

Contractual governance of sustainability

Challenges and prospects

Maria Edith Lindholm Gausdal
PhD, Assistant professor in private law and
sustainability
Centre for Private Governance (CEPRI)
maria.edith.lindholm.gausdal@jur.ku.dk

KØBENHAVNS UNIVERSITET



Introduction

- 'Sustainability contract law' from ca. 2015 - international research - scepticism
- Accelerated development over the last decade (UNGP's)
- Corporate sustainability due diligence directive
- Recent contract practice and theory: Polarity but movements towards *alignment* between contract-internal and contract-external rule systems.
- No longer **if**, but **how**...

Sustainability clauses

Contract-externality

- Standards derived from conventions/treaties
- Promotes public interests
- Favours unspecified group
- Legality/penal sanctions/prohibition/ control
- Legitimacy
- Jurisdiction

Contract-internality

- Autonomy
- Relativity
- Mutual optimization
- Catering to narrow transactional considerations:
- Price - time- location - quality
- Private law enforcement

If the clause fits...

"Environment

Businesses ***should*** (...) ***support a precautionary approach*** to environmental challenges, ***take initiatives to promote*** greater environmental responsibility, and ***encourage*** the development and deployment of environmentally friendly technologies"

Increased specification of standards

C029 - Forced Labour Convention, 1930 (No. 29) – translates to:

“Employment which confines the employee in unreasonable debt bondage, for example, ***through fee-charging employment agencies*** is prohibited.”

“Supplier shall not use forced labour, and employees ***shall be free to leave their employment*** after reasonable notice as required by national law or contract. Employees ***shall not be required to lodge deposits of money or identity papers*** with their employer”

Don't mess with my brand...

"In case of non-fulfilment of the foregoing obligations, Company shall be entitled ***to rescind the contract with immediate effect.***

In addition, the Contractor shall be ***obliged to pay per infringement a contractual penalty of 5% of the contract price but Euro 20,000 at a minimum*** which shall be used by Company for a humanitarian purpose beyond the enterprise of the Company.

By payment of the contractual penalty Company shall not be hampered ***to claim any damage exceeding the contractual penalty.***"

Towards alignment

- Reputational risk significant! Commercialisation and contractualisation of public interests...
- Densely regulated society + trade is transnational
- Societal/service/goods complexity → Standardisation

'The Supplier shall ***comply with the Business Principles of Alfa Laval.***
The Supplier shall in relation to the Goods and supply of Goods comply with all applicable laws, rules and regulations, and any ***industry and purchaser standards***, codes and requirements, relating but not limited to: ***ISO 14001:2004 and ISO9001:2008 environmental and quality system standard...***"

Towards alignment

- Consideration for the commercial chain of transactions (network)
- Duties of good faith and cooperation
- Sustainability enforcement schemes interpreted as affirmations of the importance of the protected interest
- Regulatory requirements accepted unequivocally as objects for contractual regulation
- Sustainability clauses deemed equal to 'normal' commercial terms

Rt. 2002 1155 - SH 73/06 -SH V-23-16/ØL/ B-1219-17 - Tfl 2012 294 Ø - UfR 2009.1598H
- Dansk Byggeri v. Region Hovedstaden - Paranova (Retten i Jönköping)

Hansen/Gausdal (2023), Gausdal (2021)

Climate change clause 1

Climate Risk Co-operation

The parties agree and acknowledge that this Agreement is of significant commercial value to each of the parties and that ***neither party should bear the entire risk of a Climate Change Event occurring.***

If a party's Disruption Liquidity Ratio is less than xx, the parties' finance directors shall discuss in good faith ***an amendment to the payment terms*** under this Agreement by a reasonable additional period (up to a maximum of xx days) ***to assist each party to maintain an Operating Cash Flow sufficient to meet its Current Liabilities*** and therefore avoid any Adverse Social Outcome, e.g. ***the insolvency of a party, that could be caused by cash flow problems.***

Climate change clause 2

3.2 To avoid an Adverse Climate Outcome from ***wasted Embedded Carbon resulting from a Climate Change Event*** the parties shall ***collaborate to consider and implement solutions*** to mitigate the Adverse Climate Outcome and either party may by written notice to the other party request that it:

- (a) stops providing the affected [Products/ Services] during the Period of Disruption without terminating this Agreement;
- (b) offers to sell the affected [Products/ Services] to other customers and provide a corresponding payment discount to the notifying party;

Co2 – inherent difficulties?

“The purchase of carbon offsets, e.g. by planting forests abroad, ***will not reduce CO2 emissions in the municipality, but rather somewhere else in the world***, and ...the municipality thus, by purchasing carbon offsets, performs a task that can ***only or essentially be considered to be of interest to citizens outside the municipality.***”

Co2- inherent difficulties

"...The court considers that an important characteristic of the imminent environmental damage ***..is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.***

However, ...that RDS ***is not the only party responsible*** for tackling dangerous climate change in the Netherlands and the Wadden region ***does not absolve RDS of its individual partial responsibility.***"

Key points

- The desired dual regulatory framework for sustainability (private governance) requires alignment between societal objectives and corporate consideration
- Significant regulatory differences exist between public regulation and commercial agreements
- Movements towards alignment in contract law and contractual practices can be traced
- Significant legal challenges of both public law and contract law nature

Thank you for the attention!

Sources

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Dansk Byggeri v. Region Hovedstaden:

<https://klfu.naevneneshus.dk/afgoerelse/0c34dbc6-9ba6-4bb5-917d-a372beb37d76?highlight=dansk%20byggeri>

Dom nr. 31081–14, 18 April 2018, Paranova Läkemedel v Jönköping, Kalmar and Östergötland Läns Landting.

Ankestyrelsens udtalelse af 6. marts 2020:

<https://ast.dk/tilsynet/udtalelser/udtalelседatabase/udtalelse/0ce0c72a-91d7-4751-80c2-6379324acc69>