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II.2. THE CHANGE OF COMMERCIAL CONTRACTUAL RELATIONS INFLUENCED BY SUSTAINABILITY CLAUSES

Sustainability goals – the reality of the modern business world

The Cambridge Dictionary (n.d.) defines *sustainability* as "the quality of being able to continue over a period of time." Doubtless, sustainability is now often understood in a slightly different sense. One of the core documents defining the sustainability goals of the United Nations describes *sustainable development* as that which "meets the needs of the present without compromising the ability of future generations to meet their own needs" (World Commission on Environment and Development 1987, p. 2). Mostly, it is associated with the activities of various stakeholders intended to reach the pursued environmental and social objectives. However, in certain cases it even goes beyond that. For the purposes of this chapter, the topic of sustainability clauses in business contracts will be analyzed and explained in close connection with corporate social responsibility (CSR). These definitions are not used interchangeably; the proximity and importance of each one of them to the other is noted. Corporate social responsibility (CSR) is "(…) a business practice that considers the impact a company has on society, employees, and other stakeholders. A CSR strategy is implemented by an organization to: minimize harm, practice fair business, be responsible along a global supply chain, exercise philanthropy and create a self-oriented human resource management system" (Green Business Bureau 2022).

For the sake of clarity and the precision of terminology, there is a need to define the term *commercial* used in this chapter. The term *commercial* should be explained, as it can have different meanings in various jurisdictions. The term *commerce* can be defined as activity that includes all forms of the purchase and sale of goods and services (Butterfield 2003, p. 340). The legal doctrine of Lithuania defines commercial activity as a permanent, independent, i.e., personal, activity that is developed at one's own risk in order to make a profit, and that is related to buying and selling things or providing services to other persons for remuneration (Mikelėnas *et al.* 2001, p. 23). In this article, commercial contracts shall be defined as contracts concluded between businesspeople (business-to-

business or B2B contracts). However, it cannot be doubted that sustainability goals are included not only in commercial contracts, but also in other types of agreements. Nevertheless, they are beyond the scope of this chapter.

Scholars point out that "currently, increasing attention is being paid to the issues of sustainability and social responsibility. The measure of a company's success is not only its profitability, but rather its overall evaluation relies on quantitative and qualitative characteristics, increasingly reflecting the company's interaction with its surroundings" (Myšková and Hájek 2018, p. 1). Furthermore, as the pursuit of sustainability may conflict with the pursuit of profit, the general perception and consciousness of business society must change. This tendency has an obvious impact on commercial contracts and their execution.

On the other hand, most businesspeople are used to clear and specific clauses in their contracts. However, contractual clauses defining parties' obligations in the area of sustainability (sustainability contract clauses) are usually not clear and precise. Moreover, the content of such obligations differs from the other commercial and legal clauses in the contract, leading to confusion and uncertainty regarding full compliance with such sustainability obligations. Sustainability goals are pursued not only by the policies of governments and supranational institutions, but also by the conduct of businesses. Sustainability contractual clauses may be included into commercial contracts even in cases when their inclusion is not mandatory under applicable laws and regulations. Such clauses are relatively new to commercial contractual practices, and contract parties deal with great uncertainty related to them.

Contractual regulation is mainly influenced by three major contract law theories: classical, relational, and social contract law doctrines. The ground rules of contract law were established by the traditional (classical) contract law instruments – starting with the norms establishing freedom of contract and *pacta sunt servanda*, as well as the privity of the contract and clear consequences in case of non-compliance. Relational and social contract law theories reflect modern tendencies and changes, considering the external factors of the contractual relationship and, going even further, requesting the consideration of the interests of the society, even if the contract is purely private and commercial. This chapter reflects some of the aspects of sustainability contractual obligations in the view of each of these contract law theories, explaining how sustainability contract clauses deviate from conventional classical contract law instruments and, in other cases, how sustainability objectives pursued by businesses reflect the relational and social contract law theories as an example of their influence on modern contract law. It is expected that such an explanation with a theoretical background will help to understand how sustainability contract clauses should be applied.

Thus, the aim of this chapter is to reflect on the peculiarities of sustainability contract clauses, showing the difficulties in their application induced by deviation from classical contract law rules and suggesting probable solutions via the consideration of how they reflect relational and social contract law doctrines.

The commercial contract as a tool to aim for sustainable trade

Sustainability has become a goal for most national governments and supranational institutions. The European Union is one of the best examples of this, giving attention to sustainability as an objective of its policy. The consolidated version of the Treaty on the European Union (2008, Article 3(3)) states that "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

Furthermore, Article 37 of Charter of Fundamental Rights of European Union (2012) states that "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." It is declared that the sustainability policy of European Union institutions aims to create a business environment, ensuring not only growth, job creation, and innovation but also supporting the shift to a climate-neutral economy and improving the energy efficiency of products using eco-design regulation (European Commission, n.d.). In this way, the execution of commercial activity following sustainability objectives is becoming an everyday task for businesses in the European Union. Some businesspeople introduce sustainability goals into their strategic plans and publicly announce their sustainability programs, inviting or even demanding current and future counterparties to seek the same goals. Others move forward and include such obligations into their commercial contracts.

Various policies applied within a country or even internationally embody these goals through mandatory legislation and control over their implementation. However, such goals can not only sometimes be hard to achieve due to the shortcomings of legislation and its inability to control implementation, but the restricted scope of mandatory regulation can even limit the possibilities of a particular policy. In some cases, voluntary and profit-driven initiatives can produce the results which were intended by policy makers. The introduction of such goals into commercial contracts can be called "(…) a form of transnational private regulation (TPR) that complements both public-domestic and international regulations. These are voluntary standards implemented along global chains with multiple instruments, including international commercial contracts. Supply chains, involving many thousands of enterprises, operate across multiple jurisdictions, where public regulations can significantly differ. Hence private regulatory regimes have trans-border scope and include multiple jurisdictions, harmonizing (often with stricter standards) public domestic regimes. Governing a common standard implies not only defining its content but also taking actions related to non-compliance, including enforcement and sanctioning. Differences in public regulation can be even more substantial

in relation to monitoring compliance where national practices may significantly diverge" (Cafaggi 2016, pp. 219–220). Such tendencies may seem highly influential, and have great potential to affect the market by shifting the mindset toward setting sustainability goals at every stage of the business process.

Despite this, as pointed out by K. P. Mitkidis, there is a significant contrast between the legitimacy of national and international law, both of which are derived from the state's authority vested in it by the governed subjects. Regulation at the transnational level lacks such authority, and the legitimacy of transnational corporate social responsibility regulation is uncertain. As a result, this leads to its lower effectiveness, which is undermined further by the lack of verifiable reporting and monitoring systems. The results of the implementation of corporate social responsibility are most often monitored through audits, which are conducted without any connection to public authorities (Mitkidis 2014, p. 7). This means that the results of the pursuit of sustainability stay within the particular business relationship and depend on the free will of the contract parties. However, such privacy does not mean that the significance of sustainability tendencies and their influence on commercial contracts should be ignored. Furthermore, one of the most significant challenges is the conflict between pursuing profit and implementing sustainability goals. In most cases, such implementation is a costly process. As will be discussed later, the frequent use of sustainability contractual clauses in commercial transactions and the actual monitoring of compliance will induce businesspeople to follow such agreed rules. This will lead to the improvement of the status of sustainability even without public data.

Revealing the weak aspects of the implementation of sustainability allows us to assess its actual state and understand the intensity of change. The author of this article unquestionably agrees with C. Poncibo (2016, p. 353), that "The objectives of sustainability policy, especially with respect to the environment, impliedly and expressly enter the domain of contract law." This idea can be supported by the fact that sustainability contract clauses "(…) are not a sporadic but widespread phenomenon. (…) The widespread use of sustainability contractual clauses means that certain best practice has or is developing in this respect. Thus, it is easier to build upon an already started trend than to impose new obligations upon companies" (Mitkidis 2014, pp. 10–11). As will be demonstrated later in the article, the more frequent the inclusion of sustainability obligations in commercial contracts, the more impact sustainability will have on contract regulation through norms such as implied contract terms or trade customs and standard practices.

Classical, relational and social contract law theories and sustainability

Sustainability clauses as deviations from classical contract law rules

Current contract law is still strongly defined by the ideas of classical contract law theory, the main tenets of which are party autonomy and contract freedom, as well *pacta sunt servanda*. P. S. Atiyah (1995) points out that, according to the classical (also called traditional or liberal) concept in which

the general principles of contract law are identified with the foundations of the market economy, the contractual relations of individuals were based on several essential rules: the parties in contractual relations were guided by the "at arm's length" rule, stating that each party relies on its skill and judgment and that neither party owes any fiduciary duty to the other.

During negotiations, the parties negotiated on the price and terms of the transaction, offers were submitted, accepted, rejected, or counteroffers were made, and neither party had an obligation to disclose information to the other party voluntarily, nor did either party have the right to trust the other party, except in extremely narrow exceptions. On the contrary, the author points out that each party had the right to inquire about and evaluate the fact of non-disclosure of information, analyze the situation, evaluate the object of the contract, the general market situation, future opportunities, and trust the sources of information. It had the right to negotiate, consult with experts, and acquire information for a fee from third parties; therefore, if the party did not do this, it was recognized that this party acted at its own risk (Beale, Bishop and Furmston 2006, pp. 47–48). The sanctity of the contract – the requirement to strictly comply with the provisions of concluded contracts – is also considered a fundamental idea of classical contract law (Atiyah 1995, p. 8). Such strong separation of the parties to the contract, clarity of obligations and strict compliance with them, as well strict liability for violations may be not so easy to implement in the case of sustainability obligations in business contracts, especially in supply chain cases, where there are multiple participants in the chain.

The language defining the sustainability obligation in commercial contracts may be relatively different in comparison with commonly used clear and precise contractual terminology. This is determined by the unclear definition of sustainability as a concept, as well as the vague national, international or supranational regulation of sustainability policy. As K. P. Mitkidis points out, the conventional economic rationale of businesspeople determines actions towards avoiding the costs and risks of litigation by formulating contractual terms that are as precise as possible, but there are reasons why companies choose to adopt vague contractual terms. Such reasons may vary significantly – from low negotiation power, to a weak corporate social responsibility strategy, to the clear objective of retaining the flexibility of the contract. As it is hard to control and measure compliance, businesspeople define the obligations of the counterparty in vague terms in order to communicate values to the partner rather than to future judges in the potential dispute (Mitkidis 2014, pp. 15–17). In this respect, this tendency greatly differs from the ideas and common practices under classical contract law doctrine, which is oriented towards clear obligations and negative consequences in the event of failure to comply. According to classical contract law theory, the duty of a judge is to ensure that the common will of the parties which existed at the moment of the conclusion of the contract is established and legally protected. For this reason, businesspeople are encouraged to use terminology that is as precise as possible.

Despite the ambiguity of definitions, the express inclusion of sustainability obligations in the commercial contract is a more efficient way to ensure compliance with them. In the words of K. P. Mitkidis (2014, p. 25), "Such formal and conscious acceptance of the terms as a part of a business deal is likely to increase the internalization of the values and goals by the supplier. (…) A signature may seem unimportant if the incorporated standards are drafted in vague terms; but it makes a clear, almost symbolic demarcation of what is considered a part of the deal and, therefore,

ethically binding." For this reason, businesses aiming for the greater efficiency of sustainability contractual obligations should define clear goals to be achieved by the contract parties, set negative consequences in the event of a breach, and choose contract language that is as precise as possible. In this way, sustainability contractual clauses would be more legally protected by the instruments inherent to classical contract law – for example, contractual penalties.

The specificity of sustainability contractual obligations and their differences from the provisions of classical contract law are particularly reflected when assessing the beneficiaries of such obligations and the consequences of breaching such sustainability contractual obligations. They will be discussed by analyzing relational and social contract law theories. Despite this, it may generally be concluded that sustainability contractual obligations are more akin to exceptions in the view of classical contract law doctrine – the introduction of sustainability goals into commercial contracts shows deviation from the traditional point of view. Thus, such differences may imply difficulties in applying legal instruments attributed to classical contract law doctrine (for example, general rules of contractual liability).

Achieving the sustainability goals using the methods of relational contract law

Relational contract law theory is based on the general idea that a contractual relationship is determined not only by the terms of the concluded contract, but also by a very broad spectrum of circumstances and aspects, which may even be external to that contractual relationship. Moreover, according to J. M. Feinman, the essential statement of the relational contract law doctrine is the idea that the basis of the contract is the cooperation and cooperation-based behavior of its parties: contracts are characterized by intense mutual relations formed during the contract's validity. The content of the contract's provisions is determined according to the relational method, which means that obligations arise not only based on the express terms of the contract, but also because of many external circumstances. Such ideas differ from the characteristics of classical contract law, which states that parties are not bound by unnegotiated obligations, and the neoclassical idea that self-interest is limited only by trade customs and legal regulation (Feinman 2000, p. 743).

According to P. Gudel, during the validity of long-term contracts, the content of the contractual obligations changes, and this cannot always be determined solely by the will of the parties at the time of concluding the contract. Such content must also be determined based on other factors – not only the norms expressly introduced or implied in the contract between the parties. Relational contract law moves away from the significance of the initial promise, and emphasizes that expectations also arise based on the cooperation of the parties, i.e., continuing relations. For this reason, the contractual relations of the parties are regulated not only by their contract but also by customs, traditions, and other external circumstances (Gudel 1998, pp. 769–792).

Such ideas of a cooperative approach and the notion of attention being paid not only to the results but also to the execution process correspond to sustainability obligations and the specifics of their performance in commercial contracts. Sustainability obligations in commercial contracts require parties to consider the counterparty's values. Moreover, they require close cooperation. "Generally, the goal to pursue sustainable development goals seems to favor the assessment of

contractual obligations under a 'cooperative ethics' approach – that is, one in which contracting parties are expected to cooperate especially in a long-term contractual relationship and in a supply chain. This approach is central to the relational theory of contract. It views the formal legal infrastructure governing the contractual relationship as being of secondary importance compared to informal norms of decency, solidarity and cooperation. Under this conventional understanding, resorting to the formal law of remedies upon breach misses the mark: instead of reflecting the parties' on-going commitment to promoting their goals through cooperation and mutual agreement, such a move reflects a diametrically opposed set of values" (Poncibo 2016, p. 350). As mentioned above, the traditional (conventional) approach towards remedies is inherent in classical contract law doctrine, which promotes the clarity of obligations as well as the clarity of negative consequences in the event of non-compliance. Furthermore, the values and ethics of the counterparty, as a general rule, should not interest the party to a contract, except in cases of illegal behavior – for example, deceit.

The cooperation requirement is also clearly reflected in the process of monitoring compliance with the sustainability standards agreed by the contract parties. This may become particularly important when the sustainability of a product or service offered in the market is claimed publicly. For this reason, the attention paid to the traceability of compliance with sustainability contract terms is increased. As such, "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. Traceability systems can help companies fulfil their sustainability promises by providing a means of assuring sustainability and by generating data that can be shared with the stakeholders" (United Nations 2014, p. 21). In this respect, the possibilities of modern technologies are involved in making the process highly efficient. For example, it is noted that smart contracts may potentially have a great impact on monitoring compliance with sustainability contractual obligations as they ensure the quick automatic exchange of information (Salmerón-Manzano and Manzano-Agugliaro 2019, p. 4).

Sustainability contractual clauses significantly differ in the aspect of consequences in the event of their breach. Being regulatory provisions, they "(…) focus on compliance and when breaches occur require corrections rather than compensation for harm. They are prospective rather than retrospective. Their goal is not to risk allocation but ensuring compliance with the standard. The regulatory function in global supply chains calls for wider and more effective collaboration among segments of the chain located in multiple jurisdictions" (Cafaggi 2016, p. 228). This means that requests for compensation or a contractual penalty (the remedies of classical contract law theories) are not inherent, as after the breach of a sustainability contractual clause such instruments do not influence sustainability itself. Instead, they merely improve the financial state of one of the parties and operate as a measure of prevention against future non-compliance. As mentioned above, companies aiming for sustainability in business processes seek correction. Such instruments are relational. "For example, the most common tool that companies use is a 'corrective action plan,' under which the parties agree what the supplier must do to remedy the breach. Sometimes, the buyer will even provide a supplier with capacity building resources, such as training or assistance. Relational remedies

are essential in promoting sustainability goals through contract law and that they are also available when these goals are not enforceable by traditional remedies. However, although neither companies, nor regulators stress it, the effectiveness of the relational tools is grounded in the threat of formal legal sanctions. This reliance on the indirect enforcement power of formal legal sanctions is evident from the frequent reservation of the right to terminate a contract if the supplier's non-compliance status is not remedied" (Poncibo 2016, p. 351). F. Caffagi (2013) also notes that "Different, and at times even divergent, remedial logics are in place. While remedies in contract are still primarily aimed at compensation for damages related to the breach, regulatory sanctions are directed to ensure compliance with standards all along the supply chain. Thus, they combine a deterrence and sanctioning function focusing on hazard detection and correction. Regulatory provisions impose joint problem-solving procedures that might be at odds with the conventional binary allocation of responsibility between sellers and buyers in more conventional commercial settings. Regulatory sanctions in social, environmental, and safety standards target individual responsibilities for monitoring and mitigating negative consequences stemming from breach" (p. 1617).

The same reasoning applies to the termination of the contract as a negative result of non-compliance with sustainability contract clauses. Scholars note that contract termination in such cases is ineffective if a contract party is interested in reaching a higher sustainability level in business. Contract termination does not motivate the counterparty to change its behavior in the future. In this respect, the possibility of contract termination operates as a deterrence tool rather than an actual relationship termination possibility (Mitkidis 2014, p. 22). Despite this, being entitled under the express terms of a contract to terminate a relationship in the event of non-compliance with sustainability clauses is significant if it is obvious that the counterparty is not able or not willing to improve their behavior. Due to the fact that sustainability obligations are often not related to the direct objective of the commercial contract, it may be hard to prove that there are grounds for contract termination under the general clauses of contract law determined in national legal systems. For example, article 6.217 (1) of the Lithuanian Civil Code (2000) states that a party may terminate a contract if the other party does not fulfill the contract or fails to fulfill it properly in a manner that is a fundamental breach of the contract. The circumstances in which a breach is qualified as fundamental are mostly related to the main objective of the contract. This means that if a supplier delivers goods in a timely manner and the quality of goods corresponds to the agreed contract terms, but it turns out that the delivery process was very unsustainable (for example, environmentally unfriendly vehicles were used), it would be hard to prove the existence of a material breach of the contract unless the parties expressly defined the delivery process in the agreement. The principal obligation of the supplier here is to deliver the goods of requisite quality in a timely manner, and the supplier has complied with it. As long as sustainability contractual obligations are ancillary, in most cases only express contract terms stating that a breach of sustainability contractual obligations will be considered a material breach of contract will guarantee, at least to some level, that non-compliance will be qualified as such.

The ideas of relational contract law theory are also reflected by considering the possibility for sustainability objectives to be pursued by the parties, since they may be implied. Implied contract terms are a widely known contractual concept in national legal systems (for example, Article 6.196 of the Lithuanian Civil Code) as well as *soft law* documents (for example, Article 5.1.2. of

the UNIDROIT Principles of International Commercial Contracts, hereinafter referred to as the UNIDROIT Principles) (International Institute for the Unification of Private Law 2016). Such legal norms are also found in other soft law documents, such as article 6:102 of the Principles of European Contract Law (hereinafter referred to as the PECL) (Commission on European Contract Law 2003) and Article II. – 9:101 of the Draft Common Frame of Reference (hereinafter referred to as the DCFR) (von Bar *et al.* 2009). It should be noted that a contract party can expect a counterparty's behavior under implied contract terms only if such an expectation was obvious and agreed but not included into the express terms of the contract. The official commentary of Article 5.1.2. of the UNIDROIT Principles provides an explanation: "The implied obligations may for example have been so obvious, given the nature or the purpose of the obligation, that the parties felt that the obligations 'went without saying.' Alternatively, they may already have been included in the practices established between the parties or prescribed by trade usages according to Article 1.9. Yet again, they may be a consequence of the principles of good faith and fair dealing and reasonableness in contractual relations" (International Institute for the Unification of Private Law 2016, p. 152).

Some authors state that in the area of international contracts of supply, the requirements of sustainability followed by the parties may become an implied part of the contractual relationships without express acknowledgment in the terms of the contract. Sustainability requirements must be complied with if such business conduct has previously been followed as an established practice, as well if such behavior has come into international trade usage (Mitkidis 2014, p. 14). Nevertheless, the expectation of a contract party that the counterparty will act in compliance with sustainability requirements if such requirements are not expressly defined in the contract should be legally protected only if such practices were in fact obviously established by the parties or have become common in the area of trade in question. As was cited previously, the drafters of the commentary of the UNIDROIT Principles gave an example of the obviousness of such an establishment. This means that the expectation should be obvious for the major part of the businesspeople acting in a particular trade area. Such generality is hard to measure and prove. However, if (or, perhaps, when) sustainability goals and/or practices become a common widespread reality in trade (or at least particular areas of it), the United Nations Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT, PECL, as well as DCFR may become the tools of the application of sustainable contracting. Moreover, as C. Poncibo argues (2016), "(…) the way of producing the goods influences their value on the market: a buyer may be willing to pay a higher price for goods manufactured and traded by respecting the environment and other values. Following that reasoning, one may say that the goods produced under conditions violating these goals are not of the quality impliedly asked under the contract (Article 35(1)-(2) CISG)" (p. 348). In such a case, sustainability may even fall under the legal norms of implied warranty.

It can be concluded that the current trade customs and practices of contract parties cannot be assumed to have achieved a level which allows sustainability objectives to be considered as a trade custom and a clearly established business practice worldwide. However, the tendency to take sustainability into account and include it in the commercial contractual relationship becomes more relevant, and it is possible that, in the near future, unsustainable behavior will be considered to be an act of bad faith of a contracting party, with all the negative consequences determined in the legal norms of contract law.

Sustainability clauses as significant social changes of contract law

The social contract law doctrine is associated with significant changes in contract law. The need to introduce social goals into contractual relations arose due to the changing environment and the inadequacy of the traditional approach in reflecting this process. One of the most significant categories and goals of social contract law is solidarity in contractual relations, which in the doctrine is usually opposed to personal autonomy – a value traditionally considered the essential starting point of classical contract law. C. Mak points out that, in a general sense, autonomy can be used to emphasize individual freedom and personal responsibility, while solidarity emphasizes the need to make sacrifices for others. According to the author, this dichotomy can be used to depict and explain such developments as the socialization and constitutionalization of contract law (Mak 2008, p. 200).

T. Wilhelmsson observes that developments in contract law are often interpreted in the context of the idea of the welfare state. Social contract law itself is often seen as the contract law system of such a welfare state. Although this author admits that the concept of such a welfare state is rather vague and imprecise, he does not doubt that one of its main characteristics is intervention into market forces in order to achieve redistributive social goals. Such a concept of the welfare state is inseparable from the constant search for a balance between a focus on market efficiency and solidarity-based intervention (Wilhelmsson 1995, pp. 31–36). S. Grundmann points out that in private law fundamental rights are in clear opposition to classical economic theories because they establish evaluation, with the individual being the center of attention. This prioritizes a person as a living being over their economic resources (possessions), demanding consideration of solidarity and social justice, and giving attention to the weak (young and elderly) and the economically weaker party, which could also be a consumer or a company. According to this author, the focus on contrasting human rights with the individual as an economic agent has led to the recognition of a person's dignity as a central concept in order to develop personal autonomy (Grundmann 2008, p. 161). L. E. Trakman states that "The theory behind a public responsibility holds that a private right is subject to a public good, as when an individual contractor is subject to a public responsibility not to engage in contracts that discriminate on the basis of race or sex, or that damage the environment to the harm of future generations. (…) Viewed affirmatively, public responsibilities transcend restrictive conceptions of reciprocal promises, fictionalized accounts of consent to contract, and formalized depictions of privity of contract. They are woven into the fabric of law, whether under the rubric of moral theory, equitable dealings, or socially responsible contracting" (Trakman 2016, pp. 217–262).

As mentioned previously, sustainability goals in contract law include various social aspects, protecting the social interests of particular groups or the whole of society. Companies pursue sustainability objectives through their concluded contracts, understanding their "impact on social systems. Such systems include society, local communities, employees, consumers and other stakeholders. If business activities harm social systems, degrading the wellbeing of future generations, then operations are not socially sustainable" (Green Business Bureau 2022). For this reason, it can be agreed that the introduction of sustainability obligations into commercial contracts is one of the ways in which social contract law theory changes traditional contractual business practices. Such tendencies may be illustrated with the eloquent reflection of C. Poncibo (2016): "Each generation must put aside a suitable amount of capital in return for what it received from previous generations

that enables the latter to enjoy a better life in a more just society. Hence justice considerations apply to relations that are beyond the present one" (p. 340).

Contract privity is a significant notion of classical contract law, which is based on the idea of contractual freedom. Philosophically, this idea was based on the "will theory" of the contract; economically, on *laissez-faire* liberalism (Beale 2004, pp. 10–11). The principle of contract privity means that the contract creates rights and obligations for the persons who concluded it and, apart from exceptions provided by law, does not create rights and obligations for third parties. This principle determines that only the parties to the contract can make claims due to its improper performance. The purpose of contractual civil liability and the limits of protection provided by it is the protection of the interests related to the proper performance of the contract of the persons who entered into it (for example, the ruling of the Lithuanian Supreme Court of 30 November 2019 in civil case No. e3K-3-357-313/2019; 25 June 2020 in civil case No. e3K-3-197-469/2020; 24 March 2021 in civil case No. e3K-3-44-313/2021).

The content and limits of the operation of the principle of contract privity may be different in different legal systems or countries, and depend on the regulation established in national law. For example, Lithuanian law enshrines the principle of relative privity of contracts. The court of cassation explains contract privity as a general rule of contract law, stating that a contract binds only its parties. Therefore, with the exception of situations established by law, it has a legal impact only on the mutual rights and obligations of its parties. Exceptions to the principle of contract privity include cases established by law when the contract affects the rights and obligations of third parties, not only its parties (for example, Lithuanian Supreme Court 2011 October 4 ruling in civil case No. 3K-3-367/2011; 2020 March 16 ruling in civil case No. e3K-7-151-421/2020). W. J. Chan defines the doctrine of contract privity via both positive and negative aspects. The positive aspect means that only parties to a contract can acquire rights under the contract, and the negative aspect is such that only parties to a contract can be subjected to duties based on the existence of this contract (Chan 2014, p. 24). C. Poncibo divides third-party beneficiaries into three categories depending on the situation: "express beneficiary (a person explicitly named as a beneficiary in the contract); implicit beneficiary (a person, whose right to benefit can be derived from the true will of the original parties and/or by the circumstances, though his right was not expressly worded in the contract); incidental beneficiary (a person, who gets benefit from the contract accidentally or favor has not been considered by the original parties of the contract during the formulation of the contract). In this regard, a third party's right is not generally enforceable if a third party benefitted from the contract only incidentally. The main instance for a valid stipulation in favor of a third party consists in the fact that the beneficiary must be identified with sufficient certainty at the time of performance of the clause" (Poncibo 2016, p. 352).

Sustainability obligations in commercial contracts are mainly aimed at the benefit of the whole of society (for example, the reduction of CO_2 emissions or other environmental goals) or a certain part of it (for example, child labor prohibition). In this way, they differ from the conventional concepts of contractual obligations, where only the parties to the contract receive certain benefits. In this context, the beneficiaries of contractual sustainability obligations are third parties to the contract, and their rights under such contracts are considered to be an exception from the classical contract privity rule.

Scholars exclude two third-party-related situations which are relevant to the enforcement of sustainability contractual clauses. The first relates to cases of third-party claims to enforce a contract between a buyer and a supplier. The second relates to cases when a party to a contract (a buyer) tries to extend the applicability of sustainability contractual clauses beyond the direct counterparties – from first-tier suppliers to further participants of the supply chain. Examples of such attempts include claims of false advertisement, breaches of unilateral promises and claims of other third-party beneficiaries (Mitkidis 2014, p. 17). At this moment, third-party claims under sustainability contractual clauses are not a common practice. Commercial contractual relations are mainly confidential, and it is hard for third parties to acquire such information about the fact that they are beneficiaries under certain contract clauses. Moreover, if sustainability contractual clauses are very vague and benefit the interests of all of society in general, it would be unreasonable for them to give rise to a company's limitless contractual liability. This would discourage business activity in general. However, if a person can be clearly considered as a (not accidental) beneficiary under such a clause, and non-compliance has affected their life in a way which can be proved, then it is possible that the global business world will face a new challenge. It is hard to measure and predict the risks of third-party claims, and it will be in the hands of judges to establish the rules for compensation and determine the limits of the liability of companies.

Conclusions

Sustainability obligations in commercial contracts should be considered as reflecting exceptions from the ideas of classical contract law theory. Differences in approach to contract terms, objectives, privity, and negative consequences in the event of non-compliance with sustainability clauses are more inherent to the relational and social contract law doctrines. Thus, such differences may imply difficulties in applying legal instruments attributed to the doctrine of classical contract law (for example, general rules of contractual liability).

The more frequent the inclusion of sustainability obligations in commercial contracts, the more impact sustainability will have on contract regulation through norms such as implied contract terms or trade customs and standard practices – instruments established by most modern national legal systems and *soft law* documents like the UNIDROIT Principles, PECL and DCFR.

Sustainability contractual obligations are rarely included in the primary object of the contract. As long as sustainability contractual obligations are ancillary, in most cases, only express contract terms stating that a breach of sustainability contractual obligations will be considered to be a material breach of contract will guarantee, at least at some level, that non-compliance will be qualified as significant non-compliance.

The current trade customs and practices of contract parties cannot be assumed to have reached a level which allows sustainability objectives to be considered as a trade custom and a clearly established business practice worldwide. However, the tendency to take sustainability into account and include it in the commercial contractual relationship is becoming more relevant, and it is possible that, in the near future, unsustainable behavior will be considered to be an act of bad faith of a contracting party, with all the negative consequences determined in the legal norms of contract law.

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