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Commercial contracts in Denmark: applicable law in the sales of goods and services; boilerplate and sustainability clauses

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The Denotation

Despoina Anastasiadou Galva

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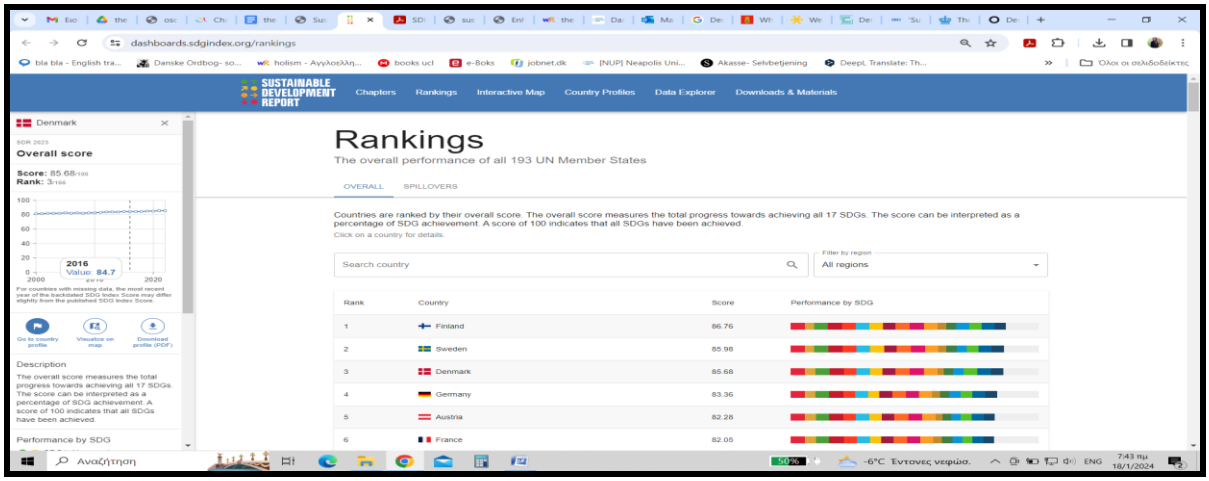

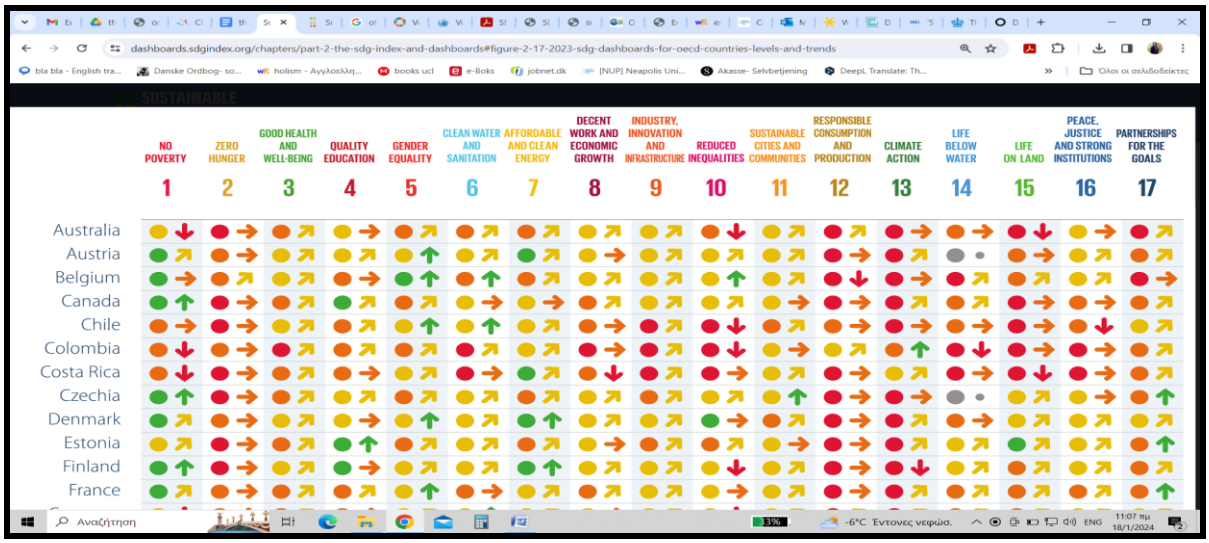

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Greek Summary

Η παγκοσμιοποίηση της αλυσίδας εφοδιασμού καθιστά την ασφάλεια δικαίου πολύ πιο πολύπλοκη λόγω των διαφορών στα νομικά συστήματα. Μια διεθνής σύμβαση απεικονίζει καλύτερα τον τρόπο με τον οποίο τα συμβαλλόμενα μέρη αποφασίζουν για την κατανομή και διαχείριση των κινδύνων που απορρέουν από την επιχειρηματική τους σχέση. Μια διεθνής συμφωνία καταδεικνύει περαιτέρω τον τρόπο με τον οποίο η εθνική νομοθεσία αντιμετωπίζει τις διασυνοριακές συναλλαγές.
Στη Δανία, οι συμβάσεις διέπονται από την αρχή της ελευθερίας των συμβάσεων. Ως εκ τούτου, κατά κανόνα, οι συμβάσεις στη Δανία δεν απαιτούν συγκεκριμένη μορφή ή περιεχόμενο και τα συμβαλλόμενα μέρη είναι ελεύθερα να συμφωνήσουν τους όρους και τις προϋποθέσεις της σύμβασης. Η παρούσα διατριβή ασχολείται με συμβατικά ζητήματα και τον τρόπο με τον οποίο τα ρυθμίζει το δανικό δίκαιο των συμβάσεων. Διερευνά τα βασικά νομικά ζητήματα του δανικού δικαίου υπό το πρίσμα της εταιρικής νομολογίας και της νομικής βιβλιογραφίας. Η εργασία αυτή υποστηρίζει ότι οι δανικές εταιρείες που δραστηριοποιούνται διεθνώς τείνουν να συντάσσουν συμβάσεις σύμφωνα με τις εθνικές νομικές απαιτήσεις, παρόλο που η συναλλαγή είναι διεθνής. Η ανάλυση περιλαμβάνει επίσης έναν προβληματισμό σχετικά με τις απαιτήσεις βιωσιμότητας και εταιρικής κοινωνικής ευθύνης και τον τρόπο με τον οποίο οι εν λόγω υποχρεώσεις ενσωματώνονται στις διεθνείς συμβάσεις. Διερευνά επίσης κατά πόσον οι δανικές εταιρείες κατάφεραν να επιφέρουν αλλαγή στις επιχειρηματικές συμπεριφορές και να προωθήσουν τους στόχους της βιωσιμότητας. Η μελέτη αυτή εξετάζει επίσης τον ρόλο των δικαστηρίων στην ερμηνεία και την εφαρμογή τέτοιων διεθνών συμφωνιών και καταδεικνύει ότι τα δανικά δικαστήρια ακολουθούν τους προεπιλεγμένους κανόνες και μια σκανδιναβική προσέγγιση. Η παρούσα εργασία εξάγει συμπεράσματα σε σχέση με την αποτελεσματικότητα του δανικού νομικού συστήματος, αλλά υπογραμμίζει επίσης την ανάγκη για ένα πιο καθολικό σύνολο κανόνων διεθνώς, καθώς κάθε κράτος έχει το δικό του νομικό σύστημα και τις ιδιαιτερότητές του. Υποδηλώνει ότι η έλλειψη αρμονίας στον τομέα των διεθνών συναλλαγών μπορεί να προκαλέσει μια σειρά προκλήσεων όχι μόνο κατά τον σχεδιασμό μιας διεθνούς σύμβασης αλλά και κατά την ερμηνεία και την εφαρμογή της.

List of Abbreviations

CA	Contracts Act (Aftaleloven)
CISG	(United Nations) Convention on Contracts for the International Sale of Goods (Vienna, 1980)
CoC	Code of Conduct
CSR	Corporate Social Responsibility
EA	Entire Agreement clause
ECJ	European Court of Justice
EPI	Environmental Performance Index
EU	European Union
INCOTERMS	International Commercial Terms
ILO	International Labour Organisation
LoI	Letter of Intent
NGOs	Non-governmental organizations
OIE	Office International des Epizooties
PECL	Principles of European Contract Law
PLA	Product Liability Act
SD	Sustainable Development
SDGs	Sustainable Development Goals
SDSN	Sustainable Development Solutions Network
SGA	(Danish) Sale of Goods Act (Købeloven)
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNIDROIT	Principles of International Commercial Contracts (UPICC)
UNCED	United Nations Conference on Environment and Development (1992)
UPICC	Principles of International Commercial Contracts

Abstract

Globalization of the supply chain makes legal certainty much more complicated because of the differences in legal systems. An international contract best illustrates how the contracting parties decide to allocate and manage the risks arising out of their business relationship. An international agreement further demonstrates how national legislation addresses cross-border transactions. In Denmark, contracts are governed by the principle of freedom of contract. Therefore, as a rule, Danish contracts do not require a specific form or content, and the contracting parties are free to agree on the terms and conditions of the contract. This thesis deals with contractual issues and the way Danish Contract law regulates them. It explores the key legal issues in Danish law under the prism of corporate jurisprudence and legal literature. This paper argues that Danish corporations operating internationally tend to draft contracts in line with national legal requirements, even though the transaction is international. The analysis also includes a reflection upon sustainability and Corporate Social Responsibility requirements and the way such obligations are integrated in international contracts. It also explores whether Danish corporations have managed to bring a change in business behaviors and promote sustainability goals. This study also reflects upon the role of the Courts in the interpretation and the application of such international agreements and demonstrates that Danish Courts follow default rules and a Scandinavian approach. This paper draws conclusions in relation to the effectiveness of the Danish legal system but also highlights the need for a more universal set of rules internationally as each State has its own legal system and its peculiarities. It suggests that a lack of harmony in the field of international transactions may cause a number of challenges not only in the design of an international contract but also in the interpretation and application of it.

Keywords

Commercial contracts; cross border transactions; Danish contract law; boilerplate clauses; sustainability clause; CSR requirements; international contracts.

Introduction

In the world of international business, it is all about considering and managing risks, including legal risks.[1] This process is reflected in the way an international contract is concluded. In practice, though, national law usually affects the interpretation and application of the transaction even if it is international. This may be challenging, as each state applies its own legal system with its peculiarities. To that end, harmonization of international contract law is of great significance in securing cross border transactions.

As a civil law country, Denmark follows a concise structure of a commercial contract, addressing only the major legal issues for efficiency reasons.[2] So, following harmonized rules may serve as a means to facilitate international trade providing for uniformity and certainty in cross borders transactions.

A number of transnational sources exist at an international level seeking for harmonization in the field of international contract law. A binding legal instrument is the United Nations (UN) Convention on Contracts for the International Sale of Goods (CISG) 1980.[3] Denmark joined this convention in 1989.[4] All the Nordic States - Finland, Norway, Sweden and Denmark- ratified the CISG with a reservation for the CISG Part II under article 92, i.e. the part which regulates sales contract formation invoking the so-called 'neighbouring country reservation' (article 94).[5] Despite the reservation of article 92 at that time, Part II of CISG entered into force in Denmark in 2013.[6] However, the reservation under article 94 CISG is still effective meaning that

[1] Giuditta Cordero-Moss, *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011) p 11.
[2] Katerina Mitkidis & Thomas Neumann, 'Entire Agreement Clauses: Convergence between US and Danish Contract Law?' (2017) Nordic Journal of Commercial Law No. 2 180-208, p 188 <https://doi.org/10.5278/ojs.njcl.v0i2.2106> accessed 28 December 2023.
[3] United Nations Convention on Contracts for the International Sale of Goods (CISG), (adopted 10 March to 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.
[4] United Nations Treaty Collection, 'Status of CISG' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10> accessed 20 January 2024.
[5] Cordero-Moss (n 1) p 233.
[6] Thomas Neumann, 'The Continued Saga of the CISG in the Nordic Countries: Reservations and Transformation Reconsidered' (2013) Nordic Journal of Commercial Law Issue N.1/2013, p 6 <https://doi.org/10.5278/ojs.njcl.v0i1.2984> accessed 20 January 2024.

the Convention is not applicable in intra-Nordic sales.[7] Such reservations, even though flexible, may be seen as a threat to the uniformity of rules and thus, as barriers to legal certainty and international trade.[8] Soft law sources without binding force are also a means to uniformly regulate business transactions, such as for instance the International Commercial Terms (INCOTERMS); the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL).[9] Apart from the latter, the most relevant European Union (EU) legal instrument in the area of contracts, is the Regulation 593 of 2008, known as 'Rome I', which is the successor of the Rome Convention of 1980 on the Law Applicable to Contractual Obligation; it applies to all Member States of the EU, with the exception of Denmark.[10]

Even if there is a rather comprehensive international legal system for regulating international business relationships, harmonizing contract law can be difficult due to the existence of different legal systems. In the same context, following international standards regarding sustainability requirements and Corporate Social Responsibility (CSR) obligations may be challenging; that is because a State has, in principle, the main responsibility of meeting the international standards in the protection of the environment and other global social issues. However, compliance has become challenging; especially in jurisdictions where such protection is weak because States cannot comply with international principles for instance due to the lack of an appropriate institutional structure or may not be willing to follow international standards as opposed to public objectives. This creates an even more complicated commercial environment and legal uncertainty. Thus, the corporate sector has started to deal with the protection of the underlying social issues in the global supply chain and develop structures in order to fill the legal gaps in the

[7] Ibid, p 14.

[8] It is being argued that the Nordic governments have not yet withdrawn the reservation made according to article 94, as the Nordic contract acts still show great similarity creating a uniform set of rules for the Nordic Countries.

[9] International Chamber of Commerce, Incoterms® rules, <https://iccwbo.org/business-solutions/incoterms-rules/>; the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles') first published in 1994 and now in their fourth (2016) edition, represent a non-binding codification or "restatement" of the general part of international contract law <https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/>; Principles of European Contract Law (PECL) <https://www.trans-lex.org/400200/_/pecl/> accessed 08 January 2024.

[10] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), (2008) OJ L 177/6; Rome Convention on the law applicable to contractual obligations (consolidated version) (1980) OJ C 27/26.1.1998/34.

national and international regulatory framework. Soft law international legal instruments provide for protection of fundamental universal rights; the United Nations' Universal Declaration of Human Rights (UDHR) and the International Labor Organization's Declaration on Fundamental Principles and Rights at Work (ILO Principles and Rights at Work) are among others.[11]

This dissertation focuses on international transactions and the way Denmark regulates these relations. The main hypothesis of this dissertation assumes that the Danish legal framework can serve as a protective regulatory tool in cross-border transactions; therefore, the primary aim is to analyze the drafting techniques of commercial contracts under the main principles of Danish Contract Law and the clauses commonly used in contracts where one party is Danish. This research also reflects upon sustainability and CSR requirements and whether Danish corporations integrate them. It further explores if such clauses are effective in promoting sustainable development and CSR goals. This paper argues that the Danish legal system and the provisions that deal with international transactions provide for safety in international trade where one party is Danish. However there is a need for a more harmonized legal environment, especially in the context of sustainability clauses where stricter laws may be necessary in the global supply chain. This analysis includes the effect of Danish Contract law on international agreements and the effect of case law, as developed by the Danish Courts and the European Court of Justice (ECJ). A discussion upon the national legal framework is given, supported by corporate jurisprudence.

The main part of this dissertation is structured into three chapters. Chapter I sets out the legal national framework and explores the main Danish rules and principles of contract law under the prism of the Danish case law and legal literature. Chapter II discusses the way Danish Contract Law affects international business agreements and reflects upon a number of selected boilerplate clauses. Chapter III deals with sustainability considerations integrated by Danish companies in their business contracts when involved in international transactions. All the chapters provide the reader with an in depth analysis of the thesis main problematic and set the scene for the discussion on the effectiveness of the Danish legal regime in the

[11] Universal Declaration of Human Rights GA Res 217/A, A/Res/3/217A (1948) [UDHR]; International Labour Organization Declaration on Fundamental Principles and Rights at Work 37 ILM 1233 (1998), CIT/1998/PR20A [ILO Principles and Rights at Work].

commercial business environment. This paper closes with concluding remarks and future implications.

Research Methodology

This dissertation explores the way international contracts are drafted in Denmark when Danish corporations operate globally. It also reflects upon the interpretation and application of a contract under the prism of case law and the main principles of national law. This dissertation analyzes the most commonly used clauses in international contracts when one Danish party is involved and discusses whether Danish corporations take into account sustainability and CSR standards in cross-border transactions.

This dissertation seeks to answer a number of research questions.

1) What are the main principles of Danish Contract law? Are there rules of general contract law?
2) What are the main provisions under Danish Contract Law for international transactions and how these rules are applied by the Courts? In Particular, what provisions can serve as a tool to provide a party with relief from an obligation?
3) What are the considerations taken into account by the Courts to interpret an international contract? And what other rules consider to relieve a party from its contractual obligations?
4) To what extent does the Danish legal regime provide the needed safety in cross-border transactions in the event of burdensome or unfair terms or unexpected circumstances as developed by case law?
5) What are the main issues in contract design? What are the commonly used clauses by the parties and how the Courts interpret them?
6) What issues arise out of a contract? What are the main legal consequences and remedies under national law and case law?
7) Does an international contract where one party is Danish correspond to national law?
8) Are there other considerations taken into account by Danish corporations in cross border transactions when entering into a contract?

9) Can an international contract serve as a means to promote the goal of global sustainability and the CSR concept?
10) How do Danish corporations integrate sustainability and CSR requirements into their international contracts? What does their content look like and how are they being enforced in the Danish legal environment?
11) Are the sustainability and CSR commitments effective in promoting ethical business behaviors? Have Danish companies managed to bring a change?
12) Is there a need for a reform of the Danish Contract Law?

The analysis of Denmark's legal framework in relation to commercial contracts is worthy of investigation due to a number of reasons. Denmark is considered to be one of the most flexible and trade friendly countries, therefore, it is exciting to learn more about its national framework. This topic also has my interest because it will shed light on the effect of Danish Contract Law in international transactions; identifying legal gaps through legal research is very motivating for me. In addition, this research will allow me to briefly reflect upon the level of harmonization of the rules in the sales of goods and services internationally and explore Denmark's compliance with other International and European legal systems. This topic has especially captured my interest because of Denmark's opts-out of basic EU legal instruments. Diving into more details in the clauses used in international contracts, is also very compelling, because it will give me a practical overview of the principles regulating these transactions; and further, it will allow me to examine the jurisprudential approaches when the Courts interpret them. The study's interdisciplinary approach makes it even more interesting because it gives a holistic view of the way Danish corporations regulate cross-border transactions and address sustainability and CSR obligations.

The methodological approach of this study is based upon the quantitative technique.[12] Both primary and secondary sources are used in order to explore Denmark's approach to commercial agreements. This study is based upon an analysis of the key pieces of Danish legislation; a reflection upon International and European law in the sales of goods and services is given wherever is relevant.

[12] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) p 46.

Secondary data retrieved from books, legal journals, online articles and websites are also used; both the Neapolis Library and the Royal Danish Library were used to obtain information. Moreover, an analysis of other disciplines is conducted, namely the areas of sustainability and CSR obligations in order to better illustrate the way Denmark regulates international contracts and investigate whether other considerations are taken into account. Grounded in library-based research, this study aims to scientifically investigate the topic and produce fast and focused data that will give a thorough knowledge in order to draw reliable conclusions.

This study had to deal with the constraint of access to the text of private contracts. Given this difficulty this research is based upon empirical data; thus, a statistical analysis through existing data is conducted with an interdisciplinary approach in order to bring more depth in the research and an insight into human behaviors.[13]

[13] Laura Lammasniemi, *Law Dissertations: A Step-by-Step Guide* (1st edition, Routledge, Taylor & Francis Group 2018) p 85.

Main Part

Chapter I - Rules and Principles of Danish Contract Law

This chapter focuses on the law of international commercial contracts, as constructed by the Danish legal system in relation to the sales of goods and services. It also reflects upon the effect of transnational rules and principles on Danish Contract law.

This chapter includes an analysis of the key legal issues concerning the contract formation in international transactions, as affected by domestic law and the Courts. It reflects, among others,[14] upon the key legislative cornerstones of the Danish Contract law; the Sale of Goods Act (Købeloven - hereafter SGA) and the Contracts Act (Aftaleloven - hereafter CA) dating back to 1906 and 1917 respectively.[15] Furthermore, this chapter explores what other general principles, as developed by International contract law, affect commercial contracts in Denmark. The analysis is based upon a representative overview of case law, as developed by the ECJ and the Danish Courts.

The following part is of great significance because it provides an overview of the Danish Contract law pointing out the main issues. It reflects upon the basic domestic legal instruments that govern an international transaction and sets out the scene for the following discussion in the next chapters. Moreover, it is important because it demonstrates what other international principles, as constructed by general contract law, affect an international agreement in Denmark.

This chapter starts off by outlining the main rules and principles of Danish Contract Law. It highlights that, despite the existing differences in jurisdictions across the globe, a number of principles of contract law are similar and default rules are applicable in Denmark when drafting or interpreting an international agreement.[16] These fundamental principles are used along with traditionally used principles in Danish law, similarly to the other Nordic countries.[17] This part also explores the way

[14] This thesis also discusses the Product Liability Act.

[15] Danish Sale of Goods Act, Act on the sale of goods, Consolidation Act No. 237 of 28 March 2003; Danish Contracts Act, Act on contracts and other juristic acts pertaining to property, Consolidation Act No. 600 of 8 September 1986 as amended by Act No. 1098 of 21 December 1994, Act No. 389 of 14 June 1995, and Act No. 385 of 22 May 1996.

[16] Cordero-Moss (n 1) p 235.

[17] For instance, the principle of reasonableness, as discussed below.

the Courts interpret an international contract based upon the developed principles by case law; special focus is given on the legal basis to relieve a party from its contractual obligations.

I.a - Contractual freedom, pacta sunt servanda and enforceability of contracts

To begin with, Denmark follows the general principles of contractual freedom, of *pacta sunt servanda*, and of the enforceability of contracts through an effective judicial system.[18]

The role of the freedom of contract is of great significance in Danish law.[19] As in line with international standards in the trade of goods, the parties can freely enter into commercial agreements and decide upon the terms and conditions of their business relationship.[20] The contractual freedom is combined with the fundamental principle of autonomy which also applies in Danish Contract Law.[21] Moreover, the Roman law doctrine of *pacta sunt servanda* applies, i.e. the general principle that agreements must be kept. This classic principle means that a contract is legally binding and enforceable at any cost.[22] The rule stems from an underlying moral norm of a business society and dictates the parties to abide by the contract, once it is completed.[23] Indeed, this rule is reflected in Danish law in article 1 of CA. Additionally the binding force of such agreements are enforceable through a court system that supplements the Danish Contract law.[24]

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[18] Christan Frier & Kim Østergaard, 'When Is a Contract Considered Unreasonable according to Danish Law? The Application of Section 36 Through 45 Years of Case Law' (2020) European Review of Private Law, Issue 3, 555-575, p 559.

[19] Michael Carsted Rosenberg and Andreas Tamasauskas, 'Danish contract law' (2020) Carsted Rosenberg Law Firm <https://www.carstedrosenberg.com/danish-contract-law> accessed 19 January 2024.

[20] For instance Article 6 of CISG.

[21] n 19.

[22] Rona Serozan, 'General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision' in Başak Başoğlu *The Effects of Financial Crises on the Binding Force of Contracts - Renegotiation, Rescission or Revision* (Springer International Publishing Switzerland 2016) p 6.

[23] Mads Bryde Andersen and Joseph Lookofsky, 'Financial Crises and Danish Contract Law: No Room for Hardship' in Başak Başoğlu *The Effects of Financial Crises on the Binding Force of Contracts - Renegotiation, Rescission or Revision* (Springer International Publishing Switzerland 2016) p 123.

[24] Danmarks Domstole (Courts of Denmark), 'The Danish Judicial System, The Courts of Denmark - Organizational Chart' <https://domstol.dk/om-os/english/the-danish-judicial-system/> accessed 13 November 2023.

I.b - The rule of flexibility and reasonableness

In general, Danish contract law is based upon the principles of flexibility, informality and pragmatism.[25] Along with these basic rules when interpreting a contract, the Danish courts, similarly to other Nordic jurisdictions, are also taking into consideration the principle of reasonableness.[26] This rule may also seem as a remedy to limit the rule of the freedom of a contract and provide for safety.[27]

Article 36 of CA -the so-called General Clause- expresses the rules of flexibility and reasonableness and was added in 1975. Section 36 was further amended in 1994; namely, the phrase 'set aside' was replaced with the phrase 'may be modified or set aside' in a way to use the contract as a remedy and strengthen an obligation.[28] Section 36 was inserted in an effort to protect consumers against unfair contractual terms in line with Directive 93/13/EC[29] and provide better balanced solutions[30]; the goal at that time was to combat economic crime.[31] The rule enables the Courts to set aside a contract if it is unreasonable or incompatible with the principles of good faith i.e. the rule of loyalty and fairness which are commonly used in a civil law society, such as Denmark.[32] Given the fact that the Danish Contract law -unlike to other jurisdictions[33]- does not include a hardship clause, this provision may also serve as a means to renegotiate a contract if the terms are too burdensome to fulfill, as described below.[34]

However, establishing the notion of 'unreasonableness' of a contract is not an easy task since there is no definition in the CA. Section 36 (2) only provides an overall overview of the considerations the Courts should take when making a decision upon this matter. It stipulates that observance shall be given to (1) the circumstances existing at the time when the contract was concluded; (2) the terms of

[25] Cordero-Moss (n 1) p 234.
[26] Frier and others (n 18) p 559.
[27] Cordero-Moss (n 1) pp 234-235.
[28] Frier and others (n 18) p 557.
[29] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (1993) OJ L 095/29), as it was last amended in 2019 with Directive (EU) 2019/2161 of the European Parliament and of the Council (2019) OJ L 328/7.
[30] See also Part IV - Special Provisions on Consumer Contracts of the Danish Contracts Act, Sections 38a, 38c and 38d along with the revision of section 36.
[31] Frier and others (n 18) p 557.
[32] Claus Emil Engel Johansen, 'Limitation of Liability, A Comparative Study of Liability Disclaimers in Business-to-Business Standard Contracts' (Master Thesis, Aarhus University 2010) p 7.
[33] For instance in Greece art 388 Civil Code; in Italy art 1467 Codice Civile.
[34] Frier and others (n 18) p 559.

the contract; and (3) the subsequent circumstances. It seems that the whole wording itself is quite controversial making the application of this provision difficult.[35] Case law has shown that this provision was frequently invoked by parties, but the Courts rarely applied it.[36]

When assessing the unreasonableness of a contract, the Danish Courts take into consideration, the status of the contracting parties -a stronger and a weaker- and apply section 36 when there is a need to balance the power between them; in that way unreasonable effects may be avoided since the General Clause may serve as a 'safety valve'.[37] For instance, case law confirmed that professionals must be considered equal in terms of power.[38] The Danish Courts also held in 2017 and 2018 that if a contract includes standard terms deviating from mandatory rules, then, such standard terms must be especially highlighted in the contract to the other party in order to be legally binding; otherwise the contract is unreasonable.[39] This approach is also adopted under the doctrine of assumptions for burdensome terms, as discussed below.

Additionally, as provided by the established case law, section 36 is applicable when unconscionable business practices take place. For instance, when a superior party misusing his dominant position to conclude a contract,[40] or external changes affect a contract, such as inflation rates[41] or aggressive business practices are being used.[42]

Case law from Danish Courts has also taken into account the 'calculated risk or the lack of gain' consideration when assessing the application of section 36, following a stricter approach, in the author's view. This consideration expects the contracting parties when concluding a contract, to act in their professional capacity

[35] This may be justified by the fact that the Contract Act and consequently the provision at issue, is applicable to all kinds of contracts, as provided by the Act itself (Section 1(b) Contracts Act).
[36] Frier and others (n 18) p 558.
[37] Cordero-Moss (n 1) p 236.
[38] Supreme Court ruling in U.2004.2894 H.
[39] U.2017.2272 V and U.2018.2616 V cases.
[40] U.1978.678 B, U.1995.799 Ø and U.2002.222 Ø.
[41] Danish High Court (Landsretten) in U 2004.2518 V, where a rental agreement about an agricultural area was agreed to be fixed for 200 years without including any provision on inflation rates; in this case, the application of section 36 must be considered as fulfilling what is meant by 'hardship'.
[42] The U1987.801 H where a provision in a sales contract of a flat provided that the original owners had 51% of the voting rights until all the 80 freehold flats were sold; the provision found to be unreasonable by the Court and a violation of section 36, as such terms deviating from mandatory rules should have been especially highlighted to each new owner at the time the contract was concluded.

and therefore, to make a viable risk calculation which will lead to a gain; in this case section 36 is not applied.[43] The *Tintin* case[44], among others[45], serves as an illustration. In more detail, in this case a translator concluded a service contract with a publisher company with a fixed payment for each page of the famous Tintin cartoon series translated from French to Danish. When the series became a huge success in Denmark, the translator asked for an extra remuneration on the basis that the predetermined sum was an unreasonable term in the agreement; the Court rejected his claim and did not apply section 36. It held that the fixed payment was dictated by the standard business practice. The Court further highlighted that, since the translator was well aware of the Danish Publishing industry, he should have suggested and agreed on more beneficial economical terms, for example royalties. The concept of subsequent circumstances is also relevant here in order to invoke unreasonableness.[46] However, it is not possible or easy to predict all future subsequent events. The judgment in U.2012.535 H case best illustrates this; the Court changed a price clause for the supply of pigs in order to better reflect the quality of the small pigs to be delivered.[47]

It is important to mention here that default rules, such as the 'will of the parties' can affect the interpretation of the notion of unreasonableness leading to a subjective method.[48] A subjective interpretation is usually the primary method in Danish courts.[49] According to the rule, the interpretation will be based upon a mutual agreement about the issues at stake.[50] This rule was not however applicable in the U 2006.3316/1H case where the Court decided to take a more objective approach in relation to the application of standard terms and focus on the actual text.[51] This seems reasonable in standard contracts, because, as the definition itself implies, the terms have not been drafted individually to the specific needs of the agreement, and

[43] Frier and others (n 18) pp 563-565.
[44] U.2003.23 H (Tintin case).
[45] U.2012.3007 H (Pandora case).
[46] Frier and others (n 18) pp 573-574.
[47] The judgment in U.2012.535 H case.
[48] This rule is also applicable in the context of section 32 (1) of the DCA when dealing with mistakes taken place in the formation of a contract; the question is whether 'the person to whom the declaration was made realized or ought to have realized that an error or mistake had been made', as provided by the article itself.
[49] Johansen (n 32) p 28.
[50] Frier and others (n 18) p 560.
[51] The U2006.3316/1H case.

therefore, a subjective approach to the actual terms would be hard to explore.[52] Other factors to be also considered by the Courts are the rules of loyalty between the contracting parties[53], of proportionality[54] and of abuse of rights.[55]

I.c - The doctrine of assumptions and relevant principles

Danish Contract law also applies the doctrine of assumptions, when interpreting a contract. This doctrine is a tool to provide a party with relief from an obligation and it is especially relevant to unexpected circumstances in a contractual relationship, as it is explained below, or unfair terms. Under this rule, a party may not be bound by its obligation to fulfill an agreement, if three conditions are met; his assumption i.e. the subsequent events, is determinable (subject to termination), relevant (risk allocation matter) and perceptible by the other party.[56] Thus, a party in a contract may be exempted by its contractual obligations if a) he would not have entered into the agreement, if he had known about the subsequent events, b) would not bear the risk of non-performance and c) if the other party realized or should have realized the assumption.[57] Case law has additionally held that the doctrine of assumptions supplements article 36 of CA providing for another legal basis of relief.[58] To this regard, the U 2002.706H case, serves as an example,[59] among others.[60] The parties invoked both these legal bases in relation to a purchase of a car by a consumer.[61] However, it should be mentioned here that, article 36 offers a more suitable solution when it comes to unexpected circumstances after the formation of the contract,

[52] Johansen (n 32) p 28.
[53] The use of the rule of loyalty is also a result of 'civil law' legal society, such as Denmark.
[54] This rule is especially relevant when a contract includes penalty clauses and the amount to be paid on breach of contract is disproportionate to the scope of the breach; most seen in consumer contracts.
[55] Cordero-Moss (n 1) p 235.
[56] Ewoud Hondius, Christoph Grigoleit, *Unexpected Circumstances in European Contract Law* (Cambridge University Press 2011) pp 112-115.
[57] Ibid.
[58] Frier and others (n 18) p 559.
[59] U.2002.706H case.
[60] See also the Danish Supreme Court (Højesteretten) in ruling U.2005.1978 H, where a majority of judges ruled in favor of the application of section 36, whereas the minority ruled in favor of applying the doctrine of assumptions; and U 1981.1070Ø where the city court applied Section 36 of Contract Act, while the appeal court, the Danish High Court, applied the doctrine of assumptions.
[61] In the U.2002.706H case the contract included a term which obliged the buyer (the consumer) to pay 10% of the price as damages if he cancelled the contract without reason. The Højesteret Court did not apply the doctrine of assumptions as it held that the parties had entered into an agreement where the seller had no information about the buyer's assumptions. Instead, it applied Section 36 of Contracts Act, because, as it was held, the term to pay damages was an unreasonable provision and thus, the contract was set aside.

following a case by case analysis.[62] The use of the principle of *in dubio contra stipulatorem* is also a way to interpret a contract, as developed by case law.[63] Under this rule, the Court interprets the contract against the party who has drafted it.[64] Thus, this principle may be another basis to relieve a party from an obligation, if it becomes more onerous to fulfill the contract than expected. But, for its application, the contract must be 'unclear, ambiguous or non-comprehensive'; to that end, the principle of the 'closest bears the risk', applies, as another general principle of the law of obligations.[65] The rule of *in dubio contra stipulatorem* was frequently applied in Danish case law either alone, as a tool to interpret a case with questions about unexpected circumstances or in combination with Section 36 DCA about unreasonable terms.[66]

Overall, it seems that the Danish Contract Law applies the main rules of general contract law supplemented by a Scandinavian approach, which for instance involves the principle of reasonableness as also contained in other Contracts Acts of the Nordic jurisdictions.[67]

The next chapter explores the effect of Danish Contract law on the interpretation and application of an international contract. Based upon an analysis of a number of standardized clauses used in an international contract, the next chapter examines the way Danish Contract Law regulates these clauses in order to discover whether or not the contract corresponds to Danish Law, as the applicable law.

[62] Hondius and others (n 56) p 115.
[63] Frier and others (n 18) pp 560-561.
[64] For instance, the Contracts Act s. 38 B provides an interpretation of the principle *in dubio contra stipulatorem* in consumer standard contracts.
[65] Frier and others (n 18) p 561.
[66] For instance U.2001.655 V and U.2003.618 H.
[67] Frier and others (n 18) p 559.

Chapter II - Boilerplate clauses affected by Danish Contract Law

As a consequence of the globalization of business, international contracts in practice follow a standard structure which is usually in line with domestic legislation.[68] The same applies in Denmark where the contract design is based upon Danish Contract Law.

In order to save time and money, when drafting a contract lawyers will usually use a similar, previously written contract, the company's standard terms and conditions or a pre-printed contract form.[69] This chapter explores the link between the commonly used clauses in an international contract and Danish law, as the governing law of the contract. It analyzes a number of boilerplate clauses used by legal practitioners when drafting a contract and further discusses their interpretation and application under Danish Law. This chapter argues that the clauses used in commercial contracts in Denmark are hugely affected by the national law.

This chapter provides a practical overview of the type of clauses integrated in an international contract in Denmark. It discusses the main legal issues in contract design highlighting the way Danish Contract law addresses them; this analysis is based upon Danish jurisprudence and legal literature.

Given the limited length of this dissertation, the purpose of this chapter is not to discuss all the legal issues when negotiating contractual terms. It rather focuses on a number of selected clauses which best illustrate the common challenges that Danish corporations have to deal with in contract design. But it also identifies the Courts' approach in their interpretation and application. These clauses set the governing rules on the relations between the parties, regulating especially the contract's legal interpretation (entire agreement), the available remedies for violations of contract (conditions, sole remedy), the legal consequences in the event of unexpected circumstances (hardship and force majeure) and the exclusion or limiting liability claims.

[68] Cordero-Moss (n 1) p 20.
[69] Mitkidis and others, '*Entire Agreement Clauses: Convergence between US and Danish Contract Law?'* (n 2) p 186.

II.a - Entire Agreement clause

It is often seen in practice to include an 'entire agreement' (EA) clause in international contracts meaning that when interpreting the contract, only the actual text of it should be taken into consideration.[70]

Empirical data suggests that EA clauses are frequently integrated into Danish contracts; even though such clauses have their origin in common-law jurisdictions.[71] Danish lawyers have started to draft lengthy contracts, contrary to a civil-law drafting style and include EA clauses as a result of globalization of business.[72] EA clauses aim to limit the full agreement between the contractual parties into the contractual text, creating in that way legal certainty in terms of the claims that either of the parties may pose.[73] They are a powerful tool to establish self-sufficiency of a contract and detach a contract from its governing law.[74]

However, Danish courts are more likely to disregard such clauses and adopt a broader approach; the Sandrew Metronome International v Angel Scandinavia case serves as an example.[75] The case involved a disagreement about how the royalties should be paid in the context of a sub-licence distribution contract; the contract did not include a clear way to calculate them and thus, one party made reference to a communication during the negotiation process. However, the other party argued that since this communication was not part of the agreement, it could not be used for the calculations.[76] The Copenhagen Maritime and Commercial Court ignored the EA clause and decided to assess the overall agreement of the parties, including the standard terms, the general terms and conditions and the prior negotiations.[77] This approach seems to also be in line with the principles of fairness and reasonableness, since the Court seeks a more subjective solution based upon the idea of reciprocity; what is fair and reasonable with trade usage and what should be mutually considered in a contractual relationship.

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[70] Cordero-Moss (n 1) p 236.
[71] Mitkidis and others, '*Entire Agreement Clauses: Convergence between US and Danish Contract Law?'* (n 2) p 180-208.
[72] Ibid.
[73] Cordero-Moss (n 1) p 236.
[74] Mitkidis and others, '*Entire Agreement Clauses: Convergence between US and Danish Contract Law?'* (n 2) p 190.
[75] Sandrew Metronome International v Angel Scandinavia case, SH 2005.H-0132-02 (Sandrew Metronome).
[76] Katerina Mitkidis, 'The use of entire agreement clauses in contracts governed by Danish law' (2017) Erhvervsjuridisk Tidsskrift, p 202.
[77] Ibid.

On the other hand, the same Court followed the opposite direction in the Rotate Aviation v Air Kilroe case and upheld the EA clause making a decision based upon the text of the contract at stake.[78] The case involved claims for refunding of the deposit and was brought before the Court by the Danish company (Rotate Aviation) operating as agent for Air Kilroe, a British Airline -the seller-.[79] A Letter of Intent (LoI) was signed between the seller and the buyer setting the rules on the refundable deposit. However, when the LoI turned into the purchase agreement, the agent did not object to it, even though it significantly changed the rules on refunding of the deposit.[80] Thus, the Court found the agent to be bound by the EA clause contained in the purchase agreement and thus, was not entitled to the payment.

It seems that the EA clauses have started to become a reality in Denmark, but the Courts have not yet a concise approach to this matter.

II.b - Conditions for termination

According to the main principle of contract law, a fundamental breach of a contract would lead to the termination of it. However, what constitutes a fundamental breach requires a number of conditions to be met, including a thorough examination of the breach, its nature and extent and its importance to the party in question, and the significance of the termination for the other party.[81]

In reference to the sales of goods between commercial parties, article 21(3) of the SGA provides for any delay is fundamental. Based upon legal theory and practice, the rule is quite inflexible, as it is believed that the SGA is not in line with the general non-statutory principles of contract law. Moreover, the conditions to be met in order for the exception of article 21(3) to apply are difficult to assess based upon an interpretation of the contract.[82]

The Courts also interpret in a restrictive way the conditions to be met for a fundamental breach of a contract; the case law is not relevant to the sales of goods but is related to insurance claims.[83]

[78] Rotate Aviation v Air Kilroe case, SH2012.H-0011-11.
[79] Mitkidis, 'The use of entire agreement clauses in contracts governed by Danish law' (n 76) p 203.
[80] Ibid.
[81] Cordero-Moss (n 1) pp 239-240.
[82] Ibid.
[83] Supreme Court, Ugeskrift for Retsvæsen 1985.766 case.

II.c - Sole remedy

The contracting parties can freely include clauses in a contract and define the remedies in the event of a breach of a contractual obligation.[84] Such clauses, including the Repair or Replace, Warranty Disclaimers and the Penalty and Liquidated Damages Clause may in reality, serve as liability disclaimer clauses.[85] That is because they indirectly limit or exclude a right or a remedy, among other types of clauses.[86]

The principle of the freedom of the parties to define the sole remedy in their contractual relationship is usually respected by the Courts, but there are significant restrictions by the general rules of contact law or the principles as a result of case law. For instance, if the contract does not adequately and reasonably protects the interests of a party, then the remedies provided by the general rules of contract law are applied, as developed by case law.[87] The repair clause as a sole remedy, in the context of a warranty clause, is relevant here. If the innocent party allows the other party to repair the non-conformity product, as provided by the contract but this turns out to be an unsuccessful attempt, then the innocent party, may employ the general rules of contract law and terminate the contract[88], or claim damages[89] or claim a price reduction.

The courts have also developed principles in order to limit the freedom of the parties to define the sole remedy in their agreement.[90] For this purpose the exemption or limited liability clauses to pay damages serve as an example, as it follows. The exemption clauses in damages can be categorized into a) the totally limiting liability, such in the event of damages caused by fire and b) the limiting only partially liability -the generally called limitation clause-, when the amount of money to be paid for damages covers some or all issues of liability.[91] According to well established case law, such clauses must be clearly stated in order to create legal

[84] Cordero-Moss (n 1) pp 241-242.
[85] Johansen (n 32) p 14.
[86] Other types of liability disclaimer clauses are the hardship or force majeure clauses because they seek an excuse to a party's liability in the event of failure to perform; also the choice of law clause because it provides the parties with the right to choose the governing law of the contract, not limited to one country but the one with the closest connection to the parties.
[87] Cordero-Moss (n 1) pp 241-242.
[88] Supreme Court judgment reported in UfR 1969.152.
[89] Supreme Court judgment reported in UfR 1986.654.
[90] Cordero-Moss (n 1) pp 241-242.
[91] Johansen (n 32) p 14.

effects. Such exemption/limited liability clauses were further held that may not be enforceable if the liable party had caused the damage on purpose or as a main rule, by gross negligence.[92] However, the Supreme Court followed the opposite approach in the UfR 2006.632 case and held that the limitation clause for damages for stolen goods along with various other terms, are reasonable and therefore valid.[93] The Court held that, the cargo freight company which had acted with gross negligence and the goods which were in its possession were eventually stolen, was not liable for the damages since the limiting clause was valid, because it was seen as part of a set of standard terms i.e. the General Conditions of Nordic Freight Forwarders (NSAB 2000) and the only exception, according to the wording of the terms, was deliberately caused damage. Therefore, the Court found no legal basis for activating the General Clause of article 36 of the CA and setting aside the limitation clause at stake.

II.d - Hardship and force majeure

Domestic legislation in line with International rules,[94] provides for clauses dealing with unexpected events and legal consequences in a contractual relationship; the so-called hardship clauses.[95] Contracting parties, as developed by practice, make use of them with the aim to avoid intervention of courts. Danish Contract law does not include a hardship clause, but includes only a limited number of provisions dealing with the legal consequences in cases of external and unprecedented events which make it difficult for a party to perform.[96]

Starting with the consideration that Denmark can be classified as a 'closed' jurisdiction; such legal systems may be reluctant to grant relief in situations of unexpected circumstances even though this is not necessarily always the case.[97] The existence of the traditionally applied doctrine of assumptions and the General Clause of article 36 of the CA are concepts that, on a broader approach, allow for a judicial control of an agreement.[98] Section 36 of the CA may serve as a means to set

[92] Cordero-Moss (n 1) pp 241-242.
[93] Supreme Court judgment in UfR 2006.632 case.
[94] For instance articles 6.2.1 - 6.2.3 of the Principles of International Commercial Contracts (UNIDROIT); Article 61 of the Vienna Convention of the Law of Treaties of 1969 deals with impossibility of performance and Article 62 deals with 'fundamental change of circumstances'; article 6.111 Principles of European Contract Law (PECL).
[95] Hondius and others (n 56) p 14.
[96] Frier and others (n 18) p 559.
[97] Hondius and others (n 56) pp 11-12, 13 and 14.
[98] Ibid.

aside a contract, wholly or partly, if unexpected circumstances make the transaction burdensome for one party, such as unfair terms.[99] However, the decision upon a violation of section 36, is not an easy task as the notions of 'reasonableness' or 'at variance with good faith' are hard to interpret. The application of the doctrine of assumptions is another tool used by the Court to constructively interpret a contract in the event of unexpected circumstances; the options are to terminate the contract, as being void or to allow for an adjustment.[100]

Another provision dealing with unexpected circumstances in a business relationship is the principle expressed in article 24 of the SGA which actually provides for the force majeure principle.[101] Based on a linguistic analysis, the provision applies to the seller's delayed delivery of goods only. It stipulates that the seller may be exempted from paying damages due to unexpected circumstances i.e. due to extraordinary and unforeseeable events at the time the parties entered into the agreement, such as war, import prohibition, natural disasters, riots, embargos and strikes. The provision sets a third condition to meet for force majeure: 'the performance of the contract must be deemed impossible', meaning in practice that nobody is able to provide similar goods. When compared to Art. 79 of the CISG, among other legal instruments that provide for force majeure events,[102] the liability within the scope of Section 24 SGA appears to be stricter.[103] It should be mentioned here that according to legal theory, the provision of article 24 also expresses a general principle for a breach of generic obligations; it has been suggested in Danish legal literature that this provision applies to all contractual obligations.[104]

II.e - Clauses on Contractual liability and/or product liability rules

The way Denmark regulates product liability issues may cause problems when interpreting contractual clauses dealing with limiting liability of a seller or a service provider.

Under Danish law the product liability rules i.e. the liability for personal injury and damage caused to property (apart from the dangerous/defective product itself)

[99] Hondius and others (n 56) pp 110-112.
[100] Hondius and others (n 56) p 112.
[101] Bryde Andersen and others (n 23) p 127.
[102] UNIDROIT Principles, Article 7.1.7; PECL, Article 8.108.
[103] Hondius and others (n 56) pp 115-116.
[104] Bryde Andersen and others (n 23) p 129.

are outside the scope of the seller's liability for breach of contract; thus, outside the scope of application of the SGA, as applied by the courts.[105] To that end, the Product Liability Act (hereafter PLA) is applicable[106], adopted in compliance with the Product Liability Directive in the context of consumer protection.[107] The scope of application of this Act, as is in the Directive, is to cover liability for personal injury and damage caused to consumers' property. These rules impose a strict defect liability on the producer, and also codify the existing principle of the professional supplier's vicarious liability for product liability by fault. Initially the PLA provided that suppliers were also vicariously liable for the producers' (and other previous links') strict liability (no-fault liability).[108] But, this no-fault liability was found by the ECJ to be in conflict with the Product Liability Directive, and therefore Denmark amended accordingly the Act and now, suppliers are vicariously liable for the producers' (and other previous links') fault-based liability only, as provided by article 10a of the PLA.[109]

The contractual limiting liability clauses of producers and suppliers of dangerous/defective products and services, apply a fault (culpa) system supported by the non-statutory principles of tort law and the principle of vicarious liability for professional suppliers, as it was developed by the courts. The principle of vicarious liability takes into consideration that the injured party is in a weaker position than the professional supplier; therefore, the latter has a vicarious liability since it is easier for him to file a claim against the producer and/or other previous links in the distribution chain.

Consequently, it seems from the above, that both the court-developed rules and the rules of the PLA apply to personal injury and damage to consumers' property, but only the court-developed rules apply to damage to non-consumer property.[110] This is one consideration that one should bear in mind.

Another interesting consideration is that the PLA is mandatory not only to the injured party i.e. the victim of personal injury or the owner of the consumer property damaged but also to the supplier who has paid damages to the injured party, based

[105] Cordero-Moss (n 1) p 249.
[106] Product Liability Act No. 371/1989.
[107] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ 1985 No. L210/29.
[108] Cordero-Moss (n 1) p 250.
[109] Case C-402/03, Skov Æg v. Bilka Lavprisvarehus [2006] ECR I-199 in conjunction with article 10a of the Product Liability Act.
[110] Cordero-Moss (n 1) p 250.

upon the supplier's vicarious liability for fault-based liability of a previous link, as provided by articles 10a and 12 of PLA. That being said, a contractual term excluding or limiting liability claims between commercial parties is not binding on suppliers who seek remedy against a previous link in the supply chain. The mandatory rule based upon the scope of the PLA, applies only in cases of personal injury and damage to consumers' property. Thus, damage to non-consumer property is outside the scope of the Act and consequently, outside the sphere of application of the mandatory rule.

A last consideration to be made is the distinction between contract law rules on non-conformity and rules on product liability in general.[111] As discussed above, personal injury and damage to property (apart from the non-conforming/defective product itself) are outside the scope of application of the liability rules of the SGA. Therefore, a clause in sales contracts that does not clearly reflect upon product liability rules but to sales law concepts, such as a clause for limiting the liability for a 'non-conformity' product, seem to be within the scope of the SGA only. Consequently, such a clause does not have any effect on the liability for physical damage caused by the object of sale.[112] Based on the relevant case law, the Courts support this assumption. For instance the Supreme Court judgment reported in Uf R 1999.255.[113] Another case that shows how a limitation clause should be drafted in a way that both contractual liability and product liability are within its scope, is the Supreme Court judgment reported in UfR 2006.2052.[114] It should be mentioned here that the Court in both these cases formed its decision based upon the court-developed rules on product liability and not under the Product Liability Act.

As a conclusion, illustrating the differences between contractual liability and product liability (outside the scope of the PLA), is a rather difficult task. The way the Court interprets the contract clauses dealing with excluding or limiting liability sometimes depends on whether the legal basis of the liability in question is found in contract law and/or in tort rules.[115]

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[111] Cordero-Moss (n 1) p 251.
[112] Ibid.
[113] Supreme Court judgment reported in UfR 1999.255.
[114] Supreme Court judgment reported in UfR 2006.2052.
[115] Johansen (n 32) p 10; Claims in Tort law, contrary to contract law, are based outside the contract; therefore are based upon either fault ("culpa") or a statutory based strict liability. On the other hand, Contract law is based on performance, therefore a breach of a contract occurs when a party fails to perform, as this obligation is defined in the agreement.

This Chapter showed that commercial agreements in Denmark include clauses and legal terminology that are compatible with domestic law, being in that way in total coordination with the governing law imposed by the contract i.e. the Danish law. It further highlighted that such agreements are also affected by international and EU law; in some cases, by common law systems.[116]

The next chapter explores whether there are other additional considerations applicable in commercial agreements in Denmark; namely, if there are any sustainability clauses integrated into international contracts dealing with environmental, social or other commitments.

[116] For instance, the Entire Agreement clause.

Chapter III - Sustainability clauses under Danish perspective

Companies, among other factors, implement business practices in order to promote sustainability and protect public interests related to Sustainable Development (SD).[117] A company's obligation for being socially responsible when operating is expressed in the CSR context which is closely connected to the goal of global sustainability.[118]

In 2001 the Commission of the European Communities when presenting a Green Paper on social responsibility pointed out that being socially responsible is a way of management style.[119] Indeed, some scholars believe that ethics constitute a dimension of CSR and management studies describe the social responsibility of corporations as an economic, legal, ethical, and philanthropic responsibility to the society in which the firm operates.[120]

This chapter analyzes whether or not Danish corporations apply social and environmental clauses in their international supply contracts. It further explores the content and application of sustainability and CSR clauses. This chapter also evaluates the effectiveness of sustainable practices and whether Danish corporations have managed to bring a change in business behaviors and people's everyday life. Business practices are effective when the company's economic growth is in balance with social and environmental sustainability goals.[121]

This chapter is important in the context of this study, because it provides the reader with a holistic view of the way international business transactions are being regulated by private entities in Denmark. This chapter gives an overview of what other considerations are taken into account when drafting an international supply contract, particularly with regards to environment protection, workplace conditions, human rights obligations and anti-bribery rules. It explores the progress made by Danish corporations in terms of global sustainability, as set out by international

[117] Non-governmental organizations (NGOs) and industrial associations also play an important role in securing CSR commitments in business practice, but fall outside the scope of this thesis.
[118] Kateřina Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (Eleven International Publishing 2015) pp 3-4.
[119] Commission, 'Corporate Social Responsibility: A business contribution to Sustainable Development' (Communication) COM (2002) 347 final, p 5.
[120] Stefania Vignini, 'Sustainable Development Goals: How Do Companies React?' (May 2023) Australasian Accounting Business & Finance Journal 17 (3) pp 124–139, p 126 <https://ro.uow.edu.au/aabfj/vol17/iss3/8/ > accessed 20 December 2023.
[121] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 26.

organizations. It further assesses whether such considerations within an international agreement can secure sustainability and serve as a tool to legally promote the SD and CSR goals.

A contract may serve as a means to achieve CSR goals if such provisions are directly incorporated into it. However, companies may also use another model to express their commitment to sustainability and CSR objectives; they can do so by making reference to another document in the contract i.e. their standard terms and conditions or their Code of Conduct (CoC).[122] Thus, this chapter is an amalgam of a legal and a multidisciplinary analysis because it touches upon sociology, economics, ethics and management style. Such an approach is also dictated by the definition of the CSR concept itself, as seen below. Additionally, since this dissertation's objective is to analyze business contracts, this chapter only refers to international and national law where relevant. Therefore, despite the fact that international and national laws, including international conventions on human rights, labor conditions, protection of environment, and corruption rules, influence the content of SCCs, they are not addressed in this paper.

The first part of this chapter outlines the definitions of key concepts and the second reflects upon a selected number of examples supplemented by a thorough legal research on literature.

III.1 - Definitions

III.1.a - Sustainability and Sustainable Development

A linguistic approach leads to accepting that these two notions interrelate, and thus, are addressed as a single one; sustainability is the objective whereas SD describes the way this can be achieved.[123]

The concept of SD was first introduced in 1987 by the UN Brundtland Commission and was defined as 'meeting the needs of the present without compromising the ability of future generations to meet their own needs.'[124] The Brundtland report is of great significance because it considered for the first time the

[122] Vibe Ulfbeck & Ole Hansen, 'Sustainability Clauses in An Unsustainable Contract Law?' (2022) Centre for Private Governance (CEPRI) Faculty of Law, University of Copenhagen Issue 6/2022 p 15 <http://dx.doi.org/10.2139/ssrn.4174259> accessed 20 December 2023.
[123] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 17.
[124] UN, Report of the World Commission on Environment and Development *Our Common Future* (Cmd A_42_427-EN, 1987, 'Brundtland Report').

human environment in examining the development of the world. With emphasis on meeting essential human needs combined with the evolution of society and technology, the Brundtland Commission addressed the environmental, social and economic global issues and laid the foundations for the goal of sustainable development based upon a universal set of values for a prosperous future.[125] This significant step resulted in the 1992 UN Conference on Environment and Development (UNCED), also known as the 'Earth Summit', which set the foundations for the agenda for sustainable development.[126] After decades of work, in 2015 the 2030 Agenda for Sustainable Development was adopted by all UN Member States. At its core is the 17 Sustainable Development Goals (SDGs), which is a global call for action to end poverty and protect the environment in order to create a better future based on global partnership.[127]

Today, the way sustainability is defined, lies on the same guiding principles, as set in the Brundtland report. Based upon three dimensions -environmental, social, and economic-, this three-pillar definition has been adopted by civil society, states and international organizations. For example, Article 3(3) of the Treaty on European Union (TEU) urges Europe to work for the Union's sustainable development where such economic growth is in line with social progress and a high level of protection of the quality of the environment.[128] For the purpose of this paper, sustainability is considered to be an approach[129] -an imperative, as described in the foreword of the Brundtland report- 'for a renewed search for multilateral solutions and a restructured international economic system of co-operation' to address global issues and protect the environment.[130]

[125] Ibid, p 46.
[126] United Nations, Department of Economic and Social Affairs Sustainable Development, the 17 Goals, History <https://sdgs.un.org/goals> accessed 07 December 2023.
[127] United Nations, Sustainable Development Goals, the 17 Goals, Take Action for the Sustainable Development Goals <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> accessed 07 December 2023.
[128] Consolidated Version of the Treaty on European Union [2012] OJ C 326/13.
[129] It is not clear among the legal community whether sustainability constitutes a legal concept, or a principle of International Law or a philosophical idea; but this analysis falls outside the scope of this thesis.
[130] Brundtland report (n 124) p 6.

III.1.b - Corporate Social Responsibility

The CSR notion is closely connected to the ideas of sustainability and SD, as they all try to achieve a better and more sustainable future for the world.[131] However, the CSR framework differs from the other two ideas, because it is aimed at businesses which seek to integrate sustainability standards when operating.

The CSR concept was firstly defined as a social obligation in 1953, i.e. the obligation to pursue what is desirable for the company.[132] Today, it can be defined as 'business measures that are consistent with the law and ethical standards under which companies accept the responsibility for the effects their activities have on the environment and society.'[133]

The binding nature of the CSR framework has triggered a lot of discussion in the public and legal community.[134] The position that the CSR refers to both legal (mandatory) and a non-legal (voluntary) activity seems to be more dominant.[135] This is best reflected in the Commission's work. In 2001 during a presentation for a Green Paper on CSR, the Commission of the European Communities stated that 'Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment.'[136] The Commission further highlighted that embracing CSR means 'not only fulfilling the applicable legal obligations, but also going beyond compliance and investing "more" into human capital, the environment and relations with stakeholders.'[137] This approach suggests that the CSR framework covers practices identified as both mandatory, and voluntary. In reality, though, companies are obliged by law to comply with social and environmental standards in jurisdictions where such legislation exists.[138]

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[131] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 19.
[132] Vignini (n 120), p 126.
[133] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 5.
[134] Katerina Peterkova, 'Enhancing Social Responsibility within Global Supply Chains: Is Legal Regulation the Optimal Solution?' (Nordic Summer University (NSU): Winter symposium: Nordic Summer University (NSU): Winter symposium, Copenhagen, Denmark, January 2011) pp 1-3.
[135] Ibid.
[136] Commission, 'Green Paper: Promoting a European framework for Corporate Social Responsibility' (Green Paper - Promoting a European framework for Corporate Social Responsibility) COM (2001) 366, p 4.
[137] Ibid, p 8 where the same approach was adopted in the Summary of this Green Paper Commission of the European Communities; see also 'Communication: Corporate Social Responsibility: A business contribution to Sustainable Development' (n 119).
[138] Peterkova, 'Enhancing Social Responsibility within Global Supply Chains: Is Legal Regulation the Optimal Solution?' (n 134) p 1.

Companies follow CSR requirements on environmental standards, ethical/human rights obligations and economic standards, because this could have a positive impact on their operations and reputation.[139] In 2012 in Denmark negative publicity was brought to a Danish cleaning company in relation to employment policies. In this case, allegations for exploiting Romanian employees were made but the case was resolved out of Courts.[140] Thus, operating in alignment with environmental and ethical/human rights standards may create a competitive advantage within the industry and such market power may lead to a more profitable business.

The concept of CSR is broad, and companies employ a number of tools to promote global sustainability, including CSR statements with commitments about the protection of the environment and the society, codes of conduct with respect to human rights obligations and voluntary CSR initiatives.[141] But this thesis does not reflect upon them because they are not part of a contract rather than measures with unilateral character.[142]

Since the main objective of this thesis is international contracts, it is being argued that the use of sustainability and CSR clauses in supply contracts may also constitute an effective tool to promote global sustainability. Such clauses reflecting upon social and environmental global concerns may also successfully regulate and enhance ethical business practices.[143] Denmark seems to apply sustainability clauses in business international contracts, as it follows.

III.2 - Danish approach to Social and Environmental clauses

This subsection discusses the content, implementation and enforcement of sustainability clauses in supply contracts when Danish companies operate

[139] It can also affect international policies and put pressure on developing legislative processes; in relation to the impact on people's lives, see for example, the *Comer II* case where in 2011 Mississippi inhabitants sued a group of companies because, according to them, the companies' operations contributed to climate change, which subsequently contributed to strengthening the Hurricane Katrina, and in turn damaged plaintiffs' properties.

[140] European Cleaning Journal, 'Danish cleaning company fined for underpaying' (11th of June 2012) <https://www.europeancleaningjournal.com/magazine/articles/latest-news/danish-cleaning-company-fined-for-underpaying> accessed 15 December 2023.

[141] Katerina Peterkova Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (2014) Nordic Journal of Commercial Law Issue 1#2014 <https://ssrn.com/abstract=2457586>, p 4 accessed 04 January 2024.

[142] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 5.

[143] Contrary to the other unilateral tools which as the word itself suggests, do not provide businesses with binding and mandatory power over their contracting parties.

internationally. It further reflects upon their effectiveness in promoting sustainability and CSR goals.

As it is probably already understood, such clauses differ from other contractual provisions. Firstly, the content is different since such clauses do not regulate the main subject of a certain contract, and do not describe or specify the actual process of supplying the goods or services but they refer to business behaviors in general; for instance to reduce the emissions in the production. Second, the subject of sustainability clauses is the protection of public interests and not the private interests as a result of a business deal.[144] In the above example, a third party is being covered i.e. the environment. Also, non-compliance with such standards, does not affect the contract itself meaning that the product or the service will still be delivered. A breach is more likely to have an impact on the product's market value and the company's reputation. Lastly, the aim with sustainability clauses is to achieve long term goals such as social equity, environmental quality, and economic vitality, rather than setting the rights and obligations of the parties to improve the conditions of one single private transaction.[145]

This dissertation's main objective is the Danish perspective on an international contract and this chapter analyzes a contract, as a tool to promote a company's social and environmental performance. The most frequently used clauses cover issues with respect to human rights obligations, anti-bribery commitments, labor rules and environmental standards. As illustrated below, prominent Danish corporations in different industries incorporate sustainability clauses in their business contracts either through the direct inclusion or by reference to other corporate documents. In that way, Danish companies contribute to a positive impact in sustainable performance.

Pressalit Group A/S is a Danish owned company, which has been working in the design of premium bathroom products since 1954 and holds an international presence.[146] The General purchasing terms of Pressalit, which supplements all the

[144] Peterkova Mitkidis, 'Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements' (n 141) p 5.
[145] Ibid, p 6.
[146] Since 1954, the company has been designing and producing toilet seats of the highest quality. And since 1975, Pressalit has also been developing accessible bathrooms and height-adjustable kitchens for people with reduced mobility. This has made Pressalit one of the world's leading manufacturers of premium bathroom solutions. For further details see Pressalit Group A/S homepage, 'About Pressalit' <https://pressalit.com/en-uk/about-pressalit/> accessed 12 December 2023.

company's contracts for the delivery of goods, include the following provision: '*With the design of the products and with the choice of materials, production methods, employees and subcontractors, the Supplier must ensure that Pressalit's Quality and Environmental Policy as well as Pressalit's Code of Conduct is complied with. Furthermore, compliance with UN's Global Compact should be observed*.'[147] This provision makes reference to two other documents; the company's commitments to environmental protection and the UN Global Compact initiative.[148] For example, Pressalit's Environmental Policy Statement calls for a deeper collaboration with its stakeholders on environmental issues concerning both processes and products.[149] But the provision offers only a vague understanding of the company's actual goals and expectations. The UN Global Compact initiative, which also constitutes part of all the company's supply contracts, is a universal set of Ten Principles on human rights, labor, environment and anti-corruption with which the participating companies should align their strategies and operations.[150] However, it is not clear what specific standards the company expects its suppliers to comply with. Moreover, Pressalit's general purchasing terms do not include adequate enforcement and monitoring mechanisms which may detect a potential breach. Pressalit is also in line with the 17 SDGs which also promote morally correct and socially responsible business behaviors and the CSR framework, as it is proven from other documents and initiatives.[151] But these unilateral activities fall outside the scope of this thesis. Additionally, the company complies with the national environmental law,[152] including

[147] Pressalit's GENERAL PURCHASING TERMS, p 2 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://admin.pressalit.com/media/1602/indkbsbetingelser_en_2016.pdf> accessed 13 December 2023.

[148] Pressalit's homepage, Sustainability, 'Pressalit believes in living in harmony with our surroundings' <https://pressalit.com/about-pressalit/csr/sustainability/>; also the UN Global Compact 'Who we are' <https://unglobalcompact.org/what-is-gc> accessed 13 December 2023.

[149] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 68.

[150] UN Global Compact, 'Our Ambition' <https://unglobalcompact.org/what-is-gc/mission> accessed 13 December 2023.

[151] In relation to the SDGs, Pressalit's activities place emphasis on Goal 4 - Quality Education, Goal 6 - Clean Water and Sanitation and Goal 12 - Responsible Production and Consumption. For further details see Pressalit's homepage <https://pressalit.com/en-uk/about-pressalit/csr/uns-global-goals/>; see also in relation to other CSR activities and documents, see Pressalit's homepage, CSR 'Performance and responsibility go hand in hand' <https://pressalit.com/en-uk/about-pressalit/csr/> accessed 12 December 2023.

[152] The Danish Ministry of Environment is the superior authority for setting out the environmental policy in Denmark and for drafting the environmental laws. It has two agencies under its administration: the Danish Environmental Protection Agency and the Nature Agency. Denmark also has a Ministry of Climate and Energy with its Danish Energy Agency along with a number of other institutions supporting its role. For further details, Ministry of Environment of Denmark, 'The Ministry' <https://en.mim.dk/> accessed 18 December 2023.

the central legislative piece of law, i.e. the Danish Environment Protection Act (miljøbeskyttelsesloven) which provides for the relevant environment approvals and permits when a Danish company operates.[153]

Another example comes from Vestas Wind Systems A/S (Vestas) with headquarters in Denmark, which operates in the wind energy sector.[154] Vestas' General Purchasing Terms for Goods and Services govern the purchase and delivery of products and apply to all Vestas' purchases, unless otherwise agreed.[155] When Danish law is applicable, the Purchase Agreement September 2016 constitutes part of the contract and clause 16 provides for observance of, among others, the Environment and Audit rules.[156] There are some specific requirements in relation to safety and health rules stipulating that according to the company's rules, the supplier should conduct its business and act in an environmentally responsible manner.[157] The agreement also makes reference to Vestas' Business Partner CoC which is a 27-pages document.[158] The CoC refers to a range of international instruments, including the UN Global Compact and the UN Guiding Principles on Business and Human Rights.[159] It also reflects upon human rights obligations and especially the Universal Declaration of Human Rights (UDHR) and the International Labor Organization (ILO) Declaration of Fundamental Principles and Rights at Work (ILO Principles and Rights at Work); and the guiding principles and recommendations on responsible business conduct by the Organization for

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[153] UN's Food and Agriculture Organization (FAO), Database, Denmark, 'Environment Protection Act' (LBK No. 5 of 2023) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC099369/> applied by the Danish Environmental Protection Agency and the municipalities as approval authorities; See also the Nature Protection Act (naturbeskyttelsesloven) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC125733/> and the Planning Act (planloven) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC052113/> which are among the main environmental laws applied by the Nature Agency accessed 18 December 2023.

[154] Vestas is a leading company in the energy sector; the company designs and installs wind turbines, providing also a number of other service solutions. For further details see Vestas homepage, 'About' <https://www.vestas.com/en/about/this-is-vestas> accessed 14 December 2023.

[155] Vestas' homepage, 'About', 'General Purchasing Terms' <https://www.vestas.com/en/about/our-partners/Suppliers/general-purchasing-terms> accessed 14 December 2023.

[156] VESTAS' General Purchasing Terms for Goods and Services - Danish Law, clause '16 Safety, Quality, Export control laws, Environment and Audit', pp 3-4 <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.vestas.com/content/dam/vestas-com/global/en/about/partnering/general-purchasing-terms/2018_general-purchasing-terms-for-goods-and-services-danish-law.pdf.coredownload.inline.pdf> accessed 14 December 2023.

[157] Ibid, p 4.

[158] Vestas' homepage, 'Supplier Code of Conduct' <https://www.vestas.com/en/sustainability/corporate-integrity/compliance> accessed 14 December 2023.

[159] Ibid, p 3.

Economic Co-operation and Development (OECD) for Multinational Enterprises.[160] By signing this agreement, the supplier is obliged to comply with the referred documents and its objectives and perform in the same sustainable manner. Vestas may also terminate the contract if the Supplier is in material breach of its CoC.[161] Additionally, Vestas has the right to audit the Supplier's operations which is an effective monitoring mechanism.[162] Vestas' sustainable performance and liability is monitored by the Danish Environmental Protection Agency through the obligation to submit a sustainability report.[163] The obligation to report on CSR activities serves as an example of an indirect legal regulation.[164] Overall, it seems that Vestas in concluding international supply contracts includes sustainability requirements both in its supply agreement -which is clear to some extent- and in Vestas Business Partner CoC.

The LEGO Group with the iconic bricks[165] also secures social and environmental standards as evidenced by the 2021 General Terms and Conditions for purchases; clause 4 stipulates that all persons, bound by this agreement and performing services, should comply with all global and national anti-bribery and corruption rules.[166] Additionally, LEGO's efforts to align with the global goal of sustainability is expressed in protecting the environment by investing in more sustainable products that create zero waste and are carbon neutral.[167] The company's Responsible Business Principles, which is part of the contractual agreement with all direct suppliers, relevant indirect suppliers, and business partners, is a set of 12 Principles, relating to ethics, people, children and the

[160] Ibid, p 3.
[161] VESTAS' General Purchasing Terms for Goods and Services - Danish Law (n 156), clause '17 Termination' p 4.
[162] VESTAS' General Purchasing Terms for Goods and Services - Danish Law (n 156) clause '16 Safety, Quality, Export control laws, Environment and Audit', clause 16.7, p 4.
[163] Ministry of Environment of Denmark, Danish Environmental Protection Agency <https://eng.mst.dk/>; also Vestas' homepage, 'Sustainability Report 2022' <https://www.vestas.com/en/sustainability/reports-and-ratings> accessed 15 December 2023.
[164] Peterkova, 'Enhancing Social Responsibility within Global Supply Chains: Is Legal Regulation the Optimal Solution?' (n 134) p 2.
[165] Founded in 1932 with headquarters in Billund, Denmark, LEGO is one of the world's leading manufacturers of play materials. For further information see LEGO's official website, 'About us' <https://www.lego.com/en-dk/aboutus> accessed 11 January 2024.
[166] LEGO's official website, 'General Terms and Conditions for purchases within the LEGO Group (English)' <https://www.lego.com/en-dk/legal/lego-terms-of-purchase/> accessed 11 January 2024.
[167] LEGO's website, 'Sustainability' <https://www.lego.com/en-dk/sustainability> accessed 11 January 2024.

environment and expects all stakeholders to act respectively.[168] For instance, observance should be paid to human and labor rights based upon the applicable UN and ILO conventions.[169] Children's rights are also protected and child labor is prohibited.[170] With regard to monitoring and enforcement mechanisms, the Principles also include the 'right to audit' which allows for inspections of suppliers in order to ensure compliance.

Operating in 90 markets globally, Ecco, the Danish owned company, produces high quality leather and footwear.[171] The company is a strong advocate of human and labor rights and also supports sustainable development while protecting the environment in all levels of organization.[172] Apart from its employees, Ecco's CoC applies to all its external suppliers.[173] The 60-page CoC sets clear strategies in order to achieve the company's goals by fighting against HR abuse and especially modern slavery.[174] Acknowledging that its operations have an impact on the environment, the CoC also stipulates that 'Ecco strives to reduce emissions and waste, minimize consumption of materials, energy and water and avoid pollution whenever possible.'[175] Ecco expects its business partners to behave ethically in line with international and wherever applicable, national anti-corruption and anti- bribery laws.[176] Special mention should be made to the company's animal welfare commitments in line with international and EU standards, such as the Office International des Epizooties (OIE) guidelines.[177] To ensure compliance with the CoC, Ecco implements an Audit System which includes not only onsite audits at its shoe

[168] LEGO's website, 'The LEGO Group Responsible Business Principles' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.lego.com/cdn/cs/sustainability/assets/blt123637cf697b8687/1023787_LEGO_Responsible_Business_Principles_130618_FINAL.pdf> accessed 11 January 2024.
[169] Ibid, p 6.
[170] Ibid, p 14.
[171] Ecco's official website, 'About us' <https://group.ecco.com/en/about-us> accessed 17 January 2024.
[172] Ecco's official website,'Ecco Modern Slavery & Transparency Statement 2022' <https://media.ecco.com/GroupCommunication/ecco-modern-slavery-transparency-statement-2022/?page=1> accessed 17 January 2024.
[173] Ibid, p 2.
[174] Ecco's official website, 'Ecco Code of Conduct', 4th edition, 2022, pp 38-39, 40-41 <https://media.ecco.com/GroupCommunication/code_of_conduct/?page=1> accessed 17 January 2024.
[175] Ibid, p 9.
[176] Ibid, pp 34-35.
[177] Ibid, pp 42-43.

factories and key suppliers, but also pre-screenings of potential new suppliers.[178] It seems that the company has set clear strategies in order to promote global SD and CSR goals.

Based upon an empirical legal research, it may also be concluded that the enforcement of sustainability clauses is not based on a judicial system. It is also being argued that sustainability clauses cannot be explained by the general theories of contract law.[179] Thus, they are to a large degree self-enforced, as they depend on the commitment of the parties to comply with such requirements and pursue the same goals; this is expressed by the relational contract theory where a contract is not a formal agreement but a general framework of an economic transaction regulating business behavior.[180] A representative example of this theory comes from the LEGO Group. In the event of non-compliance with the LEGO Code of Conduct, the company focuses on cooperation with suppliers stating that 'we expect the supplier to develop an action plan to address it'.[181] From this wording, it is obvious that emphasis is placed in the improvement of business practices, rather than strict compliance where opening a dispute resolution proceeding is the solution.

The discussion of the above examples reveals that Danish corporations are mindful of the significance of sustainability and CSR clauses in international business contracts. It also implies that sustainability clauses appear to have the same features, content and scope. These Danish companies were selected from those considered to be among CSR leaders and the study on their CSR reports supplemented this analysis. However, it is quite hard to draw general conclusions based upon this sample. Therefore, this analysis is also supported by statistics.

Denmark is among the world's top five countries in terms of achieving SDG targets, based upon the 2023 Sustainable Development Report issued by the (UN) Sustainable Development Solutions Network (SDSN).[182]

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[178] Ibid, pp 50-53.
[179] Peterková Mitkidis, *Sustainability Clauses in International Business Contracts* (n 118) p 93.
[180] Ibid.
[181] 'The LEGO Group Responsible Business Principles' (n 168) p 4.
[182] Jeffrey D. Sachs, Guillaume Lafortune, Grayson Fuller and Eamon Drumm, 'Sustainable Development Report 2023, Implementing the SDG Stimulus' (Paris: SDSN, Dublin University Press Dublin, Ireland, 2023) p 24 <https://dashboards.sdgindex.org/> accessed 18 January 2024.

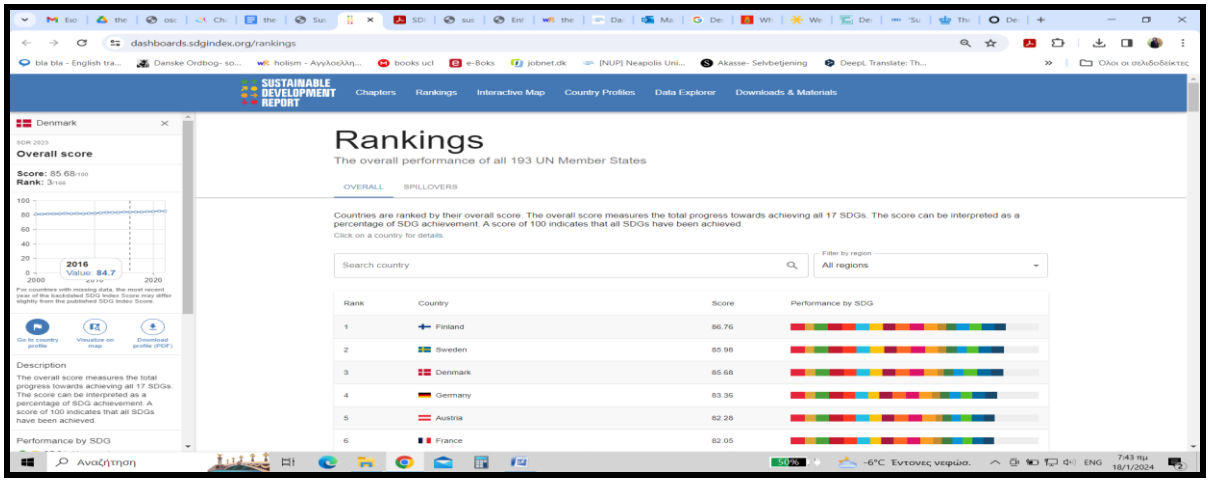

DIAGRAM 1: The 2023 SDG Index: score and rank

Source: 2023 Sustainable Development Report by the (UN) Sustainable Development Solutions Network (SDSN)

Diagram 1 demonstrates how a number of UN States - the first six- are ranked by their overall score; the overall score measures the total progress towards achieving all 17 SDGs.[183] According to Diagram 1, Denmark's performance is ranked third out of 166 UN States with an overall score of 85,7%. This indicates the country's strong efforts and progress in addressing global challenges.

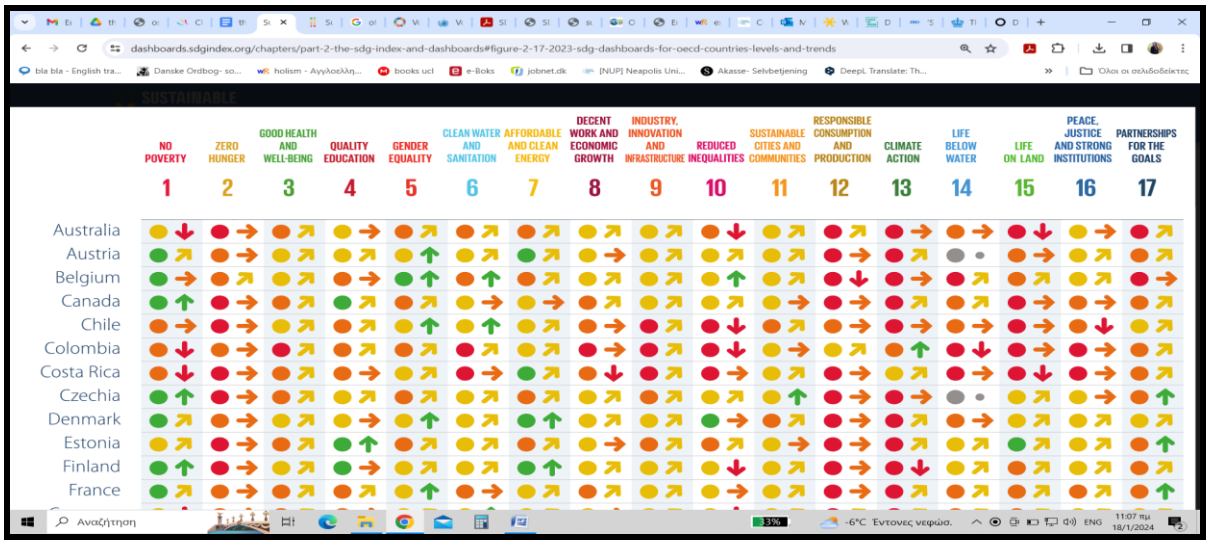

DIAGRAM 2: 2023 SDG dashboards for OECD countries (levels and trends)

Source: 2023 Sustainable Development Report by the (UN) Sustainable Development Solutions Network (SDSN)

[183] Ibid, p 25.

Diagram 2 highlights, among others, Denmark's exceptional performance in almost every indicator of environmental health, such as health care access (SDG 3), clean water and sanitation (SDG 6), affordable and clean energy (SDG 7), sustainable cities and communities (SDG 11) and climate actions (SDG 13).[184] The country has reached the targets with an overall percentage of 74,3% and other improvements have been also observed, for instance regarding poverty (SDG 1) and working conditions and economic growth (SDG 8), as evidenced by the country's profile.[185]

Additionally the government's focus on environmental issues is reflected in a number of distinctions and purposeful actions. Denmark was named a global sustainable leader in 2022 by the Environmental Performance Index (EPI); every two years researchers from Yale and Columbia universities' conduct a study that ranks 180 countries on 32 sustainability criteria.[186] Denmark ranked highest for two consecutive years in EPI. The country was also ranked second in 2021 by the Global Sustainability Index which is a combination of global indexes on pollution, climate change, policy, energy, oceans, biodiversity.[187] In particular the country's commitment to green transition was recognized by a number of facts such as the Climate Act implemented in 2019 with the aim to achieve the 2050 net-zero emissions goal.[188] Moreover, based upon the report by the SDSN, in 2023 the Danish government took a number of measures to implement the SDGs, including the allocation of a certain budget and the adoption of monitoring mechanisms on CSR activities, as seen at the beginning of this part.[189] In the same context, a project with a number of localized Danish sustainability indicators was conducted in line with the Global Goals for Sustainable Development and discusses governance and management from a Danish perspective.[190] Arguably, such positive results have

[184] Ibid, p 215.
[185] Ibid.
[186] Katherine Notman, 'The Environmental Performance Index Has Named Denmark The Most Sustainable Country' Secret København (2 June 2022) <https://secretkobenhavn.com/environmental-performance-index-denmark/> accessed 18 January 2024.
[187] Owen Mulhern, 'Denmark- Ranked 2nd in the Global Sustainability Index' Earth.Org (4 January 2021) <https://earth.org/global_sustain/denmark-ranked-190th-in-the-global-sustainability-index/> accessed 18 January 2024.
[188] Ibid.
[189] Sustainable Development Report 2023, Implementing the SDG Stimulus (n 182) p 49.
[190] Statistics Denmark, 'The Danish sustainability indicators' <https://www.dst.dk/en/Statistik/temaer/SDG/danske-maalepunkter> accessed 18 January 2023.

largely contributed to the global commitment of building a more equitable, sustainable, and prosperous world.

To summarize, Danish companies when doing business internationally, follow sustainable practices by integrating sustainability and CSR clauses into their contracts and corporate documents. They do so, in order to protect social and environmental interests not only because they are obliged by law to comply with international and national standards but also because this could increase their profitability. However, such protection is being achieved only when the company includes clear and comprehensive clauses and is able to secure the compliance of its business partners. It should also be mentioned that the protection of such social objectives may become quite complex if States are not willing or cannot enforce international law within their territory.[191] For instance the Vestas' Code of Conduct forbids child labor establishing certain age limit to work in the company.[192] This however, could be a complex matter in countries where governments are not willing to meet the international standards if, for example, such international obligations contravene the country's public objectives or because the country lacks an appropriate institutional structure. India for instance has not ratified the UN Convention on the Rights of the Child, stating that the socio-economic situation in the country does not allow for one age limit applicable to all types of work.[193] It appears that, in this case, more effort on an international level should be done in order to establish a universal set of rules so as all national regulation will provide sufficient protection to social values.

[191] This is especially relevant in developing countries where governments are not willing to meet the international standards due to a number of reasons, for instance if such international obligations are not in line with public objectives or because of the lack of institutional structures.
[192] Vestas Supplier Code of Conduct English (n 158) p 8.
[193] United Nations Treaty Status, 'Declarations and Reservations', India's declaration regarding the UN Convention on the Rights of the Child, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#EndDec> accessed 14 December 2023.

Conclusion and future implications

This dissertation's purpose was to explore the key elements in commercial contracts involving one Danish party. The primary research objective was to examine the considerations taken in contract formation under the prism of Danish Contract Law and the way the Courts interpret an international agreement. In addition, this dissertation discussed a number of boilerplate clauses, the legal effects and the available remedies. It also reflected upon sustainability and CSR requirements in contract formation and further explored the effect of international and EU law on Danish law.

Chapter I demonstrated the main principles and provisions of the Danish Contract Law in international transactions and the way the Courts interpret them. Based on this analysis, it answered the 1st research question and it was found that Danish Law applies, among other defaults rules, the general rule of *pacta sunt servanda*; a rather strict principle based upon which the contract is binding and must be performed in accordance with its terms. However, Chapter I also illustrated that the Courts may deviate from this basic rule when interpreting an international agreement for the sake of the principles of flexibility and reasonableness, as traditionally applied in the Nordic jurisdictions. Based upon the analysis, the 2nd research question was also answered. It was found that both section 36 of CA and the doctrine of assumptions can relieve a party from its obligations, as developed by case law; in case a contract is unreasonable or incompatible with the principles of good faith and in relation to unexpected circumstances respectively. The analysis of Chapter I also identified what other considerations the Danish Courts are taking into account when interpreting an international agreement, answering in the 3rd research question. The Danish Courts consider other default rules, such as the rule of loyalty between the contracting parties, the will of the parties, the principle of proportionality and good faith. This chapter also answered the 4rd research question as it was found that a number of rules contained in the Danish legal system protect the commercial environment, such as section 36 of the Danish Contract Act. The analysis also showed that such provisions can limit the contractual freedom of the parties and thus, serve as safety velvet in international transactions. Based upon the analysis it may also conclude that the role of the Courts is significant in providing for safety in the commercial environment.

Chapter II explored the problematic of certain clauses, as used by legal practitioners in Denmark and their effect on commercial contracts in Denmark; it also analyzed the Courts' approach, answering the 5th research question. It further illustrated that, in line with international and EU law, international contracts in Denmark contain relief rules based upon which a party may claim relief if it is difficult to perform due to for example unexpected circumstances. For example the force majeure principle dealing with the legal consequences of a breach of generic obligations is expressed in article 24 of the Danish Sale of Goods Act. This chapter also demonstrated that the Danish drafting style started to change over the years and under the pressure of the globalization of the business environment. Danish contracts have become longer and detailed, as they are being affected by common-law legal systems. Chapter II answered the 6th question because it reflected upon the legal consequences and the available remedies in the event of a breach of a contract; it was found that a Danish Court considers the purpose of the contract, i.e. the discussions between the parties during the contract negotiations, the literal final wording of the contract and the reasonable expectations created by the contract, both written and oral statements. Other more pragmatic factors such as what is needed to fulfill the parties' interests in a fair and reasonable way are also included in the basis for the decision. Based upon an analysis of Denmark's legal system this chapter also answered the 7th research question and showed that the clauses correspond to the domestic law, as the governing law of the contract.

Chapter III dealt with the issue of contractual sustainability provisions as a means to pursue the goal of global sustainability and CSR requirements and answered the 8th research question. It showed that a CSR orientation is adopted by Danish corporations when entering into an international agreement because of the associated financial and reputational benefits with operating ethically. Such behaviors are also dictated by the national commercial legislation which puts special focus on committing to ethical or social obligations. Chapter III also gave answer to the 9th research question, as it was found that a contract may serve as a means for engaging in positive sustainability and CSR efforts. Two ways were identified; either through the inclusion of such clauses into the company's supply contract itself or by reference to other corporate documents, which usually supplement the supply contract. The latter is the most common mechanism, as the analysis in Chapter III showed and also answered the 10th and 11th research questions. The study of the

way four Danish companies operate showed that they indeed integrate sustainability and CSR clauses into their Code of Conduct and Standard Terms and Conditions documents, and these are integral parts of their supply contracts. These documents are an effective means of internal and external communication of the company's CSR commitments but should be particularly clear, in order to produce binding legal effects. In answering the enforcement of contractual sustainability clauses under the Danish legal system, it was illustrated that the national system puts special emphasis on global sustainability through an increased regulation to protect social interest, such as the Danish Environmental Act and through the enactment of an appropriate surveillance system, such as the obligation to submit sustainability reports. Based upon the analysis of this chapter, it was also illustrated that the enforcement of such clauses is not based upon a judicial mechanism but based upon a mutual commitment of the parties to comply with these standards. Of course, the inclusion of provisions regarding the right to monitor compliance with the company's CSR code may also be an effective enforcement mechanism. However, this chapter also indicated the weaknesses of this model, i.e. the implementation of international HR and labor standards through supply contracts. It was shown that the differences in national law may challenge the enforcement of CSR standards, especially in jurisdictions where such protection is weak. Another flaw would be that auditing may be a costly process, especially for smaller companies or companies with lesser international activity and less market power.

Overall, the analysis proved the dissertation's main objective that the Danish legal regime provides for certainty in international transactions to a large extent. It also secures sustainability and CSR obligations. However, it seems that there is a need for a more harmonized legal framework globally, especially in securing CSR obligations; but this topic falls outside the scope of this dissertation.

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