

Sustainability due diligence in international sales contracts: insights from the CISG[†]

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Abstract

International contracts and, specifically, international sales contracts are increasingly employed by soft law instruments and regulators alike as tools to advance sustainability by addressing adverse impacts on human rights and the environment. Notable examples of this trend are the United Nations Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises on Responsible Business Conduct, and the European Union's Corporate Sustainability Due Diligence Directive. In response, supply chain leaders need to consider incorporating due diligence measures into their contracts to address adverse human rights and environmental impacts. Such sustainability due diligence involves requesting commitments from business partners, monitoring and verifying compliance, cooperating, and employing adequate remedies to breaches of such commitments. Many contracts affected by these developments fall under the United Nations Convention on Contracts for the International Sales of Goods, necessitating an analysis of how mechanisms of sustainability due diligence operate within its framework. Under the CISG, sustainability due diligence commitments create agreements not only on the goods' quality but also on continuing independent obligations. If a sustainability due diligence commitment is breached, the buyer may invoke non-conformity remedies once the goods have actually been delivered. In addition, irrespective of delivery, the buyer may claim specific performance of the commitment or seek damages to recover losses such as those arising from administrative fines imposed under mandatory sustainability due diligence legislation. Depending on the gravity of the breach, the buyer may also suspend their own contractual obligations or avoid the contract. However, to fully retain these remedies, the buyer may need to comply with certain monitoring and cooperation requirements as failing to do so could lead to a partial exemption of the seller. Overall, the CISG provides a well-balanced basis for integrating mechanisms of sustainability due diligence into the framework of international sales contracts.

I. Introduction

Sales contracts are the primary legal framework for international supply chains. Businesses worldwide either source goods for their manufacturing processes from various countries or have their own products manufactured abroad and sell them under their own trademark.

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In both scenarios, they risk contributing to human rights and environmental violations if the countries where production takes place lack robust legal systems to safeguard these values.¹ A striking example is the 2013 collapse of the Rana Plaza textile factory in Bangladesh, which supplied major retailers like Benetton and Primark. The building was constructed on the site of a former pond, with inadequate building materials, and without proper permits. Despite large cracks appearing in the walls in the days leading up to the disaster, the operators forced employees to return to work, leading to 1,100 deaths and 2,500 injuries in the eventual collapse. The tragedy sparked global outrage, criminal investigations against operators and officials, and private-sector initiatives such as the Accord on Fire and Building Safety in Bangladesh.²

Nevertheless, international sales contracts can serve as powerful tools for promoting sustainable production across the supply chain.³ Buyers with significant market power—often referred to as chain leaders, such as final goods producers or trademark owners—frequently possess the leverage to set conditions for entry and exit, allocate costs, and determine how revenues are distributed along the supply chain.⁴ These chain leaders can perform due diligence on their business partners, aimed at addressing adverse impacts on human rights and the environment (HREDD). HREDD involves requiring business partners to adhere to a code of conduct, monitoring their compliance, supporting adherence through cooperation, and employing adequate measures to enforce compliance in the case of breaches (HREDD clauses). By requiring direct business partners to pass on corresponding HREDD clauses to their respective business partners and/or by operating a supplier qualifications system, chain leaders can drive meaningful improvements in production standards throughout their supply chain, especially in regions where government action is lacking or insufficient.

In recent years, HREDD clauses have become an increasingly prominent feature of international contracts, particularly sales contracts—driven partly by the adoption of soft law instruments as best practice, but also by the growing influence of mandatory legislation.⁵ Based on soft law instruments like the United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs)⁶ and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business

¹ See Carsten Koenig, 'An Economic Analysis of Supply Chain Liability' [2024] SSRN Working Paper 17 et seq <<https://ssrn.com/abstract=4819667>> accessed 21 March 2025; Axel Marx and others, 'Introduction to the Research Handbook on Global Governance, Business and Human Rights' in id (eds), *Research Handbook on Global Governance, Business and Human Rights* (Elgar 2022) 1, 11; EU Commission, 'Commission Staff Working Document, Impact Assessment Report, Accompanying the document: Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' SWD(2022) 42 final, Part 1/2, 9, 17.

² On the Rana Plaza collapse and its aftermath, see Oscar Holland, '10 years after Rana Plaza, is Bangladesh's garment industry any safer?' CNN (23 April 2023) <<https://edition.cnn.com/style/article/rana-plaza-garment-worker-rights-accord/index.html>> accessed 28 March 2025.

³ David V Snyder, Susan A Maslow, and Sarah Dadush, 'Balancing Buyer and Supplier Responsibilities. Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0' (2021–2022) 77 *The Business Lawyer* 115, 116; European Working Group for Responsible and Sustainable Supply Chains, *Introduction to the Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains* (Responsible Contracting Project 2024) 1, 7 <www.responsiblecontracting.org/files/ugd/fcee10_9369ac77da2d4a4493dcd476eb6ecd40.pdf> accessed 28 March 2025 (EMCs Zero Draft Introduction).

⁴ Fabrizio Cafaggi, 'Sales in global supply chains: a new architecture of the international sales law' in Djakhongir Saidov (ed), *Research Handbook on International and Comparative Sale of Goods Law* (Elgar 2019) 334, 335.

⁵ See Fabrizio Cafaggi, Paola Iamiceli, and Federico Pistelli, 'Sustainability, Due Diligence, and the Impact on Global Value Chain Governance: The Emergence of a EU Framework in Global Regulation' in Fabrizio Cafaggi, Paola Iamiceli, and Federico Pistelli (eds), *Due Diligence, Sustainability and the Impact on Global Value Chain Governance* (Elgar 2025, forthcoming) 1, 7; Marx and others (n 1) 2, 18; Snyder, Maslow, and Dadush (n 3) 119.

⁶ United Nations, *Guiding Principles on Business and Human Rights. Implementing the United Nations 'Protect, Respect and Remedy' Framework* (UN 2011, HR/PUB/11/04) <www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 28 March 2025.

Conduct (OECD Guidelines)⁷, many chain leaders voluntarily use their leverage over business partners to promote sustainability. Moreover, some legislators have enacted mandatory HREDD laws, such as France's 2017 Law on the Duty of Vigilance,⁸ Germany's 2021 Supply Chain Act,⁹ and the European Union's (EU) 2024 Corporate Sustainability Due Diligence Directive (CSDDD).¹⁰ Enforcement mechanisms include both administrative fines (public enforcement) and direct tort claims for harmed individuals (private enforcement).¹¹

Thus far, academic discussions on international sales law have primarily treated agreements on sustainable production as a quality criterion relevant to the conformity of goods.¹² More recently, however, some scholars have suggested that HREDD clauses could also be understood as additional obligations¹³—that is, contractual obligations existing alongside the primary obligation to deliver conforming goods.¹⁴ This new perspective merits closer attention as remedies for breach of additional obligations remain independent of the delivery of (non-conforming) goods. Such remedies may still apply even if the seller ultimately delivers sustainably produced goods from a different source, particularly if the breach of HREDD commitments has already resulted in public fines or required the chain leader to compensate third parties for harm caused by, for example, human rights violations.¹⁵ Moreover, the nature of contractual HREDD commitments warrants closer examination—in particular, their character as continuous obligations requiring best efforts, as

⁷ The most recent version is from 2023: OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing 2023) <<https://doi.org/10.1787/81f92357-en>>, accessed 21 March 2025.

⁸ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017, texte n° 1.

⁹ Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 16. Juli 2021, BGBl. I 2021, Nr. 46 vom 22. Juli 2021, S. 2959.

¹⁰ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, *OJ L*, 2024/1760. Even though the 2025 Omnibus I proposal by the EU Commission could significantly water down the CSDDD (if adopted by the EU legislature), it still adheres to the core idea of mandatory HREDD. See European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements' COM (2025) 80 final; European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU), 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements' COM (2025) 81 final.

¹¹ Under the Omnibus I proposal (n 10), the harmonised provision on civil liability in Art 29 CSDDD would be removed. However, civil liability for violating the CSDDD would remain possible under non-harmonised EU member state law.

¹² Yeşim M Atamer and Patrick M Gerber, 'Ethische Produktionsprozesse als Merkmal der Mangelfreiheit der Kaufsache?' (2022) *Aktuelle Juristische Praxis* 1159, 1164 et seq; Petra Butler, 'The CISG—A Secret Weapon in the Fight for a Fairer World?' in Ingeborg Schwenzer (ed), *35 Years CISG and Beyond* (Eleven 2016) 295, 302 et seqq; Ben G Köhler, 'The CISG in the age of sustainable supply chains' in Rishi Gulati, Thomas John, and Ben G Köhler (eds), *The Elgar Companion to UNCITRAL* (Cheltenham 2023) 339, 350–52; César Pires, 'Party Autonomy in the CISG and the New Corporate Sustainability Due Diligence Directive' (2024) 24 (4) *Internationales Handelsrecht* 133, 135 para 22 et seqq; Christina Ramberg, 'Emotional Non-Conformity in the International Sale of Goods, particularly in relation to CSR-policies and Codes of Conduct' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Boundaries and Intersections* (Eleven International 2015) 71, 82 et seq; Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts' in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds), *Commercial law challenges in the 21st century: Jan Hellner in memoriam* (Iustus 2007) 249, 266 et seqq; Ingeborg Schwenzer, 'Ethical standards in CISG contracts' (2017) 22 (1) *Uniform Law Review* 122, 126 et seq; Ingeborg Schwenzer and Edgardo Muñoz, 'Sustainability in Global Supply Chains Under the CISG' (2021) 23 *European Journal of Law Reform* 300, 319 et seqq.

¹³ Anna Beckers, *Enforcing Corporate Social Responsibility Codes. On Global Self-Regulation and National Private Law* (Hart Publishing 2015) 350; Benedikt Bartylla, 'Lieferkettenregulierung und internationales Kaufrecht' (2023) *Neue Zeitschrift für Gesellschaftsrecht* 103, 106.

¹⁴ On the term 'additional obligation' in the context of the CISG, see Pascal Hachem, 'Article 3 CISG' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 13; Christoph Brunner, Diana Akikol, and Lucien Bürki, 'Article 45 CISG' in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019) para 16.

¹⁵ See Bartylla (n 13) 106.

opposed to delivery of conforming goods, which constitutes a promise to achieve a specific result, and the implications that this distinction has for the available remedies in the event of breach. Finally, the reciprocal nature of HREDD duties, often involving not only one-sided undertakings by the business partner but also contractual commitments by the chain leader, requires an analysis from the perspective of international sales law.

The present article aims to examine the legal consequences of viewing contractual HREDD clauses as additional obligations in sales contracts requiring only best efforts, and to assess how their reciprocal nature shapes the remedial framework under international sales law. We base our discussion on the UN Convention on Contracts for the International Sale of Goods (CISG)¹⁶ because it serves as the default law for most international sales contracts, provides an internationally comprehensible framework suitable for addressing such global problems, and has influenced many national sales laws.¹⁷ Against this backdrop, this article starts by explaining the concept of HREDD in the context of international sales contracts, before examining its operation within the CISG framework.

II. The concept of sustainability due diligence

1. Sustainability due diligence in general

The concept of due diligence in relation to sustainability was first introduced by the UNGP and later adopted by the OECD Guidelines.¹⁸ More recently, the notion of HREDD has been integrated into mandatory legislative frameworks, most notably the CSDDD.¹⁹ These duties apply to all types of contracts, including contracts for work and services, and especially to construction contracts. However, this article focuses on the role of sustainability due diligence in the context of sales contracts. As noted above, a particularly significant concern in international supply chains is that sales contracts are often used to outsource production of goods to countries where protection of human rights and the environment is weak.

The UNGP encourage all enterprises to undertake due diligence,²⁰ while the OECD Guidelines specifically target multinationals.²¹ The CSDDD, in turn, imposes mandatory due diligence duties on companies that exceed certain thresholds regarding turnover and/or number of employees ('in-scope companies').²² The UNGP primarily focus on human rights, referencing key international instruments such as the International Covenant on Civil and Political Rights,²³ the International Covenant on Economic, Social and Cultural Rights,²⁴ and the eight core conventions of the International Labour Organization.²⁵ The OECD Guidelines also include environmental concerns such as climate change, biodiversity

¹⁶ United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) UNTS 1489 3.

¹⁷ Regarding the CISG's influence on European Private Law, see Ingeborg Schwenzer and Patrick Wittum, 'CISG and European Private Law: When in Rome, Do as the Romans Do' (2022) 30(5) *European Review of Private Law* 835.

¹⁸ Robert McCorquodale and Christina Blanco-Vizarreta, 'Guiding Principle 17: Human Rights Due Diligence' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights. A Commentary* (Elgar 2023) para 17.03.

¹⁹ Art 5(1) CSDDD.

²⁰ UNGP (n 6) No 14.

²¹ OECD Guidelines (n 7) Chapter I. Concepts and Principles para 4.

²² Art 2(1) and (2) CSDDD. See further Yeşim M Atamer and Patrick Wittum, 'Von Laissez-faire zu Regulierung: Grundlagen der EU-Richtlinie über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit (CSDDD)' (2024) 9 *EuZ—Zeitschrift für Europarecht* I 14–21.

²³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) A/RES/2200A (XXI).

²⁴ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1966) A/RES/2200A (XXI).

²⁵ UNGP (n 6) No 12.

loss, and pollution.²⁶ The CSDDD, in turn, protects all human rights addressed in the UNGP and the OECD Guidelines, plus the Convention on the Rights of the Child,²⁷ and some (but not all) of the environmental concerns covered by the OECD Guidelines.²⁸

All three international instruments burden chain leaders with the task of addressing adverse impacts arising from certain business partners. The UNGP and OECD Guidelines attribute responsibility to enterprises that cause, contribute to, or are directly linked to adverse impacts.²⁹ Responsibility under these soft law instruments covers a company's supply chain, distribution, use, and waste disposal. The CSDDD establishes responsibility for business partners within the in-scope companies' so-called 'chain of activities'.³⁰ Both direct (tier 1) and indirect business partners (tier 2 and beyond) are covered.³¹ However, the chain of activities primarily covers activities of upstream business partners related to the production of goods and the provision of services of the in-scope company³²—namely, the supply chain. Contrary to the soft law instruments, the CSDDD covers only a small section of downstream activities.³³

HREDD, as envisaged by these instruments, is a dynamic and ongoing process aimed at addressing adverse impacts on protected interests.³⁴ Chain leaders are expected to adopt a risk-based approach, allowing them to prioritize certain impacts over others.³⁵ They are required to make best efforts to prevent and/or end adverse impacts rather than guarantee specific results.³⁶ Hence, the expected standard of behaviour closely resembles the duty of care concept found in national tort laws.³⁷

2. Sustainability due diligence in the context of international sales contracts

In international sales contracts, implementing HREDD typically involves four key elements: (i) seeking contractual HREDD commitments from business partners; (ii) monitoring compliance

²⁶ OECD Guidelines (n 7) Chapter VI. Environment.

²⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) A/RES/44/25.

²⁸ Art 3(1)(b) and (c), Annex CSDDD. For example, the CSDDD does not explicitly create due diligence obligations to combat climate change beyond establishing a climate transition plan. See generally Atamer and Wittum (n 22) I 25–29.

²⁹ UNGP (n 6) No 17(a); OECD Guidelines (n 7) Commentary on Chapter II: General Policies para 16.

³⁰ Art 1(1)(a), Art 3(1)(f) and (g) CSDDD.

³¹ Art 3(1)(f) CSDDD. By contrast, the Omnibus I proposal will limit the information-gathering burden and thereby indirectly subsequent action to direct business partners with a particular risk-profile. Indirect partners, even if they pose high risks, will only require closer scrutiny once credible signs of adverse impacts materialise. See Art 8(2)(b) and (2a) CSDDD as amended by COM (2025) 81 final (n 10).

³² Art 3(1)(g)(i) CSDDD.

³³ See Art 3(2)(g)(ii) CSDDD.

³⁴ See OECD Guidelines (n 7) Chapter II. General Policies para A. 11, and Commentary on Chapter II: General Policies para 19; OECD Due Diligence Guidance for Responsible Business Conduct (2018) 17 et seq (OECD Due Diligence Guidance); European Working Group for Responsible and Sustainable Supply Chains, *Commentary to the Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains* (Responsible Contracting Project 2024) 4 <www.responsiblecontracting.org/files/ugd/fcee10_97c2e2a4323a4bf58cb20d1623cc2308.pdf> accessed 28 March 2025 (EMCs Zero Draft Commentary); Fabrizio Cafaggi, Paola Iamiceli, and Federico Pistelli (n 5) 12 et seq; Snyder, Maslow, and Dadush (n 3) 127 et seq.

³⁵ UNGP (n 6) No 24; OECD Guidelines (n 7) Commentary on Chapter II: General Policies para 17; Art 5(1) and Art 9 CSDDD.

³⁶ See Recital 19 CSDDD; Fabrizio Cafaggi, Paola Iamiceli, and Federico Pistelli (n 5) 12 et seq; Ulrich G Schroeter, 'Lieferkettenhaftung Schweizer Unternehmen nach geltendem schweizerischem Recht und der EU-Lieferkettenrichtlinie (CS3D)' (2025) 1 Basler Juristische Mitteilungen 1, 18 et seq.

³⁷ See Atamer and Wittum (n 22) I 3; Lise Smit, Claire Bright, and Stuart Neely, 'Muddying the waters: The Concept of a 'Safe Harbour' in Understanding Human Rights Due Diligence' (2023) 8 Business and Human Rights Journal 1, 14 et seq; Gerhard Wagner, 'Haftung für Menschenrechtsverletzungen' (2016) 80(4) Rabels Zeitschrift für ausländisches und internationales Privatrecht 717, 753 and 757. But see also John Gerard Ruggie and John F Sherman, III, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28(3) The European Journal of International Law 921, 923 et seq, who warn against equating the concept of due diligence under the UNGP with familiar conceptions from other areas of the law.

with those commitments; (iii) cooperating with business partners to facilitate compliance; and (iv) adopting adequate responses to breaches.

A. Seeking sustainability due diligence commitments from business partners

Since soft law instruments by their nature cannot directly impact existing contracts, their implementation depends on the parties' agreement.³⁸ Even mandatory HREDD legislation, such as the CSDDD, only creates one-sided duties for in-scope companies to conduct due diligence within their sphere of responsibility, which includes seeking contractual commitments from their business partners.³⁹ This duty is one-sided because, while the in-scope company is legally required to achieve an agreement with its business partners and may be fined or subjected to tort claims if it fails to do so, the business partner has no corresponding duty to agree to the proposed contractual HREDD commitments. Hence, HREDD legislation neither automatically impacts business partners who fall outside its scope of application nor automatically overrides existing contracts.⁴⁰

HREDD commitments mostly require business partners to comply with the chain leader's code of conduct,⁴¹ which sets out general rules and principles for addressing adverse impacts.⁴² Since soft law and mandatory HREDD legislation only demand risk-based due diligence, HREDD clauses will reflect this expectation and focus on risk-based due diligence rather than on commitments to achieve specific results.⁴³ Requesting guarantees could even be counterproductive as it might incentivize some business partners to conceal adverse impacts in order to avoid liability for breach of contract, ultimately exacerbating the harm.⁴⁴

In addition, HREDD instruments require chain leaders not only to seek commitments from their direct business partners—that is, entities with whom they have an immediate contractual relationship—but also to oblige those partners to obtain similar commitments also from their business partners ('cascading'⁴⁵).⁴⁶ This enables the chain leader to extend its regulatory influence throughout the entire supply chain.⁴⁷ However, relying exclusively on cascading can lead to significant agency costs. This is because direct business partners often lack sufficient incentives to enforce HREDD commitments *vis-à-vis* their respective business partners, while the chain leader is not privy to those contracts and therefore often lacks direct enforcement powers against indirect business partners.⁴⁸ One potential solution is to require direct business partners to include clauses in their contracts that designate the chain leader as a third-party beneficiary to HREDD commitments by indirect business

³⁸ United Nations, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (UN 2012, HR/PUB/12/02, 49) (UNGP Interpretative Guide).

³⁹ Art 10(2)(b), (5) subpara 1 and Art 11(3)(c), (6) subpara 1 CSDDD.

⁴⁰ See EMCs Zero Draft Introduction (n 3) 8.

⁴¹ OECD Due Diligence Guidance (n 34) 60; Art 10(2)(b), (5) subpara 1 and Art 11(3)(c), (6) subpara 1 CSDDD. For guidance on how to draft a code of conduct, see Snyder, Maslow, and Dadush (n 3) 155–75.

⁴² See Art 7(2)(b) and Recital 39 CSDDD.

⁴³ Snyder, Maslow, and Dadush (n 3) 118, 125 et seq; EMCs Zero Draft Commentary (n 34) 4.

⁴⁴ Dadush, Schönfelder, and Streibelt, 'What the EU's Corporate Sustainability Due Diligence Directive Says About Contracts' [2024] SSRN Working Paper 4 et seq, 6 <<https://ssrn.com/abstract=4888176>> accessed 28 April 2025.

⁴⁵ SWD(2022) 42 final (n 1) Part 2/2, 190; Fabrizio Cafaggi, 'Transnational Private Regulation of Environmental Sustainability through Commercial Contracts. Reassessing Contractual Governance in Supply Chains' (2024) 20(1) *European Review of Contract Law* 25, 36, 61; Nicholas Mouttos, 'The UNIDROIT Principles on International Commercial Contracts and sustainable development' (2024) 29 *Uniform Law Review* 362, 366.

⁴⁶ See OECD Due Diligence Guidance (n 34) 60; Art 10(2)(b), (5) subpara 1 and Art 11(3)(c), (6) subpara 1 CSDDD.

⁴⁷ Atamer and Wittum (n 22) I 21; Verity McCullagh, 'The EU Corporate Sustainability Due Diligence Directive: Real Change or More of the Same?' (2024) 35(5) *European Business Law Review* 603, 608; Schroeter (n 36) 13 et seq; Rolf H Weber, 'Verantwortlichkeit von Unternehmen mit internationalen Lieferketten' (2024) 4 *Haftung und Versicherung* 371, 373, 375. See also Galit A Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 *Harvard International Law Journal* 419, 435 et seq.

⁴⁸ Cafaggi (n 45) 61.

partners—if possible under the applicable contract law.⁴⁹ Alternatively, some chain leaders choose to implement qualification systems in contracts with their direct business partners that establish general sustainability criteria as prerequisites for subcontracting.⁵⁰ Under such frameworks, business partners who fail to meet the required standards may be excluded from the supply chain altogether, denied new business opportunities, or removed at a later stage.⁵¹ Through this form of private sanctioning, the chain leader gains greater leverage over indirect business partners compared to standard cascading.⁵²

To streamline compliance and ensure a fair sharing of the burden, several private initiatives have already drafted model sustainability due diligence clauses.⁵³ In addition, the EU Commission will propose such clauses by 2027 as guidelines for implementing due diligence duties under the CSDDD.⁵⁴ Relying on uniform HREDD commitments is of particular importance when a business partner works with multiple chain leaders, as it helps reduce compliance costs and prevent potentially conflicting requirements.⁵⁵

B. Monitoring compliance with sustainability due diligence commitments

Merely agreeing on HREDD commitments is insufficient to protect human rights and the environment if business partners do not honour those commitments in practice.⁵⁶ Consequently, chain leaders should adopt appropriate measures to monitor compliance with HREDD commitments.⁵⁷ However, monitoring is a risk-based process and therefore depends on the risk profile of the respective business partner. Both the UNGP and the OECD Guidelines explicitly recognize that it would be disproportionate for most enterprises to monitor every single business partner regardless of their risk profile.⁵⁸

Imposing documentation and information duties on some business partners allows chain leaders to reduce their information deficit, monitor implementation, and identify emerging adverse impacts.⁵⁹ To prevent flooding every business partner with unnecessary information requests, data collection should be guided by risk factors and, where possible, focus directly on those partners posing the highest risk.⁶⁰ Information requests *vis-à-vis* indirect business partners can take place on an informal basis, rely on the chain leader's qualification system, or stem from formal third-party rights in favour of the chain leader.

⁴⁹ See Art 7.2 MCCs 2.0 (n 53). The question of whether it is permissible to stipulate for third-party beneficiaries is a question of validity and thus not governed by the CISG. See Pascal Hachem, 'Article 4 CISG' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 21.

⁵⁰ See Cafaggi (n 45), 52 et seqq.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ See European Working Group for Responsible and Sustainable Supply Chains, *Zero Draft for Consultation: The European Model Clauses (EMCs) for Responsible and Sustainable Supply Chains* (Responsible Contracting Project 2024) <www.responsiblecontracting.org/_files/ugd/fcee10_538d4de3351d4b699cd1c47e81ba8f22.pdf> accessed 28 March 2025 (EMCs Zero Draft); American Bar Association Section of Business Law, *Model Contract Clauses to Protect Human Rights in International Supply chains, Version 2.0*, printed in Snyder, Maslow, and Dadush (n 3) 132–54 (MCCs 2.0).

⁵⁴ Art 18 CSDDD.

⁵⁵ Koenig (n 1) 33; OECD Guidelines (n 7) Commentary on Chapter II: General Policies para 26; OECD Due Diligence Guidance (n 34) 60. See also Fabrizio Cafaggi, 'Regulation through contracts: Supply-chain contracting and sustainability standards' (2016) 12 *European Review of Contract Law* 218, 243; EMCs Zero Draft Introduction (n 3) 4, 8.

⁵⁶ Recital 66 CSDDD; Snyder, Maslow, and Dadush (n 3) 117. See also Alexander Wilhelm, 'Compliance-Klauseln im unternehmerischen Geschäftsverkehr' (2021) 221 *Archiv für civilistische Praxis* 657, 688.

⁵⁷ See Art 10(5) subpara 1, Art 11(6) subpara 1 CSDDD.

⁵⁸ UNGPs (n 6) Commentary on GP 17; OECD Guidelines (n 7) Commentary on Chapter II: General Policies para 20; OECD Due Diligence Guidance (n 34) 66.

⁵⁹ See Art 1.1(d) EMCs Zero Draft (n 53); Fernanda Luisa Breckenkamp, *Rechtliche Governance von Zuliefererverträgen* (Mohr Siebeck 2020) 97 et seq; Cafaggi (n 45) 41.

⁶⁰ See Art 8(4) CSDDD and Recital 41 CSDDD; EMCs Zero Draft Commentary (n 34) 7. To further protect SME from the burden of information requests, the Omnibus I proposal by the EU Commission limits the amount of information that may be requested from business partners with fewer than 500 employees. See Art 8(5) CSDDD as amended by COM (2025) 81 final (n 10).

However, chain leaders should not always rely solely on information provided by business partners. Instead, they should verify compliance independently whenever the risk of compliance breaches is high.⁶¹ To be in a position to monitor compliance, they should include a clause in contracts with direct business partners that gives them the right to inspect facilities, conduct interviews with the management and a representative selection of employees, and access relevant documentation.⁶² In addition, they should require their direct business partners to include similar provisions in contracts with their respective business partners.⁶³ While delegating monitoring of indirect business partners to direct business partners can be cheaper than centralized monitoring, it also increases agency costs.⁶⁴

To streamline monitoring, especially regarding indirect business partners with a high risk, chain leaders could rely on third-party verification,⁶⁵ such as industry or multi-stakeholder initiatives like FairTrade, Rainforest Alliance, Ecovadis, or Sedex. Third-party monitoring can be particularly cost-saving when multiple chain leaders share a business partner and jointly rely on the same verification.⁶⁶ Furthermore, it can also be integrated into a qualification system by tying supply chain participation to positive audits. Ensuring the trustworthiness of third-party verification will be crucial to the effectiveness of HREDD.⁶⁷ A recent example of flaws in third-party verification is the Dalmia Bharat sugar mill in Western India, which supplies sugar to Coca-Cola, PepsiCo, Unilever, and General Mills. Despite severe human rights violations, including forcing women into underage marriages, trapping them in debt, and pressuring them into hysterectomies, the mill was routinely certified by Bonsucro, the leading sugar industry verifier, as compliant with human rights standards.⁶⁸ With the further development of specialized monitoring services, the question of whether the service provider can incur direct liability to victims of human rights and environmental harm will become particularly relevant.⁶⁹

C. Cooperation with business partners

Effectively fighting adverse impacts on human rights and the environment requires open communication and a sharing of responsibilities via cooperation between the chain leader and its business partners.⁷⁰ First, business partners are more likely to accept HREDD and

⁶¹ UNGPs (n 6) Commentary on GP 17: 'Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritise these for human rights due diligence.' See also Art 10(5), subpara 1 and Art 11(6), subpara 1 CSDDD.

⁶² See Art 4 EMCs Zero Draft (n 53); Ekaterina Pannebakker, 'Sustainable development clauses in international contracts through the lens of the UNIDROIT principles' (2024) 29 Uniform Law Review 352, 359; Veronika Seitz, *Die vertragsrechtliche Durchsetzung von Corporate Social Responsibility* (Beck 2024) 197; Wilhelm (n 56) 688.

⁶³ See SWD(2022) 42 final (n 1) Part 1/2, 38; OECD Due Diligence Guidance (n 34) 69.

⁶⁴ Cafaggi (n 45) 37 et seq.

⁶⁵ See Art 10(5) subpara 1, Art 11(6) subpara 1 CSDDD.

⁶⁶ SWD(2022) 42 final (n 1) Part 2/2, 56 et seq; Cafaggi (n 55) 242. See also Koenig (n 1) 33.

⁶⁷ Patrick C Leyens, 'Transparenzregeln zur Steuerung der Lieferkettensorgfalt' in Peter Jung and Ulrich G Schroeter (eds), *Unternehmerische Verantwortung in Lieferketten* (Nomos 2023) 79, 93 et seq. See the quality requirements on third-party verification in Recital 52 CSDDD.

⁶⁸ Megha Rajagopalan, 'How a Sugar Industry Stamp of Approval Hid Coerced Hysterectomies' *New York Times* (30 July 2024) <<https://www.nytimes.com/2024/07/30/world/asia/sugar-human-rights-bonsucro-india-hysterectomies.html?smid=url-share>> accessed 31 March 2025.

⁶⁹ On liability of external evaluators to third parties, see generally *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL); German Supreme Court, 2 April 1998, III ZR 245/96, BGHZ 138, 257; Art 35a Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (Text with EEA relevance) OJ L 302 17.11.2009, p 1, last amended by Regulation (EU) 2023/2869; Miguel Alzola, 'Beware of the Watchdog: Rethinking the Normative Justification of Gatekeeper Liability' (2017) 140 *Journal of Business Ethics* 705.

⁷⁰ Recital 46, 54 and 66 CSDDD; Dadush, Schönfelder, and Streibelt (n 44) 5 et seqq; Daniel Schönfelder and Michaela Streibelt, 'The Obligations to Responsible Purchasing and Responsible Procurement Established

openly communicate about potential breaches when responsibilities are shared.⁷¹ Second, responding to newly arising adverse impacts requires cooperation, as it is impossible to foresee all potential adverse impacts in advance and detail every measure for their mitigation in the contract.⁷² Third, chain leaders themselves may be unaware of the potential adverse impacts of their pricing, delivery terms, and order changes on protected interests.⁷³

Chain leaders should, therefore, engage with business partners to communicate their expectations regarding the prevention of such adverse impacts. Where necessary, they should offer access to capacity building, guidance, and administrative as well as financial support.⁷⁴ Regular dialogue is crucial for raising awareness, identifying emerging adverse impacts, and collaboratively developing practical solutions that cannot always be anticipated in contracts.⁷⁵ Transparency regarding expectations and implemented measures can help avoid harmful escalation spirals and safeguard relationships from deteriorating into disengagement.⁷⁶

When dealing with small and medium-sized businesses (SME), the CSDDD requires in-scope companies to provide targeted and proportionate support to these businesses, taking into account their resources, knowledge, and constraints.⁷⁷ Support can include capacity building, training, or upgrading management systems.⁷⁸ Where meeting responsible conduct expectations significantly challenges an SME's viability, companies should offer targeted and proportionate financial support.⁷⁹ For example, the company might fund the installation of new filters or better fire protection systems at the business partner's production site. Additionally, companies under the CSDDD should bear the costs of third-party verification for SMEs, unless the SME intends to use the verification for other contracting partners too, in which case the costs could be shared.⁸⁰

Ideally, chain leaders would explicitly include cooperation measures in their contracts with direct business partners and ask them to include similar clauses in contracts with their business partners.⁸¹ An explicit agreement fosters trust and reliability while providing business partners with a potential defence against alleged breaches of HREDD commitments.⁸² Without such provisions, business partners may fear full indemnification claims, thereby discouraging disclosure of adverse impacts and hindering joint efforts to address these issues.⁸³

D. Remedies for breaching sustainability due diligence commitments

When a breach of HREDD commitments occurs, the key question is how the chain leader should respond. If the adverse impact occurs with an indirect business partner, the chain leader can take direct action only where it qualifies as a third-party beneficiary of a

by the CSDDD' [2024] SSRN Working Paper 1 et seq, 12 <<https://ssrn.com/abstract=5052020>> accessed 28 March 2025. See also McCullagh (n 47) 609; Snyder, Maslow, and Dadush (n 3) 124; Cafaggi (n 55) 223 et seq.

⁷¹ EMCs Zero Draft Introduction (n 3) 6; Seitz (n 62) 244.

⁷² See Michael Klausner, 'Governance Mechanism in Long-term Contracts' in Stefan Grundmann, Florian Möslein, and Karl Riesenhuber (eds) *Contract Governance* (OUP 2015) 218, 222 et seq.

⁷³ See Snyder, Maslow, and Dadush (n 3) 117, 124; EMCs Zero Draft Introduction (n 3) 2 et seq.

⁷⁴ See Art 10(3) and Art 11(4) CSDDD.

⁷⁵ See Klausner (n 72) 226; Schönfelder and Streibelt (n 70) 13.

⁷⁶ Klausner (n 72) 226.

⁷⁷ Art 10(2)(e) and Art 11(3)(f) CSDDD.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ Art 10(5) subpara 2 and Art 11(6) subpara 2 CSDDD.

⁸¹ See Art 1.3, 2.2(a) MCCs 2.0 (n 53); Art 1.1.(a), (c), Art 1.3.(b), Art 3.1(b) EMCs Zero Draft (n 53); Dadush, Schönfelder, and Streibelt (n 44) 8 et seq. On advantages of formal relational contracts more generally, see also David Frydlinger, Oliver Hart, and Kate Vitasek, 'A New Approach to Contracts. How to build better long-term strategic partnerships' [2019] *Harvard Business Review* <<https://hbr.org/2019/09/a-new-approach-to-contracts>> accessed 3 April 2025.

⁸² See III.4.

⁸³ Dadush, Schönfelder, and Streibelt (n 44) 8 et seq.

cascaded HREDD commitment or operates a qualification system.⁸⁴ Alternatively, the chain leader has to act through its direct business partners. In any case, breaches of HREDD commitments should be approached in a cooperative manner to increase the likelihood of finding a solution together with the relevant business partners.⁸⁵ An adequate response to adverse impacts can include jointly developing and implementing an action plan that outlines reasonable, clearly defined timelines as well as qualitative and quantitative indicators to measure progress.⁸⁶

If other measures prove unsuccessful in ending a breach of contract, the chain leader may suspend their contractual obligations *vis-à-vis* direct business partners to incentivize them to address human rights and environmental adverse impacts within their own operations or to take measures against their respective business partners, especially by implementing action plans.⁸⁷ The threat of disengagement can likewise motivate direct business partners to honour HREDD commitments because they may fear losing a lucrative business relationship or suffering reputational harm.⁸⁸ Disengagement can involve both informal mechanisms, such as refraining from entering or extending contracts, downgrading within a qualification system, and also formal termination.⁸⁹

However, the expectation of suspension or disengagement could prompt business partners to conceal adverse impacts that have already occurred or are likely to arise.⁹⁰ While disengagement can sometimes yield benefits even *ex post* (for example, in preventing or ending adverse impacts that would result from maintaining the harmful relationship), it often fails to advance human rights or environmental protection⁹¹—particularly if the former business partner can easily join another supply chain that does not seek to promote sustainability, or if disengagement leads to insolvency and consequent job losses.⁹² Additionally, both suspension and disengagement often disrupt production,⁹³ and disengagement wastes previous relation-specific investments in due diligence mechanisms.⁹⁴ Such lock-in effects often incentivize against disengaging.⁹⁵ Considering these challenges, disengagement (and to a lesser degree also suspension) is a double-edged sword and should only be seen as a measure of last resort.⁹⁶

⁸⁴ See II.2.A.

⁸⁵ See II.2.C.

⁸⁶ See Art 10(2)(a), (6) subpara 1(a) and Art 11(3)(b), (7) subpara 1(a) CSDDD.

⁸⁷ See Art 10(6), subpara 1(a) and Art 11(7), subpara 1(a) CSDDD.

⁸⁸ Pannebakker (n 62) 360 et seq. See also Ronald J Gilson, Charles F Sabel, and Robert E Scott, 'Contract, Uncertainty, and Innovation' in Stefan Grundmann, Florian Möslin, and Karl Riesenhuber (eds) *Contract Governance* (OUP 2015) 155, 162; UNGP Interpretative Guide (n 38) 49.

⁸⁹ Cafaggi (n 55) 233.

⁹⁰ Dadush, Schönfelder, and Streibelt (n 44) 4 et seq, 6.

⁹¹ EMCs Zero Draft Introduction (n 3) 3; Dadush, Schönfelder, and Streibelt (n 44) 12; Snyder, Maslow, and Dadush (n 3) 128.

⁹² EMCs Zero Draft Introduction (n 3) 3; Jürgen Basedow, 'Von Lieferketten, Kinderarbeit und Standesämtern. Gedanken zu europäischer Moral und globaler Realität' in Christian von Bar and others (eds) *Gedächtnisschrift für Peter Mankowski* (Mohr Siebeck 2024) 761; Dadush, Schönfelder, and Streibelt (n 44) 14; Seitz (n 62) 256.

⁹³ EMCs Zero Draft Commentary (n 34) 26, 39; Snyder, Maslow, and Dadush (n 3) 128.

⁹⁴ See Cafaggi (n 55) 236 et seq; Gilson, Sabel, and Scott (n 88) 158 et seq; Seitz (n 62) 255.

⁹⁵ Bremenkamp (n 59) 23, 26, 179 et seq. See also Cafaggi (n 4) 357; Pascal Hachem and Aysun Günes, 'Sorgfalt in der Lieferkette' (2023) 119 *Schweizerische Juristen-Zeitung* 706, 711 et seq; Pascal Hachem, 'Einfluss, Kontrolle und Haftung in Lieferketten—Gestaltungsmöglichkeiten für Unternehmen' in Peter Jung und Ulrich G Schroeter (eds), *Unternehmerische Verantwortung in Lieferketten* (Nomos 2023) 151, 158 et seq.

⁹⁶ On considerations relevant to deciding whether to disengage from a crucial business relationship, see United Nations Office of the High Commissioner for Human Rights, 'Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting' (2023) <<https://www.ohchr.org/en/documents/tools-and-resources/business-and-human-rights-challenging-contexts-considerations>> accessed 4 April 2025. Because of the potential drawbacks associated especially with disengagement, the Omnibus I proposal does not require contract termination anymore but rather focuses on informal mechanisms and suspension. See Art 10(6) and Art 11(7) CSDDD as amended by COM (2025) 81 final (n 10).

To address uncertainties as to the prerequisites of suspension or termination under the applicable contract law, chain leaders should consider including explicit rights of suspension and termination in their contracts.⁹⁷ However, they should avoid stipulating suspension or termination for minor breaches. By threatening immediate suspension or termination, they incentivize business partners to hide impacts instead of addressing them, thus potentially contributing to further harm rather than preventing it.⁹⁸

III. Sustainability due diligence under the CISG

In light of the above, enforcing HREDD largely depends on contract law.⁹⁹ Given the global nature of supply chains, which typically involve the sale of goods, contracts incorporating HREDD obligations may often be governed by the CISG.

1. Application of the CISG to contracts that may give rise to sustainability due diligence

A. Substantive scope of application

The CISG's substantive scope of application covers contracts for the sale of goods (Article 1(1) of the CISG).¹⁰⁰ Goods encompasses products, semi-finished products like chemicals, machinery, or semi-conductors, as well as raw materials like agricultural or animal products, precious metals and minerals, timber, and fossil fuels. Contracts for the supply of goods manufactured or produced specifically for the buyer's needs are also considered sales contracts subject to the CISG, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (Article 3(1) of the CISG). Besides, mixed contracts in which the seller undertakes to perform labour or other services in addition to delivering goods fall within the scope of the Convention, unless the service obligations form the preponderant part of the seller's obligations (Article 3(2) of the CISG). The Convention also extends to sales contracts providing for delivery of goods by instalments (see Article 73 of the CISG). Such instalment sales involve at least two separate deliveries.¹⁰¹ It is irrelevant whether deliveries are to be made in predetermined quantities and at predetermined dates or upon request.¹⁰² Even contracts for indefinite, ongoing supply are instalment sales within the meaning of Article 73 of the CISG and are therefore subject to the Convention.¹⁰³

The CISG's broad definition of a sales contract, coupled with its inclusion of all types of contractual obligations of the seller (Articles 3(2) and 45(1)), readily facilitates the integration of HREDD obligations within the framework of the Convention. Under the CSDDD, for instance, contracts with upstream business partners trigger HREDD obligations if they are related to the in-scope company's production of goods or provision of services.¹⁰⁴ The

⁹⁷ See Art 3.2(b)(iii), Art 3.5 EMCs Zero Draft (n 53); OECD Due Diligence Guidance (n 34) 60; Hachem and Günes (n 95) 714 et seq; Pannebakker (n 62) 359 et seq

⁹⁸ Dadush, Schönfelder, and Streibelt (n 44) 13.

⁹⁹ Hachem and Günes (n 95) 713; EMCs Zero Draft Introduction (n 3) 2, 8.

¹⁰⁰ For the present purposes, we assume that the specific transaction does not fall under one of the exceptions in Article 2 CISG and that the parties did not exclude the application of the CISG (Art 6 CISG).

¹⁰¹ Christoph Brunner and Christoph Hurni, 'Article 73 CISG' in Heinrich Honsell (ed), *Kommentar zum UN-Kaufrecht* (2nd edn, Springer 1996) para 2; Christina Fountoulakis, 'Article 73 CISG' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 7. See also Djakhongir Saidov, 'Article 73 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 3.

¹⁰² Brunner and Hurni (n 101) 'Article 73 CISG' paras 2, 9; Ulrich Magnus, 'Article 73 CISG' in Heinz-Peter Mansel (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB—Buch 2: Recht der Schuldverhältnisse: Wiener UN-Kaufrecht (CISG)* (Otto Schmidt—De Gruyter 2025) para 6.

¹⁰³ *ibid.*

¹⁰⁴ Art 3(1)(g)(i) CSDDD.

Directive mentions as examples the design, extraction, sourcing, manufacture, transport, storage, and supply of raw materials, products or parts of products, and the development of the product or service.¹⁰⁵ Of these, the supply of raw materials, products, or parts of products used by the in-scope company to produce its own products or to provide its services are usually cases of contracts for the purchase of goods falling under the CISG. Furthermore, the extraction, sourcing, and manufacturing by the business partner will often involve contracts of sales under Article 3(1) of the CISG. In addition, it is part of the manufacturing and production process within the meaning of Article 3(1) of the CISG that the business partner specifically designs the goods or develops them for the in-scope company.¹⁰⁶ Whenever the seller purchases goods upstream for delivery to the in-scope company, the conduct of due diligence on its own business partners becomes relevant. In this context, the seller is not (only) controlling its own production facilities but is also promising the buyer an additional service obligation pursuant to Article 3(2) of the CISG. This includes seeking sustainability due diligence commitments from its own business partners and monitoring compliance with these commitments. However, given that the tests in Article 3(1) (substantial part) and (2) (preponderant part) are fact-dependent, the assessment of whether a given contract falls under the CISG ultimately depends on a case-by-case analysis.¹⁰⁷

Implementation of HREDD becomes particularly relevant in long-term contracts, as there is more scope for investing in due diligence mechanisms. These long-term agreements are often based on a framework contract outlining the basics of future cooperation. From the perspective of the CISG, such contracts fall within its scope if they already contain the obligation to buy and sell.¹⁰⁸ If the long-term arrangement involves more than one separate delivery or is even open-ended, it qualifies as an instalment sale within the meaning of Article 73 of the CISG.¹⁰⁹ Moreover, a sales contract subject to the CISG also exists if the framework contract only specifies price and minimum quantities while leaving the concrete amount and delivery schedules to later agreements.¹¹⁰

¹⁰⁵ *ibid.*

¹⁰⁶ On specific, customised goods, see CISG-AC Opinion No 4, ‘Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts (Article 3 CISG)’, 24 October 2004 (Rapporteur: Perales Viscasillas), Rule 6; Pascal Hachem, ‘Article 3 CISG’ in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 3; Loukas Mistelis and Anjanette Raymond, ‘Article 3 CISG’ in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 5.

¹⁰⁷ See Pascal Hachem, ‘Article 3 CISG’ in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 5 et seq and 18 et seq; Loukas Mistelis and Anjanette Raymond, ‘Article 3 CISG’ in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 5 et seq and para 15 et seq.

¹⁰⁸ See *Multifunctional fax machine case*, Court of Appeal Canton Geneva [CH], 20 May 2011, CISG-online 2429 para 4.1; *Metallurgical sand case*, Polish Supreme Court, 27 January 2006, CISG-online 1399 p 8; *Behr France Sarl v Romay AG*, French Supreme Court, 30 June 2004, CISG-online 870; *Distribution agreement for fork lifts case*, Court of Appeal Munich [DE], 22 September 1995, CISG-online 208 para 12; Pascal Hachem, ‘Article 1 CISG’ in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 15; John O Honnold and Harry M Flechtner, *Honnold’s Uniform Law for International Sales under the 1980 United Nations Convention* (5th edn, Wolters Kluwer 2021) para 71; Köhler (n 12) 352. The question of whether a framework distribution agreement falls under the CISG is of minor importance in the present context, as HREDD is primarily relevant in upstream relationships—that is, before the final product reaches the market. The CSDDD, for example, includes only very limited HREDD duties in downstream relationships. See Atamer and Wittum (n 22) 143 et seqq.

¹⁰⁹ See n 103 and the accompanying text.

¹¹⁰ Fountoulakis (n 101) ‘Article 73 CISG’ para 8. Some even suggest a broader interpretation, arguing that a framework contract falls under the CISG if it lacks a direct obligation to buy and sell (contract of sale) but instead lays the ground for individual sales contracts to be concluded in its execution (contract for sale). See *Agricultural excavators case*, District Court Zeeland-West-Brabant [NL], 15 February 2023, CISG-online 6231 para 4.5; Loukas Mistelis, ‘Article 1 CISG’ in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 28.

B. International and territorial scope of application

HREDD becomes particularly important when business partners are located in different countries to the chain leader's, especially where these countries offer potentially lower levels of human rights or environmental protection. As of September 2025, the CISG has 97 contracting States¹¹¹ and, according to one estimation, potentially governs more than 80 per cent of international trade in goods.¹¹² However, a significant number of the countries that are not CISG contracting States are in Africa, Southern Asia, and South-Eastern Asia. Companies from these regions are frequently situated at the very beginning of longer supply chains. Accordingly, the application of the CISG to contracts at the start of such supply chains can depend on the rules of private international law leading to the application of the law of a CISG Contracting State (Article 1(1)(b) of the CISG) (for example, the parties choosing Swiss law without explicitly excluding the CISG).¹¹³

2. Incorporating sustainability due diligence clauses into CISG contracts

Since HREDD commitments are likely preformulated for use in multiple contracts and presented to the seller on a take-it-or-leave-it basis, they can be classified as standard terms.¹¹⁴ Regarding their incorporation, standard terms become part of the offer under Article 14(1) of the CISG only if (i) there is a sufficiently clear reference to the terms and (ii) the other party has a reasonable opportunity to take notice of them.¹¹⁵ Where both parties seek to introduce their own sets of standard terms ('battle of the forms'), it is disputed whether the last set of terms should prevail ('last-shot rule')¹¹⁶ or the conflicting terms of both parties should be struck out and replaced by the statutory default rule ('knock-out rule').¹¹⁷ By contrast, questions concerning the validity of standard terms are not governed by the CISG but determined under the applicable national law (Article 4(a) of the CISG),¹¹⁸ including, for example, the FRAND standard contained in the CSDDD.¹¹⁹

¹¹¹ United Nations Commission on International Trade Law, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)' <https://uncitral.un.org/en/texts/sale_goods/conventions/sale_of_goods/cisg/status> accessed 18 August 2025.

¹¹² Ingeborg Schwenzer, 'Introduction I' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022).

¹¹³ On the CISG forming part of the respective national laws, see *Facade panels for mountain lodge case*, Swiss Supreme Court, 4 January 2021, CISG-online 5508 para 18 (on Swiss law); *Kingspan Environmental v Boralis A/S*, High Court of Justice [UK], 1 May 2012, CISG-online 2391 para 617 (on Danish law); *Benetton II case*, German Supreme Court, 23 July 1997, CISG-online 276 para 13 (on German law); Hachem (n 108) 'Article 1 CISG' para 31 and 'Article 6 CISG' para 33.

¹¹⁴ See the definition of standard terms in Art 2.1.19(2) of the UNIDROIT Principles of International Commercial Contracts 2016 (PICC) available at <<https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-English-i.pdf>> accessed 8 April 2025.

¹¹⁵ CISG-AC Opinion No 13, 'Inclusion of Standard Terms under the CISG', 20 January 2013 (Rapporteur: Sieg Eiselen) Rule 2 (CISG-AC Opinion No 13); Franco Ferrari, 'Article 14 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasilas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 39; Ulrich G Schroeter, 'Article 14 CISG' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 136.

¹¹⁶ See Ferrari (n 115) 'Article 19 CISG' para 15.

¹¹⁷ See *Les Verreries de Saint Gobain SA v Martinswerk GmbH*, French Supreme Court, 16 July 1998, CISG-online 344; *Milk powder case*, German Supreme Court, 9 January 2002, CISG-online 651; CISG-AC Opinion No 13 (n 115) Rule 10; Honnold and Flechtner (n 108) para 237; Magnus (n 102) 'Article 19 CISG' para 24; Schroeter (n 115) 'Article 19 CISG' para 92; Ingeborg Schwenzer and Florian Mohs, 'Old Habits Die Hard: Traditional Contract Formation in a Modern World' (2006) 6 *Internationales Handelsrecht* 244; Schwenzer and Muñoz (n 12) 316.

¹¹⁸ On control of standard terms in the context of supply chain legislation, see generally: Barbara Grunewald, 'Inhaltskontrolle von AGB in Lieferverträgen im Hinblick auf die sich aus dem LkSG ergebenden Pflichten' [2023] *ZIP—Zeitschrift für Wirtschaftsrecht* 2238; Hannes Wais, 'Das Lieferkettensorgfaltspflichtengesetz und das AGB-Recht' [2023] 122 *Zeitschrift für Vergleichende Rechtswissenschaft* 120.

¹¹⁹ Art 10(5) subpara 2 and Art 11(6) subpara 2 CSDDD.

3. Operation of sustainability due diligence commitments under the CISG

A. Legal nature of sustainability due diligence commitments

(i) *Dual role: quality standards for goods as well as additional obligations*

Whenever the seller agrees to HREDD commitments, these become legal obligations, rather than merely ethical duties.¹²⁰ In CISG contracts, HREDD commitments have a Janus-faced nature: they can simultaneously qualify as agreements on the quality of the goods and as additional obligations.

Previous scholarship generally interpreted agreements of sustainable production as agreements on the quality of the goods under Article 35(1) of the CISG.¹²¹ This ‘non-conformity reading’ relies on the correct presupposition that quality characteristics under Article 35(1) of the CISG can go beyond the goods’ physical appearance and encompass factual circumstances, such as the goods’ relationship to their surroundings, including sustainable manufacturing practices.¹²² Broadening the notion of quality to include production-related HREDD issues increases the scope of the seller’s liability in case of breach compared to liability for breaches of other obligations, as the buyer is entitled to resort to powerful goods-centred remedies.¹²³ This expansion of liability, in turn, gives the seller a strong incentive to meet expected standards for human rights and environmental protection.

However, if chain leaders (buyers) aim to meet HREDD expectations under mandatory rules such as the CSDDD, HREDD commitments need to go beyond mere agreements on the quality of the goods. This is because questions of conformity of goods are determined in general at the time when the risk passes to the buyer (Article 36(1) of the CISG). Due diligence, by contrast, does not crystallize at a discrete point in time. Particularly in long-term procurement relationships or during extended production periods, it denotes an ongoing, process-oriented obligation that exists independently of the final delivery of goods.¹²⁴ In practice, such commitments will usually only be given against a surcharge, which is reflected in additional price clauses or similar arrangements. Whenever the contract language reflects an expectation of ongoing commitment, HREDD clauses should be interpreted as establishing independent additional obligations (Article 8(2) of the CISG).¹²⁵ Especially in long-term supplier relations where the buyer is an in-scope company subject to mandatory HREDD laws, such independent additional obligations are likely to be the norm. However, it is the buyer’s responsibility to include sufficiently clear language to ensure that the seller knows what is expected. By recognizing that HREDD commitments constitute not only elements of conformity but also additional obligations, liability is conceptually decoupled from the eventual delivery of (non-conforming) goods.¹²⁶

¹²⁰ See Beckers (n 13) 47; Vibe Ulfbeck and Ole Hansen, ‘Sustainability Clauses in an unsustainable contract law?’ (2020) 16(1) *European Review of Contract Law* 186, 193.

¹²¹ See the sources cited in n 12.

¹²² CISG-AC Opinion No 19, ‘Standards and Conformity of the Goods under Article 35 CISG’, 25 November 2018 (Rapporteur: Djakhongir Saidov) para 3.1; Atamer and Gerber (n 12) 1161; Christoph Brunner and Benjamin Gottlieb, ‘Article 35 CISG’ in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019) para 6; Cafaggi (n 4) 353 et seq; Stefan Kröll, ‘Article 35 CISG’ in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 25; Magnus (n 102) ‘Article 35 CISG para 8; Schwenzer and Leisinger (n 12) 267; Ingeborg Schwenzer, ‘Article 35’ in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) para 8 et seq.

¹²³ See III.3.B.

¹²⁴ See UNGP Interpretative Guide (n 38) 33; OECD Guidelines (n 7) Commentary on Chapter IV: Human Rights para 50.

¹²⁵ See the sources cited in n 13.

¹²⁶ See Bremenkamp (n 59) 48 who argues on German national law that quality controls are service elements within a supply agreement.

To clarify, this is not a matter of two mutually exclusive interpretations of HREDD commitments. Both interpretations—as quality agreements and as additional obligations—are valid and can coexist. In fact, requiring that all of the seller’s operations—as well as those of its business partners involved in the buyer’s operations—be sustainable inherently includes the obligation that the goods ultimately delivered are sustainably produced.¹²⁷ Nevertheless, it remains important to distinguish between the two faces of HREDD commitments given that a breach of such commitment does not automatically render the goods non-conforming. The seller may become aware of the breach in a timely manner and either produce or procure untainted goods from another source to fulfil the contract. But even if the seller ultimately delivers conforming goods, the buyer may still pursue remedies such as damages for the earlier breach of this additional independent obligation, especially where it has incurred administrative fines under national HREDD legislation and/or tort liability towards third parties.¹²⁸

(ii) *Obligations of best effort versus obligations to achieve a specific result*

To fully appreciate the scope and content of HREDD commitments under the CISG, it is essential to distinguish between obligations of best efforts and obligations to achieve a specific result. In general, the CISG frames the seller’s obligations as obligations to achieve specific results.¹²⁹ For example, Article 35(1) of the CISG requires them to deliver goods that conform to the contract, rather than merely making reasonable efforts.¹³⁰ Even if the non-conformity results from an impediment beyond the seller’s control that qualifies for exemption under Article 79 of the CISG, the seller is only relieved from liability for damages (Article 79(5)). All other remedies, such as the right to claim delivery of substitute goods, remain available to the buyer.

However, Article 6 of the CISG allows the parties to derogate from default rules and agree on obligations of best efforts instead.¹³¹ To distinguish best efforts obligations from obligations to achieve a specific result,¹³² and to define their precise content, contract interpretation will be of vital importance.¹³³ For instance, Nestlé’s Responsible Sourcing requirements state: ‘No child aged 15 or below is employed’.¹³⁴ The absolute phrasing seems to impose an unequivocal prohibition rather than a qualified commitment, thereby suggesting a duty to achieve a specific result instead of a duty of best efforts. However, in less clear cases, contract interpretation may be informed by the relevant legislative and soft law background. Pertinent HREDD instruments usually require chain leaders (buyers) only to ensure that their business partners (sellers) engage in risk-based due diligence—that is,

¹²⁷ On the connection between HREDD and conformity, see Art 3.2 MCCs 2.0 (n 53); EMCs Zero Draft Commentary (n 34) 38.

¹²⁸ See Bartylla (n 13) 106.

¹²⁹ Atamer and Gerber (n 12) 1172; Schwenzer and Muñoz (n 12) 320 et seq.

¹³⁰ Schwenzer and Muñoz (n 12) 320.

¹³¹ Yeşim M Atamer, ‘Article 79 CISG’ in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 93; Magnus (n 102) ‘Article 79 CISG’ para 65; Schwenzer (n 112) ‘Article 79 CISG’ para 60; Schwenzer and Muñoz (n 12) 320.

¹³² The terms ‘obligation to achieve a specific result’ and ‘obligation of best efforts’ do not represent a strict dichotomy. Rather, there is a fluid spectrum of possible contractual arrangements, with these two concepts serving as prominent reference points. See generally PICC (n 114), Comment to Art 5.1.4 para 1.

¹³³ Schwenzer and Muñoz (n 12) 327, who highlight that Art 5.1.5 PICC can serve as a useful guideline in distinguishing obligations to achieve a specific result from obligations of best efforts. Relevant factors include the wording of the contract, the price and other terms, the degree of risk involved in achieving the expected result, and the other party’s ability to influence performance. For drafting examples, see Schwenzer and Muñoz (n 12) 328 et seq.

¹³⁴ Nestlé Responsible Sourcing: Core Requirements (January 2024), IV. Requirements, Requirements for Direct Suppliers, para. 3.4.1 and Requirements for Origins, para. 2.4.1, available at: <<https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/suppliers/nestle-responsible-sourcing-standard-english.pdf>> accessed 16 August 2025.

to undertake best efforts rather than guarantee specific outcomes.¹³⁵ This expected standard of conduct will be relevant when interpreting an HREDD clause in a given contract that seeks to implement the relevant instrument, as it helps define the expectations of a reasonable person in the seller's position (Article 8(2) of the CISG). Where contract interpretation reveals that only a best-efforts obligation has been agreed upon, it should ordinarily be understood to require the obligor to exert efforts comparable to those of a reasonable person of the same kind in the same circumstances (Article 8(2) of the CISG).¹³⁶

Furthermore, in the case of a best-efforts obligation, a seller who performs due diligence but still causes adverse impacts on human rights and/or the environment does not breach the contract.¹³⁷ Despite the occurrence of adverse impacts, the seller fulfils their additional obligations and delivers conforming goods, as they only committed to making best efforts to mitigate those risks. Since there is no breach of contract in the first place, all remedies (including damages) are precluded.¹³⁸ Obviously, the parties are free to stipulate a guarantee on the seller's part, under which any breach of the production standard automatically triggers both a contractual breach and a non-conformity of the goods.

B. Distinguishing remedies for the delivery of non-conforming goods (goods-centred remedies) from those for breaches of additional obligations (non-goods-centred remedies)

In the event of a breach of HREDD commitments by the seller, the available remedies and their prerequisites vary partially depending on whether such commitments are viewed as quality agreements and/or additional obligations, which are not mutually exclusive interpretations. When HREDD commitments are interpreted as quality agreements and non-conforming goods have been delivered, the buyer can resort to goods-centred remedies like substitute delivery, price reduction, or damages for loss of profit from resale.¹³⁹ The buyer may, alternatively, make use of its right to avoid the contract if the breach is a fundamental one.¹⁴⁰ However, these remedies are subject to the buyer's timely notification of the lack of conformity according to Article 39 of the CISG.¹⁴¹

By contrast, a breach of HREDD commitments interpreted as additional obligations is independent of the delivery of goods and therefore entitles the buyer to exercise remedies that are not goods-centred. These include specific performance of the HREDD commitment, suspension or avoidance of the contract, and damages for losses not related to the buyer's expectation interest in receiving conforming goods (for example, liability for third-party tort claims or administrative fines under mandatory HREDD legislation like the CSDDD).¹⁴²

¹³⁵ See II.2.A.

¹³⁶ See Art 5.1.4(2) PICC; Stefan Vogenauer, 'Article 5.1.4 PICC' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, OUP 2015) para 8. Also see Art 86(1) CISG on preservation of the goods.

¹³⁷ See EMCs Zero Draft Commentary (n 34) 22.

¹³⁸ But see Schwenzer and Muñoz (n 12) 327–33, who read best efforts obligations into Art 79 CISG, which would mean that all remedies other than damages remain based on the strict liability principle.

¹³⁹ Goods-centred remedies generally depend on the prior delivery of non-conforming goods. See Markus Müller-Chen and Yeşim M Atamer 'Artikel 45 CISG' in Peter Schlechtriem, Ingeborg Schwenzer and Ulrich G Schroeter, *Kommentar zum UN-Kaufrecht (CISG)* (8th edn CH Beck 2025) para 5 n 8. The only exception is the claim for damages under Arts 75 and 76 CISG, which may arise even in cases of avoidance for anticipatory non-conformities under Art 72 CISG. See Saidov (n 101) 'Article 72 CISG' paras 33 et seqq.

¹⁴⁰ See III.3.E.(iii).

¹⁴¹ Regarding ancillary obligations such as installation or assembly, which directly impact the conformity of the goods and must therefore be notified in the event of defects, see Magnus (n 102) 'Article 38 CISG' para 9 and 'Article 39 CISG' para 12; Schwenzer (n 112) 'Article 35 CISG' para 35. Some scholars go even further and suggest extending the notification requirement to breaches of additional obligations in general. See Peter Schlechtriem, 'Interpretation, Gap-Filling and Further Development of the UN Sales Convention' (2004) 16 *Pace International Law Review* 279, 297.

¹⁴² On the question of whether notification under Art 39(1) CISG is necessary to rely on the breach of additional obligations, see the sources cited in n 141.

In the following sections, we focus on remedies for breaches of HREDD commitments as independent obligations—a key aspect of contractual due diligence that has not yet received in-depth scholarly attention.¹⁴³ By contrast, the issue of non-conformity of goods has already been extensively analysed in previous scholarship, to which we refer.¹⁴⁴

C. Specific performance

Under Article 46(1) of the CISG, the buyer may request specific performance of any of the seller's obligations.¹⁴⁵ For example, if the seller fails to take reasonable efforts to avoid child labour, the buyer could demand that the seller take appropriate measures henceforth. These measures could include cooperating with drafting and implementing action plans, as well as compelling the seller's own business partners to honour their respective HREDD commitments (if they cause or contribute to the adverse impacts). However, the specific performance claim is subject to Article 28 of the CISG, which says a court is not bound to enter a judgement for specific performance unless it would do so under its own law in respect of similar contracts of sale not governed by the CISG. Given that enforcement of obligations to render a service or to act in a certain way is often problematic, it is advisable to include contractual stipulations incentivising the seller to comply. These might be penalties or liquidated damages clauses (if these are valid under the applicable law)¹⁴⁶ or bonuses for exemplary compliance, such as granting supplier awards, or offering long-term contracts.¹⁴⁷ Nevertheless, setting excessively strong incentives can backfire by encouraging business partners to conceal adverse impacts rather than address them openly, thus potentially contributing to a breach of due diligence duties.¹⁴⁸

D. Suspending performance of contractual obligations

Article 71(1) of the CISG allows a party to suspend performance of their obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of their obligations.

(i) *Applicable suspension standard for sustainability due diligence breaches*

Applying Article 71 of the CISG to breaches of HREDD commitments requires two preliminary clarifications. First, Article 71 applies exclusively to future breaches, not to present ones.¹⁴⁹ However, current due diligence breaches often raise legitimate concerns about future violations,¹⁵⁰ which the seller can address by ensuring appropriate measures to remedy these breaches.¹⁵¹ Therefore, anticipated breaches of HREDD commitments clearly fall

¹⁴³ See the citations in n 13.

¹⁴⁴ See the citations in n 12.

¹⁴⁵ Annette Kock, *Nebenpflichten im UN-Kaufrecht* (Roderer 1995) 37; Müller-Chen and Atamer (n 139) 'Article 46 CISG' para 12 and 'Article 45 CISG' para 3.

¹⁴⁶ Cafaggi (n 55) 247 et seqq. See also Hachem and Günes (n 95) 714; Klausner, (n 72) 225; Pannebaker (n 62) 358 et seqq; Schwenzer and Muñoz (n 12) 335; Wilhelm (n 56) 690.

¹⁴⁷ *ibid.* See also German Environmental Agency, Cost allocation and incentive mechanisms for the environment, climate protection and resource conservation along global supply chains. Recommendations for selected incentive mechanisms, p 27–55, available at <https://www.umweltbundesamt.de/sites/default/files/medien/11850/publikationen/73_2025_texte.pdf> accessed 12 August 2025.

¹⁴⁸ See EMCs Zero Draft Introduction (n 3) 6; Schönfelder and Streibelt (n 70) 12.

¹⁴⁹ *Tic Ltd Sti v Karintrad Nederland BV*, District Court Noord-Holland [NL], 2 February 2022, CISG-online 5798 para 29; *Shoe leather case*, Polish Supreme Court, 11 May 2007, CISG-online 1790 para 22 et seqq; *Roller bearings case*, ICC International Court of Arbitration, 1 July 1999, CISG-online 707; Fountoulakis (n 101) 'Article 71 CISG' para 11; Clayton P Gillette and Stephen D Walt, *The UN Convention on Contracts for the International Sale of Goods: Practice and Theory* (CUP 2016) 186; Damien Nyer, 'Withholding Performance for Breach in International Transactions: An Exercise in Equations, Proportions or Coercion?' (2006) 18 Pace International Law Review 29, 72 et seq.

¹⁵⁰ See UNGP Interpretative Guide (n 38) 49.

¹⁵¹ On present breaches giving rise to the fear of future breaches and therefore allowing for suspension under Art 71(1) CISG, see *Rijn Blend oil case*, Netherlands Arbitration Institute, 15 October 2002, CISG-online 740 para 136; *Umbrellas case*, Austrian Supreme Court, 12 February 1998, CISG-online 349 p 7 et seq;

under Article 71(1), without requiring recourse to an unwritten right to suspend one's obligations under the contract.¹⁵²

Second, most scholars today rightly reject the need for a reciprocal relationship between the obligation anticipated to be breached and the obligation suspended for Article 71(1) of the CISG to apply.¹⁵³ Hence, the provision also applies to anticipated breaches of additional obligations arising from the same contract, irrespective of whether they are explicitly linked to an exchange relationship involving a payment obligation.¹⁵⁴

(ii) Prerequisites for suspension in the case of sustainability due diligence breaches

Article 71(1) of the CISG requires that the expectation of a future breach arises from either (a) a serious deficiency in the obligor's ability to perform or creditworthiness or (b) the obligor's conduct in preparing to perform or in performing the contract. Examples of (a) include credible reports about the seller using child labour or polluting the environment. Examples of (b) include the seller implementing due diligence measures with little chance of success,¹⁵⁵ previous breaches of due diligence obligations,¹⁵⁶ or refusal to participate in a verification process.

Article 71(1) further stipulates that the scenarios described in subparagraphs (a) and (b) must result in a future breach becoming 'apparent' after contract conclusion.¹⁵⁷ 'Apparent' means the presence of objective grounds that demonstrate a high degree of probability.¹⁵⁸ For example, the seller might expressly state their intention not to fulfil due diligence obligations.¹⁵⁹ In addition, past breaches may suggest a high likelihood of future ones.¹⁶⁰ Similarly, a high probability exists when pre-products originate from a source known for human rights and/or environmental violations.¹⁶¹ However, mere market rumours do not establish a sufficiently high likelihood of future breaches to justify contract suspension.¹⁶²

To allow for contract suspension under Article 71(1) of the CISG, the anticipated breach must pertain to a substantial part of the seller's obligations. Whether a breach concerns a substantial part depends on the materiality of the term within the parties' agreement and

Fountoulakis (n 101) 'Article 71 CISG' para 9 and 'Article 73 CISG' para 33; Saidov (n 101) 'Article 73 CISG' para 23; Alexander von Ziegler, 'The Right of Suspension and Stoppage in Transit (and Notification Thereof)' (2005–06) 25 *Journal of Law and Commerce* 353, 356.

¹⁵² On a general right to suspend contractual obligations under the CISG, see Fountoulakis (n 101) 'Article 71 CISG' para 12; Hachem (n 106) 'Article 7 CISG' para 40 et seq; Müller-Chen and Atamer (n 139) 'Article 45 CISG' para 29 et seqq; Pilar Perales Viscasillas, 'Article 7 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods* (2nd edn, CH Beck, Hart, Nomos 2018) para 64.

¹⁵³ Brunner and Hurni (n 101) 'Article 71 CISG' paras 12, 18; John W Carter, 'Suspending Contract Performance for Breach' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP 1997) 485, 511; Fountoulakis (n 101) 'Article 71 CISG' para 13; Magnus (n 102) 'Article 71 CISG' paras 5, 14; Saidov (n 101) 'Article 71 CISG' paras 29, 33.

¹⁵⁴ See the sources cited in n 153. Alternatively, one could argue that the parties linked due diligence to the exchange relationship involving the payment obligation, considering that they likely agreed on payment of a higher price in return for the increased costs.

¹⁵⁵ On measures that do not promise success, see Magnus (n 102) 'Article 71 CISG' para 27.

¹⁵⁶ On past breaches, see Mercêdeh Azeredo da Silveira, 'Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods' (2005) 2 *Nordic Journal of Commercial Law* 1, 8 et seq.

¹⁵⁷ It does not matter if the reasons for the expected non-performance existed before contract conclusion, as long as—in our case—the buyer becomes aware of the facts only afterwards. See Saidov (n 101) 'Article 71 CISG' para 16.

¹⁵⁸ Azeredo da Silveira (n 156) 4; Honnold and Flechtner (n 108) para 513; Saidov (n 101) 'Article 71 CISG' para 19; von Ziegler (n 151) 359.

¹⁵⁹ On express statements, see Saidov (n 101) 'Article 71 CISG' para 22.

¹⁶⁰ On past breaches making future ones apparent, see Saidov (n 101) 'Article 71 CISG' para 23 (specifically for delivering non-conforming goods).

¹⁶¹ On problems with the only source of supply, see Saidov (n 101) 'Article 71 CISG' para 23 (specifically for delivering non-conforming goods).

¹⁶² On market rumours and gossip, see Honnold and Flechtner (n 108) para 516; Saidov (n 101) 'Article 71 CISG' para 27.

the surrounding circumstances (Article 8(2) of the CISG).¹⁶³ Contracts implementing HREDD are likely to attach significant weight to such commitments. If future breaches of these obligations become apparent, are more than merely trivial, and are likely to give rise to adverse impacts, the seller should reasonably be aware that the buyer cannot be expected to tolerate the situation¹⁶⁴ and simply wait for those impacts to materialize. Thus, anticipated HREDD breaches generally give rise to a right of suspending contractual obligations under Article 71(1) of the CISG.¹⁶⁵

(iii) Notice of suspension and adequate assurance of performance

Under Article 71(3) of the CISG, the buyer must immediately inform the seller of their decision to suspend performance or resume performance if the seller provides adequate assurance.¹⁶⁶ Assurance is adequate if it offers reasonable security to the suspending party of substantial (not necessarily perfect) performance.¹⁶⁷ For example, the seller might offer a different supply source free from adverse impacts,¹⁶⁸ provide independent certifications,¹⁶⁹ or agree to an enhanced prevention or corrective action plan and take initial steps to implement it.

E. Avoidance of the contract

There are several legal grounds under which a buyer may terminate a CISG contract ('avoidance'). The primary basis is Article 49(1)(a) of the CISG, which permits avoidance of the entire contract if a breach qualifies as fundamental when viewed against the background of the entire contract. For instalment contracts, Article 73(1) of the CISG 'narrows down'¹⁷⁰ the effects of avoidance to the specific instalment affected by a fundamental breach. Additionally, Article 72(1) of the CISG permits avoidance of the entire contract in cases of an anticipated fundamental breach, while Article 73(2) permits avoidance of future instalments in an instalment contract if a breach in one instalment raises good grounds to expect fundamental breaches in subsequent instalments.¹⁷¹

(i) Fundamental breach of contract in general

All provisions mentioned above require a fundamental breach of contract for avoidance.¹⁷² Article 25 of the CISG classifies a breach of contract as fundamental if it results in such a

¹⁶³ See Fountoulakis (n 101) 'Article 71 CISG' para 20; Saidov (n 101) 'Article 71 CISG' para 5; von Ziegler (n 151) 358.

¹⁶⁴ Fountoulakis (n 101) 'Article 71 CISG' para 20.

¹⁶⁵ Note, however, that contract suspension under Art 71(1) CISG is restricted to a proportionate part, ie the seller cannot suspend the entire obligation, unless the anticipated breach qualifies as fundamental under Art 25 CISG, thereby justifying contract avoidance: Fountoulakis (n 101) 'Article 71 CISG' para 15. For problems with suspension in the case of payment by letter of credit, see EMCs Zero Draft Commentary (n 34) 37.

¹⁶⁶ The consequences of a failure to notify immediately are not expressly addressed in the CISG. Mostly it is argued that the right to suspend the contractual obligations expires if not exercised immediately. See *Rijn Blend oil case*, Netherlands Arbitration Institute, 15 October 2002, CISG-online 740 para 137 (implied); *Swedish furniture case*, District Court Darmstadt [DE], 29 May 2001, CISG-online 686 para 14; Saidov (n 101) 'Article 71 CISG' para 39. However, even if this interpretation is applied, the continuous nature of HREDD suggests that a new right to suspend contractual obligations would arise if the breach of HREDD commitments persists.

¹⁶⁷ Azeredo da Silveira (n 156) 14; Honnold and Flechtner (n 108) para 519; Saidov (n 101) 'Article 71 CISG' paras 52 et seq.

¹⁶⁸ *ibid.*

¹⁶⁹ See Saidov (n 101) 'Article 71 CISG' para 53.

¹⁷⁰ Peter Huber and Alastair Mullis, *The CISG. A new textbook for students and practitioners* (sellier 2007) 350.

¹⁷¹ Article 73(3) CISG also permits avoidance of past and future instalments together where they are interdependent. However, since this rule does not raise considerations of particular relevance in the context of HREDD clauses, it will not be discussed further here.

¹⁷² We leave out the questions of timely declaration in Art 49(2)(b)(i) and 73(2) CISG and reasonable notice under Art 72(2) CISG. Note that there is a debate on whether avoidance in case of Art 73(1) CISG is subject to a time limit as well. On time limits for avoidance under Art 73(1) CISG, see Fountoulakis (n 101) 'Article 73 CISG' para 15; Saidov (n 101) 'Article 73 CISG' para 12.

detriment to the other party as to substantially deprive them of what they are entitled to expect under the contract, unless the party in breach did not foresee, and a reasonable person of the same kind in the same circumstances would not have foreseen, such a result. The breach of any kind of obligation can qualify as fundamental, irrespective of whether it is a main obligation (transfer of property) or an additional one (HREDD obligations).¹⁷³ Even multiple minor breaches, when combined, can amount to a fundamental breach.¹⁷⁴ A detriment is not necessarily a financial loss but covers the loss of any benefit expected under the contract.¹⁷⁵ The contractual expectation of the party not in breach is determined under Article 8 of the CISG.¹⁷⁶ Since the CISG treats avoidance as a remedy of last resort (*ultima ratio*),¹⁷⁷ a substantial deprivation of the contractual expectation requires that the interest in performance essentially ceases to exist.¹⁷⁸ According to the prevailing opinion, foreseeability is assessed at the time the contract was concluded.¹⁷⁹

(ii) *Avoidance prior to delivery*

When the buyer declares avoidance prior to the goods' delivery because of an HREDD breach, the first question is whether there is a present fundamental breach of the entire contract that gives rise to avoidance under Article 49(1)(a) of the CISG. While past breaches may have caused severe impacts, they do not automatically nullify the buyer's contractual interest. For instance, the seller might have negligently failed to provide protective equipment to employees. Still, if the seller has since acquired the necessary equipment, they reaffirm the buyer's contractual expectation in *continuous* due diligence. Consequently, past HREDD breaches on their own will generally not lead directly to a fundamental breach under Article 25 of the CISG.

Instead, avoidance for HREDD breaches prior to delivery requires a prognosis that a fundamental breach is likely to occur in the future (which may sometimes be based on breaches that have already occurred).¹⁸⁰ Therefore, avoidance should be based on Article 72(1) of the CISG or, in the case of instalment sales, on Article 73(2).¹⁸¹ The buyer must demonstrate that a future fundamental breach is either 'clear' (Article 72(1) of the CISG) or that there are 'good grounds to conclude' that such breaches will occur (Article 73(2) of the CISG). In both cases, the substantial deprivation is not the future breach itself but rather the adverse impacts on human rights and/or the environment potentially

¹⁷³ *Cobalt sulphate case*, German Supreme Court, 3 April 1996, CISG-online 135 para 17; Christoph Brunner and Benjamin Leisinger, 'Article 25 CISG' in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019) para 20; Schroeter (n 115) 'Article 25 CISG' para 60, 62.

¹⁷⁴ *GETEC SAS v Bystronic Laser AG et al*, French Supreme Court, 22 March 2016, CISG-online 2688 p 8; *Chinese wired rod case II*, Swiss Supreme Court, 2 April 2015, CISG-online 2592 para 137; Andrea Björklund, 'Article 25 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (2nd edn, CH Beck, Hart, Nomos 2018) para 11; Brunner and Leisinger (n 173) 'Article 25 CISG' para 7; Schroeter (n 115) 'Article 25 CISG' para 70.

¹⁷⁵ Michael Bridge, 'Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods' (2010) 59(4) *International and Comparative Law Quarterly* 911, 918; Schroeter (n 115) 'Article 25 CISG' para 75, 78.

¹⁷⁶ Schroeter (n 115) 'Article 25 CISG' para 84 et seq.

¹⁷⁷ *Chinese products and spare parts case*, ICC International Court of Arbitration, (2019) XLIV ICCA Yearbook Commercial Arbitration 145 para 195; *Chinese wired rod case II* (n 174) para 71; *Cobalt sulphate case* (n 173) para 21; *Down jackets and winter coats case*, China International Economic & Trade Arbitration Commission, 22 March 1995, CISG-online 1118 para 28; Müller-Chen and Atamer (n 139) 'Article 49 CISG' para 2; Schroeter (n 115) 'Article 25 CISG' para 22.

¹⁷⁸ *Chinese products and spare parts case* (n 177) para 195; *Chinese wired rod case II* (n 174) para 71; *Video surveillance systems case*, Austrian Supreme Court, 22 November 2011, CISG-online 2239 para 22; *Cobalt sulphate case* (n 173) para 21; Björklund (n 174) 'Article 25 CISG' para 12; Schroeter (n 115) 'Article 25 CISG' para 87.

¹⁷⁹ Schroeter (n 115) 'Article 25 CISG' para 143 with further references.

¹⁸⁰ Compare UNGP Interpretative Guide (n 38) 49.

¹⁸¹ Before the first instalment was delivered, the buyer can base avoidance on Art 72(1) CISG. See Fountoulakis (n 101) 'Article 73 CISG' para 32; Saidov (n 101) 'Article 73 CISG' para 25.

resulting therefrom.¹⁸² Consequently, the crucial question will be whether anticipated breaches are likely to result in adverse impacts, how severe those impacts will be, and whether they can reasonably be averted—for instance, through enhanced prevention or corrective action plans. A substantial deprivation in the form of anticipated harm to human rights and/or the environment is also reasonably foreseeable (within the meaning of Article 25 of the CISG) for any seller who has explicitly committed to due diligence in the interests of human rights and the environment.

(iii) Avoidance after delivery

After delivery, contract avoidance for HREDD breaches can be based on Article 49(1)(a) of the CISG or, in the case of instalment sales, on Article 73(1). Given the hybrid nature of HREDD commitments as both continuing additional obligations and quality agreements, we must distinguish between goods affected by the prior breach and those unaffected. Where the delivered goods are untainted by the prior breach and conform to the contract (for example, because the seller produced them after curing the HREDD breach or sourced them from an alternative compliant supplier at the last minute), the buyer ultimately receives what it bargained for: sustainably produced goods. Even though severe impacts may have occurred, there is no reason why untainted goods should be returned. Instead, damages can address any harm the buyer suffers because of the earlier breaches (for example, liability for tort claims or administrative fines). Partial avoidance of only the additional obligation is no viable option either. Given the hybrid nature of HREDD obligations, the additional obligation cannot be severed from the main contract—doing so would also modify the conformity obligation. In certain circumstances, however, the mere risk of the goods being tainted and/or the reputational damage suffered by the buyer due to the seller's breach of HREDD commitments may constitute a fundamental breach allowing the buyer to avoid the contract retrospectively.¹⁸³ If past breaches indicate that a fundamental breach will occur in respect of future deliveries, the buyer may declare the contract avoided for the future as discussed in the previous paragraph.

F. Damages for breach of contract

Under Article 45(1)(b) of the CISG, the buyer is entitled to claim damages for any loss incurred due to the seller's breach of contract. Such a breach may involve both primary and additional obligations,¹⁸⁴ including violations of HREDD commitments. The following discussion focuses on three types of losses the buyer could face due to a breach of contractual HREDD commitments: (i) the general loss of the benefit of the bargain (expectation interest) due to non-performance of the HREDD obligation; (ii) losses due to civil liability (tort) claims by third parties; and/or (iii) administrative fines in connection with mandatory HREDD legislation like the CSDDD.¹⁸⁵

(i) General considerations

The first sentence of Article 74 of the CISG establishes that damages for a breach of contract consist of a sum equal to the loss suffered by the non-breaching party because of the breach. The provision is grounded in the principle of full compensation, aiming to place

¹⁸² See *Chinese wired rod case II* (n 174) para 134; Schroeter (n 115) 'Article 25 CISG' para 80. On taking into account negative effects beyond contractual privity within the context of Art 25 CISG, see Cafaggi (n 4) 356 et seq.

¹⁸³ Regarding the 'classic' scenario that the goods are non-conforming due to unsustainable production, and the right of the buyer to avoid the contract if this results in a fundamental breach, see the sources cited in n 12.

¹⁸⁴ Milena Djordjevic, 'Article 74 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods* (2nd edn, CH Beck, Hart, Nomos 2018) para 9.

¹⁸⁵ The breach of HREDD obligations may also give rise to reputational harm. Yet such loss is difficult to quantify and substantiate. A possible basis for calculation could be the marketing expenses the buyer has to incur in order to restore customer trust. See Magnus (n 102) 'Artikel 74 CISG' para 50; Schwenzer and Muñoz (n 12) 336; Schwenzer (n 12), 129. On losses resulting from the violation of HREDD commitments as quality agreements, see the sources cited in n 12.

the non-breaching party in the same position, in monetary terms, as it would have been if the contract had been properly performed.¹⁸⁶ Consequently, Article 74 is broadly interpreted to ensure that all financial disadvantages resulting from the breach are adequately compensated.¹⁸⁷ Recoverable losses are restricted to those that the breaching party foresaw or ought to have foreseen at the time of the conclusion of the contract, in light of the facts and matters of which they then knew or ought to have known, as a possible consequence of the breach of contract (Article 74 of the CISG). Relevant factors include the contractual risk allocation, the contract's purpose, and the protective scope of the specific contractual obligation that was breached.¹⁸⁸ The foreseeability requirement pertains to the type and general extent of the loss, rather than the specific amount or likelihood of the breach.¹⁸⁹ The relevant point in time for determining foreseeability is the moment of contract formation.¹⁹⁰

The key issue regarding the seller's breach of HREDD commitments is whether the relevant losses are generally recoverable under the CISG (see below, ii–iv). If this is accepted, a further question would be whether such losses were foreseeable for the seller at the time of contract conclusion. With respect to the performance interest, such losses are usually recognized as foreseeable consequences of a breach.¹⁹¹ As for losses arising from tortious liability and fines, it is reasonable to expect that any seller would foresee their buyer seeking explicit HREDD commitments precisely to mitigate liability toward potential victims and avoid sanctions—whether under general tort law or specific HREDD legislation such as the CSDDD. Therefore, unless the liability is exceptionally high,¹⁹² the seller cannot rely on the foreseeability limitation under Article 74 of the CISG.¹⁹³

(ii) Compensation for the diminished value of performance

The price agreed to between the parties reflects the seller's commitment to comply with HREDD. If these commitments are breached, the buyer will have overpaid the seller. Just as in cases where the goods delivered are of lesser value, the buyer should, likewise, be entitled to claim compensation for the reduced value of the seller's HREDD performance.¹⁹⁴ The question of whether the buyer may also claim the savings achieved by the seller/manufacturer through the unethical production methods (for example, by employing child labour) remains debated.¹⁹⁵ However, since the price attributable to independent HREDD obligations is generally ascertainable, it appears unnecessary to rely on a disgorgement of profit approach.¹⁹⁶ Such an approach is primarily relevant where unethically produced

¹⁸⁶ *Brands International Corporation v Reach Companies, LLC*, US Court of Appeals (8th Circuit), 30 May 2024, CISG-online 7006 para 19; *Cooling machine case*, Austrian Supreme Court, 14 January 2002, CISG-online 643 para 46; CISG-AC Opinion No 6, 'Calculation of Damages under CISG Article 74', 2006 (Rapporteur: John Y Gotanda) para 1.1 (CISG-AC Opinion No 6); Djordjevic (n 184) 'Article 74 CISG' para 2; Honnold and Flechtner (n 108) para 532; Schwenger (n 112) 'Article 74 CISG' para 18.

¹⁸⁷ CISG-AC Opinion No 6 (n 186) para 1.1.

¹⁸⁸ Schwenger (n 112) 'Article 74 CISG' para 51.

¹⁸⁹ *Indian glass mosaic tiles case*, Austrian Supreme Court, 15 January 2013, CISG-online 2398 para 4; Schwenger (n 112) 'Article 74 CISG' paras 47, 52.

¹⁹⁰ Schwenger (n 112) 'Article 74 CISG' para 49.

¹⁹¹ Schwenger (n 112) 'Article 74 CISG' para 54.

¹⁹² For example, because liability is based on previous violations or annual turnover of the in-scope company. See Art 27(2)(e) and (4) CSDDD.

¹⁹³ On the foreseeability of loss in the form of liability to third parties, see *Valve tappets case*, Court of Appeal Schleswig [DE], 28 May 2020, CISG-online 5538 para 69; *Natural stones case III*, Austrian Supreme Court, 22 April 2010, CISG-online 2296 para 17; Schwenger (n 112) 'Article 74 CISG' para 58.

¹⁹⁴ See Schwenger and Köhler (n 205) 'Artikel 74 CISG' para 75. It should be noted that this performance interest differs from the performance interest in receiving goods produced in a sustainable manner. The latter can only be protected by interpreting HREDD clauses as quality agreements, once unsustainably produced goods have actually been delivered. See III.3.A.(i) and III.3.B.

¹⁹⁵ See Ingeborg Schwenger and Ben G Köhler, 'Artikel 74 CISG' in Peter Schlechtriem, Ingeborg Schwenger, and Ulrich G Schroeter, *Kommentar zum UN-Kaufrecht (CISG)* (8th edn CH Beck 2025) para 35 et seq.; Müller-Chen and Atamer (n 139) 'Artikel 45 CISG' para 40; Djordjevic (n 184) 'Article 74 CISG' para 65.

¹⁹⁶ Compare Schwenger (n 112) 'Article 74 CISG' para 24.

goods can be resold by the buyer without any price reduction, so that no economic loss can be established.

(iii) *Third-party tort liability*

As a result of a seller's breach of HREDD commitments, the chain leader (buyer) may also face third-party tort claims. In general, the buyer's contractual and non-contractual liability to third parties resulting from the seller's breach of contract is classified as a recoverable consequential loss under Article 74 of the CISG.¹⁹⁷

However, Article 5 of the CISG states that the Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person. In terms of classical tort law, human rights violations often amount to death or personal injury, such as physical harm resulting from unsafe working conditions, child or forced labour, and torture.¹⁹⁸ Adverse impacts on the environment can sometimes cause harm to human health as well (for example, toxication). Nevertheless, Article 5 only excludes claims for death or personal injury caused by the goods themselves; it does not extend to death or personal injury arising during the production of the goods.¹⁹⁹ In addition, Article 5 is concerned with direct claims against the seller for personal injury suffered by the buyer or third parties. This potentially involves questions specific to national law, like compensation for the harm and suffering of surviving dependants, or other third parties.²⁰⁰ By contrast, the situation at hand only involves recourse for the buyer's ordinary financial loss, which does not raise any special considerations beyond those applicable in other cases of liability to third parties (such as liability to a sub-buyer due to the non-conformity of the goods—a scenario that undoubtedly falls within the scope of the CISG).²⁰¹ Moreover, exemptions from a harmonizing convention like the CISG should be interpreted narrowly to uphold its unifying purpose. Consequently, the buyer's financial losses from compensating third-party victims are recoverable under the CISG.

In addition to damages under the CISG, the buyer may have a recourse claim under national law, based on the joint and several liability of both the seller and the buyer for the

¹⁹⁷ *Foil case I*, German Supreme Court, 25 November 1998, CISG-online 353 para 21 (contractual liability); *Propane gas case*, Austrian Supreme Court, 6 February 1996, CISG-online 224 para 45 (contractual liability); CISG-AC Opinion No 6 (n 186) Rule 6 (general statement, examples given on contractual liability); Schwenger (n 112) 'Article 74 CISG' para 33 (general statement and examples for both contractual and non-contractual liability).

¹⁹⁸ Cees van Dam, *European Tort Law* (2nd edn, OUP 2013) para 711-4. See also Wagner (n 37) 753.

¹⁹⁹ Note that some extend Art 5 CISG beyond its wording to death or personal injury arising from the performance of a service under Art 3(2) CISG. See CISG-AC Opinion No 12, 'Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG', 20 January 2013 (Rapporteur: Hiroo Sono) para 2.2.2; Hachem (n 106) 'Article 5 CISG' para 8; John Ribeiro, 'Article 5 CISG' in Stefan Kröll, Loukas Mistelis, and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods* (2nd edn, CH Beck, Hart, Nomos 2018) para 7; Peter Schlechtriem, 'Requirements of Application and Sphere of Applicability of the CISG' (2005) 36 *Victoria University of Wellington Law Review* 781, 792. It is even argued that the same logic should apply to harm caused by breaches of ancillary obligations: Ribeiro, loc cit para 7.

²⁰⁰ On the seller's direct liability to third parties for breaching a sales contract under national law, see Uniform Commercial Code § 2-318; German Supreme Court, 27 February 2020, VII ZR 151/18, BGHZ 225, 23; French Supreme Court, 13 January 2020, n° 17-19.963; French Supreme Court, 9 October 1979, n° 78-12.502, Bull. civ. I, n° 241.

²⁰¹ This is also in line with the ratio legis of Art 5 CISG. The provision was suggested by countries like France, which do not allow for a concurrent tort claim if there is a contractual claim (*non cumul*). If product liability claims would be covered by the CISG, buyers, who were victim of a defective product, could only assert their damages claim by complying with the notification duty as well as the upper 2-year liability limit of Art 39 CISG, which would be very unfavourable. See Magnus (n 102) 'Article 5 CISG' para 2 seq. On claims for financial loss not falling under Art 5 CISG, see CISG-AC Opinion No 12, 'Liability of the Seller for Damages Arising Out of Personal Injuries and Property Damage Caused by Goods and Services under the CISG', 20 January 2013 (Rapporteur: Hiroo Sono) para 2.3.2 (CISG-AG Opinion No 12); Hachem (n 106) 'Article 5 CISG' para 11; Honnold and Flechtner (n 108) para 101; Ribeiro (n 199) 'Article 5 CISG' para 12; Schwenger (n 112) 'Article 74 CISG' para 33. But see the opposing view that Art 5 CISG excludes even redress claims: Franco Ferrari 'Artikel 5 CISG' in Peter Schlechtriem, Ingeborg Schwenger and Ulrich G Schroeter, *Kommentar zum UN-Kaufrecht (CISG)* (8th edn, CH Beck 2025) para 8; Magnus (n 102) 'Article 5 CISG' para 8.

harm caused to the third party.²⁰² However, there is ongoing debate as to whether the CISG, within its scope of application, excludes concurrent claims under national law that arise out of similar fact patterns but that are classified as non-contractual.²⁰³

(iv) *Administrative fines*

Besides third-party tort claims, buyers may face administrative fines if they violate their duties under mandatory HREDD legislation (for example, negligence in monitoring).²⁰⁴ In most cases, a significant proportion of the blame for the harm caused will lie with the seller, who violated their contractual HREDD commitments. Based on the principle of full compensation, many commentators consider administrative fines to be a recoverable loss under Article 74 of the CISG, often without further elaboration on the issue.²⁰⁵

By contrast, English, Swiss, and German national laws have reservations against the transfer of fine liability to a person who, by breaching a contractual obligation or fiduciary duty (such as incorrect tax advice by a tax consultant or breach of competition rules by a company's director), has triggered the fine. Since the purpose of the statute on which the fine was based is usually to impose a personal punishment on the wrongdoer, this objective would be undermined if the negative consequences could simply be shifted onto someone else through a claim for damages.²⁰⁶

Nevertheless, excluding certain categories of loss from Article 74 of the CISG must stem from the CISG itself, not from domestic statutory policies, as the Convention must be applied uniformly (Article 7(1) of the CISG).²⁰⁷ The CISG itself does not contain policy considerations that would justify excluding redress for fines imposed on the obligee, especially when such fines are partly a result of the obligor's breach of contract. Consequently, administrative fines should be considered a recoverable loss under Article 74 of the CISG. An apportionment between the parties can be achieved via Article 80 of the CISG, as discussed in the next section.

²⁰² Art 29(5), subpara 2 CSDDD declares joint and several liability but leaves the question of redress to national law. Potential national redress provisions include Section 426 German Civil Code; Art 1317 et seqq French Civil Code; Civil Liability (Contribution) Act 1978 [UK], s 1.

²⁰³ On the exclusion of concurrent national recourse claims by the CISG, see *Czechoslovakian fish case*, Court of Appeal Jena [DE], 26 May 1998, CISG-online 513 para 53; CISG-AC Opinion No 12 (n 199) para 2.3.2 read in conjunction with para 2.2.2; Müller-Chen and Atamer (n 139) 'Artikel 45 CISG' para 49; Ribeiro (n 199) 'Article 5 CISG' para 26.

On the possibility of concurrent recourse claims under national law, see *Pamesa Ceramica v Yisrael Mendelson Ltd*, Israeli Supreme Court, 17 March 2009, CISG-online 1980 para 70 et seqq (on ULIS); Hachem (n 106) 'Article 5 CISG' para 11; Honnold and Flechtner (n 108) para 103; Joseph Lookofsky, 'In Dubio Pro Conventione? Some Thoughts about Opt-outs, Computer Programs and Preemption Under the 1980 Vienna Sales Convention [CISG]' [2003] 13 *Duke Journal of Comparative and International Law* 263, 286 et seq; Schlechtriem (n 199) 793.

²⁰⁴ See Art 27 CSDDD.

²⁰⁵ Köhler (n 12) 354; Schwenzer and Köhler (n 195) 'Artikel 74 CISG' para 64; Schwenzer and Muñoz (n 12) 335.

²⁰⁶ Switzerland: Swiss Supreme Court, 12 November 2007, BGE 134 III 59 para 2.3.2 (client has no damages claim against their tax advisor who offered wrong advice, leading to a fine against the client). England: *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2011] Bus LR 1629 [44] (Pill LJ) (company has no claim against its directors who breached competition law, leading to a fine against the company). Germany: Court of Appeal Dusseldorf, 27 July 2023, 6 U 1/22 (Kart), [2023] *Neue Zeitschrift für Gesellschaftsrecht* 1279 para 152 (similar situation as *Safeway Stores*) (an appeal is currently pending in front of the German Supreme Court under docket no KZR 74/23, which referred the matter for preliminary ruling to the European Court of Justice on 11 February 2025).

²⁰⁷ The recoverability of attorney fees as a loss item under Article 74 of the CISG is highly debated. See *Brands International* (n 186); *Zapata Hermanos Sucesores, SA v Hearthside Baking Co*, US Court of Appeals (7th Circuit), 19 November 2002, CISG-online 684; CISG-AC Opinion No 6 (n 186) Rule 5; Honnold and Flechtner (n 108) para 537; Schwenzer (n 112) 'Article 74 CISG' para 30. Critical of the exclusion of attorney fees: Florian Mohs and Milivoje Mitrovic, 'The Saga Continues: Can Attorneys' Fees be Recovered as Loss under the CISG?' (2024) 24(4) *Internationales Handelsrecht* 142. However, in the context of attorney fees, the reasoning differs. Proponents of non-recoverability argue that offering redress would violate the principle of equality between the parties, as a successful defendant may still be unable to recover attorney fees if the claimant was not in breach of the contract.

4. Cooperation duties under the CISG

The UNGP, the OECD Guidelines, and the CSDDD place duties on the chain leader that go beyond merely seeking contractual HREDD commitments. These include accompanying duties such as ensuring compliance and fairly sharing the associated burdens required to meet the HREDD expectations. First and foremost, they must collect information and monitor compliance by business partners.²⁰⁸ Additionally, they are expected to reduce the compliance burden by adapting appropriate business practices, providing financial and non-financial support, and maintaining clear communication.²⁰⁹

A. Legal qualification of cooperation duties under the CISG

Buyers may include cooperation mechanisms in contracts to promote compliance with HREDD commitments.²¹⁰ Contractually agreed cooperation mechanisms could include technical or financial assistance. In such a case, the seller has the right to enforce contractually agreed cooperation measures in court under Article 46(1) or to claim damages under Article 45(1)(b) of the CISG. Alternatively, they can invoke Article 80 as a partial defence against the buyer's remedies for breaches of HREDD commitments. Article 80 of the CISG states that a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

However, even if the sales contract does not explicitly grant sellers enforceable rights, buyers may still have a duty to cooperate and/or monitor to avoid losing their right to remedies under Article 80 of the CISG.²¹¹ Omissions are only relevant under Article 80 if the obligee is under a duty to act or cooperate.²¹² While it remains debated whether the CISG imposes a general duty of good faith,²¹³ it is generally accepted that the Convention requires cooperation when this is necessary to enable the other party's performance.²¹⁴ Since some degree of cooperation is essential for sellers within interconnected global supply chains to meet their HREDD obligations, the CISG's general duty of cooperation may apply, even where the contract does not expressly ask for such measures.²¹⁵ In this context, the duty to cooperate could include regularly instructing the seller, clearly communicating expectations, and monitoring the seller's conduct. Especially in long-term relations, the duty to cooperate could also involve avoiding unreasonable demands during the contract's lifespan, such as excessively shortening delivery times or drastically reducing prices, which could encourage unlawful behaviour by the seller. Combined

²⁰⁸ See II.2.B.

²⁰⁹ See II.2.C.

²¹⁰ See II.2.C.

²¹¹ On non-actionable duties under the CISG, see Djordjevic (n 184) 'Article 74 CISG' para 9; Müller-Chen and Atamer (n 139) 'Artikel 45 CISG' para 4; Schwenger (n 112) 'Article 74 CISG' para 13.

²¹² *Artem v Gray Fox Logistics*, Arbitration Institute of the Stockholm Chamber of Commerce, 30 April 2020, CISG-online 5548 para 449; Atamer (n 131) 'Article 80 CISG' para 6.

²¹³ Against a general duty of good faith under the CISG: ICC International Court of Arbitration, 23 January 1997, number 8611/HV/JK (UNILEX); Honnold and Flechtner (n 108) para 119; Hachem (n 106) 'Article 7 CISG' para 17.

In favour of a general duty of good faith under the CISG: *Busrel Inc v Dotton et al*, US District Court for the Western District of New York, 1 November 2022, docket no 1:20-cv-017667, sub 3 (PACE); *Noridane Foods SA v Anexo Comercial Importação e Distribuição Ltda*, Court of Appeal State of Rio Grande do Sul [BR], 14 February 2017, number 70072362940 (UNILEX); ICC International Court of Arbitration, 2003, number 11849 para 74 (UNILEX); *Fresh-Life International BV v Cobana Fruchtring GmbH & Co, KG*, District Court Rotterdam [NL], 25 February 2009, CISG-online 1812 para 4.4; *Machinery case*, German Supreme Court, 31 October 2001, CISG-online 617 para 16; Hungarian Chamber of Commerce and Industry Court of Arbitration, 17 November 1995, number VB/94124 para 6 (UNILEX); *SARL Bri Production 'Bonaventure' v Société Pan African Export*, Court of Appeal Grenoble, 22 February 1995, CISG-online 151; Vienna International Arbitration Centre, 15 June 1994, number SCH-4318 para 5.5 (UNILEX); Ferrari (n 201) 'Artikel 7 CISG' paras 26, 49; Magnus (n 102) 'Article 7 CISG' paras 10, 29; Perales Viscasillas (n 152) 'Article 7 CISG' para 24 et seqq.

²¹⁴ Camera arbitrale nazionale ed internazionale di Milano, 28 September 2001 para 6.1 (UNILEX), which read Art 5.1.3 PICC into a CISG contract; Atamer (n 131) 'Article 80 CISG' para 6; Ferrari (n 201) 'Artikel 7 CISG' para 54; Magnus (n 102) 'Article 7 CISG' para 47; Schwenger (n 112) 'Article 80 CISG' para 3.

²¹⁵ See Cafaggi (n 4) 355 et seqq.

with Article 80 of the CISG, this duty can provide a fair burden-sharing mechanism by apportioning losses and thereby incentivizing buyers to act responsibly.

B. Defence of the seller under Article 80 of the CISG

(i) *(Partial) causation of the breach of contract by the buyer*

For exemption under Article 80 to take place, the breach of contract by the seller needs to be caused by the buyer's omission in the form of violating its contractual obligations or the CISG's general duty to cooperate. In the case of omissions, causation requires that the necessary action would have prevented the breach with a high probability.²¹⁶ However, the omission does not need to be the sole cause for the breach of contract. Instead, Article 80 of the CISG provides for exemption 'to the extent that' the obligee caused the failure to perform.²¹⁷

It may be argued that breaching cooperation duties could, in some cases, be seen as a failure to mitigate the loss under Article 77 of the CISG rather than as a cause of the initial breach, given that the buyer's failure to cooperate or monitor often persists after the initial breach of HREDD commitments.²¹⁸ However, given the continuous nature of both HREDD commitments and the duty to cooperate, a breach of such duties contributes to an ongoing violation of due diligence obligations. For instance, if a seller fails to install adequate fire safety measures, the buyer contributes to unsafe working conditions by failing to instruct, monitor, or provide investment. Similarly, the buyer may allow child labour concerns to persist by failing to monitor any measures taken by the seller, such as requesting school certificates in countries without a national birth register.

(ii) *Legal consequences of an exemption under Article 80 of the CISG*

If the buyer is solely responsible for the breach of the HREDD commitments, they will lose all remedies resulting therefrom.²¹⁹ These remedies include specific performance, avoidance, contract suspension, and the right to claim damages.²²⁰ In cases of joint contributions, common in HREDD violations, apportionment becomes necessary ('to the extent that'). This apportionment is based not on comparative fault but on the degree of objective causation.²²¹ Monetary claims, like the right to claim damages, can be reduced proportionally to reflect each party's contribution.²²² Conversely, indivisible rights, like the right to

²¹⁶ *Beer case I*, Court of Appeal Brandenburg [DE], 5 February 2013, CISG-online 2400 para 80; Atamer (n 131) 'Article 80 CISG' para 8; Magnus (n 102) 'Article 80 CISG' para 12.

²¹⁷ Atamer (n 131) 'Article 80 CISG' para 17 et seq; Christoph Brunner, Christopher Boog, and Beat Schläpfer, 'Article 80 CISG' in Christoph Brunner and Benjamin Gottlieb (eds), *Commentary on the UN Sales Law (CISG)* (Wolters Kluwer 2019) para 11; Magnus (n 102) 'Article 80 CISG' para 14; Thomas Neumann, *The Duty to Cooperate in International Sale: The Scope and Role of Article 80 CISG* (sellier 2012) 84, 155; Ingeborg Schwenzer and Simon Manner, 'The Pot Calling the Kettle Black: The Impact of the Non-Breaching Party's (Non-)Behavior on its CISG-Remedies' in Camilla B Andersen and Ulrich G Schroeter (eds), *Sharing International Commercial Law across National Boundaries, Festschrift for Albert H Kritzer* (Wildy, Simmonds & Hill Publishing 2009) 470, 477 et seq; Schwenzer (n 112) 'Article 80 CISG' para 7.

²¹⁸ See Köhler (n 12) 354 et seq; Schwenzer and Köhler (n 205) 'Artikel 74 CISG' para 64.

²¹⁹ *Italian grape juice case*, Court of Appeal Hamm [DE], 25 March 2019, CISG-online 5215 para 47; Brunner, Boog, and Schläpfer (n 217) 'Article 80 CISG' para 9; Neumann (n 217) 93, 145, 181.

²²⁰ Atamer (n 131) 'Article 80 CISG' para 12; Brunner, Boog, and Schläpfer (n 217) 'Article 80 CISG' para 9; Neumann (n 217) 182; Ingo Saenger, 'Herabsetzung des Schadensersatzes und Befreiung von Vertragspflichten bei beiderseitiger Mitverursachung nach CISG' in Peter Mankowski and Wolfgang Wurmnest (eds), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (sellier 2014) 291, 295; Schwenzer (n 112) 'Article 80 CISG' para 9.

²²¹ Denis Tallon, 'Article 80 CISG' in Cesare Massimo Bianca and Michael Joachim Bonell (eds), *Commentary on the International Sales Law* (Giuffrè 1987) para 2.5.

²²² Atamer (n 131) 'Article 80 CISG' para 18; Brunner, Boog, and Schläpfer (n 217) 'Article 80 CISG' para 11; Neumann (n 217) 196; Schwenzer and Manner (n 217) 478 et seq; Schwenzer (n 112) 'Article 80 CISG' para 10.

suspend their contractual obligations or avoid the contract, should only be excluded if the buyer's contribution outweighs that of the seller.²²³

IV. Conclusion

In sum, there is an increasing demand to integrate HREDD into international sales contracts, which are often governed by the CISG. When HREDD commitments are validly incorporated into CISG contracts, they amount to both a specification of the goods' quality and an additional agreement on seller's obligations. The question of whether the seller is merely required to use best efforts to avoid adverse impacts on human rights and the environment or is, instead, deemed to guarantee a specific result must be determined based on the wording of the contract and the surrounding circumstances. In cases of doubt, HREDD clauses should only be interpreted as best-efforts obligations. When relying on the breach of HREDD obligations, the buyer can exercise non-goods-centred remedies irrespective of delivery. These include specific performance under Article 46(1), suspension of contractual obligations under Article 71, contract avoidance under Article 72 or 73(2), and damages for breach of contract under Article 45(1)(b) of the CISG. However, the buyers' remedies may be partially barred under Article 80 of the CISG if they fail to monitor the seller's compliance and do not cooperate in the HREDD process.

The CISG, overall, is well equipped to meet HREDD expectations raised by soft law and mandatory legislation. Suspension serves as an effective mechanism to prompt the implementation of enhanced preventive or corrective action plans and will frequently be applicable in cases where HREDD commitments are breached. In addition, the reciprocal duties to notify and provide assurance for suspension foster cooperation between the parties.²²⁴ Furthermore, the standard of fundamental breach required for contract avoidance is flexible enough to take up the contractual expectation of continuous efforts and ensures that disengagement remains a last resort. Finally, damages allow for compensation of the diminished value of performance, as well as recovery for other losses like third-party tort liability or administrative fines. However, in order to enhance legal certainty, it may be beneficial to explicitly specify in the contract the circumstances in which the buyer can suspend their contractual obligations or avoid the contract. Moreover, contracts should clearly outline reciprocal obligations to improve the effectiveness of HREDD, requiring the buyer to cooperate and monitor compliance with HREDD commitments. On this basis, Article 80 of the CISG offers a flexible mechanism to ensure a fair distribution of the burden between the parties.

To conclude, contract drafters should consider the following points when planning to integrate HREDD into international sales contracts:

- establish HREDD as mutual obligations of both parties (shared responsibility) and expressly stipulate for cooperation where necessary;
- request business partners to obtain corresponding commitments from their business partners if your responsibility extends to them;
- include risk-based documentation and information obligations as well as monitoring measures in your contracts and cascade those to indirect business partners;
- consider requesting direct business partners to make you a third-party beneficiary to cascaded HREDD clauses;
- provide for contract suspension and avoidance as a measure of last resort; and
- consider operating a supplier qualifications system to gain more direct leverage over indirect business partners.

²²³ Atamer (n 131) 'Article 80 CISG' para 20; Brunner, Boog, and Schläpfer (n 217) 'Article 80 CISG' para 11 et seq; Magnus (n 102) 'Article 80 CISG' para 14. Others argue that, to exercise indivisible rights, the obligee should have to contribute a sum of money reflecting their comparative contribution. See Schwenzer and Manner (n 217) 478 et seqq.

²²⁴ Saidov (n 101) 'Article 71 CISG' paras 1, 50.

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