Hesselink, 'Unfair Prices in the Common European Sales Law', *English and European perspectives on contract and commercial law: essays in honour of Hugh Beale* (Oxford Hart Publishing 2014) 234–235.

[113] For example, it could be rebuttably presumed that prices that significantly deviate from the market price which is established by free competition are unfair, see ibid 235–236.

[114] See Case C-415/11 (Aziz).

[115] On the Critical Legal Studies camp, see, for example, Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard Law Review 1685.

[116] See, for example, Hans Erich Brandner and Peter Ulmer, 'The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission' (1991) 28 Common Market Law Review 655–657.

[117] Daniel Markovits, 'Market Solidarity: Price as Commensuration, Contract as Integration' (New Haven, 1 April 2013). Also see, Hockett and Kreitner (n 101) 773–781.

[118] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1619.

[119] Bartl (n 114); Pistor (n 41).

[120] Hockett and Kreitner (n 101).

sectors that drive inflation – especially the 'systemically significant prices'[121] – could be a way out.[122]

The issue of pricing justice is even more intricate in the context of global value chains. To begin with, it would be staggering to ignore the significant power imbalance in global value chains and insist that prices are autonomously determined by the parties' free negotiation. Moreover, 'just price' in this context not only entails inter-partes justice, but it is also expected to safeguard fairness for all actors beyond privity. For example, a 'just price' in supply contracts should ensure a 'just wage' to workers in downstream factories who have been denied living wages. But how to operationalise this? Who should be responsible for its compliance? And who should be responsible for its non-compliance – with the interconnectedness of social cooperation and tainted products passing along the chain, how far could the responsibility reach? Such complexity plagues the institution of fair pricing in global value chains. Moreover, value chain justice straddles private and public realms. Ideally, public and private actors would collaborate to address the injustices in value chains. A just price rule could be most helpful where private companies could be expected to remedy state failures. However, a private rule of just price might be overburdensome for some companies while blurring and even obviating the public obligations of the state to protect human rights.

Given the political and ideological sensitivity, how should we reconsider the just price rule today? I have no conclusive answer so far, but a few EU law cases are in order for reflection. Firstly, by the same token as the ABA MCC 2.0, price control can be proceduralised into the framework of EU sustainability due diligence legislation. Secondly, though price terms are in principle excluded from the Unfair Terms Directive, the CJEU has been mobilising the transparency requirement under the Directive (a procedural or formal requirement) to expand its remit to substantive control of price terms.[123] Thirdly, the approach undertaken by the Unfair Trading Practices Directive further extends fairness safeguards from consumers to downstream suppliers in supply chains (in the agricultural sectors), which prohibits certain contractual terms and practices, including pricing terms.[124] A stronger governmental role is assumed to further correct the power imbalances in the market and shape economic relationships.

[121] Robert C Hockett and Saule T Omarova, 'Systemically Significant Prices' (2016) 2 Journal of Financial Regulation 1.

[122] Isabella Weber, 'Could Strategic Price Controls Help Fight Inflation?' *The Guardian* (29 December 2021) <https://www.theguardian.com/business/commentisfree/2021/dec/29/inflation-price-controls-time-we-use-it> accessed 27 February 2023.

[123] See Case C-186/16 (Andriciuc). Also see Candida Leone, 'Transparency Revisited – on the Role of Information in the Recent Case-Law of the CJEU' (2014) 10 European Review of Contract Law 312.

[124] 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' (Social Science Research Network 2019) SSRN Scholarly Paper 3380355 <https://papers.ssrn.com/abstract=3380355> accessed 19 May 2022.

Final Remarks: Reimagine Contracts

In this report, we repurpose commercial contracts as a relational governance device with a hybrid compliance mechanism. In this way, contracts are no longer a stack of documents hidden deep in the drawers but a handbook that the parties can consult on demand to better navigate their purpose-driven co-operation. This report offers some guidelines for non-extractive entities who are struggling to find their way around non-extractive business practices. It especially sheds light on how to make contractual inroads where legal systems have lagged behind or have stifled innovative non-extractive practices. This report is also a policy proposal calling for reform of contract law and adjudication to make non-extractive contracting an easier and more attractive option for all business operators.

More importantly, against our broader vision of a non-extractive economy, non-extractive contracting opens the gate for us to reimagine contracts as part of the enabling toolkit. From an exchange tool with the parties in oppositional positions, we can start to see contracts as a relational device where the parties attend to and care for each other. As opposed to sanctifying the principle of privity as a backdoor to externalise costs, we should integrate third-party interests and broader social values into the contractual framework. Instead of focusing on the conformity of the final deliverables, we should put the whole co-operation process into the realm of contracts. Rather than relying on remedies to make good the loss, we should combine informal and formal mechanisms to ensure better compliance. At the end of the day, contracts are no longer solely driven by an economic engine to amplify commodifying capitalism; they evolve into a governance vehicle that embeds and fuels non-extraction by bringing care, purpose and ethics back into the human relationships of our times.