

This article is published in a peer-reviewed section of the Utrecht Law Review

Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices

Louise Vytopil*

1. Introduction

This article explores the choices that multinational companies make in order to regulate corporate social responsibility aspects of their supply chains. The first part will look at the context in which these companies operate and explain the relevance of the questions which are central to this article. Furthermore, the methodology will be set out. The second part provides a theoretical private law background with respect to contracts, general terms and conditions and codes of conduct in the Netherlands. The final part will answer the following research questions: what do the codes of conduct and CSR contracts currently used by best-practice players look like? What are the contractual consequences (both in terms of possibilities and limitations) of these instruments? The article will answer these questions by describing the initiatives that fourteen Dutch multinational companies currently use in order to regulate their supply chains. Furthermore, it will qualify these initiatives in terms of contract law and highlight some patterns found in these initiatives.

2. Setting the stage

Over the past couple of decades, the world in which companies operate has changed dramatically. Since the early 1990s, there has been a strong increase in the amount of companies that operate multinationally. At the end of the 1960s, only 7,000 multinational companies (MNCs) had been registered, expanding to over 30,000 in the early 1990s and 60,000 at the start of the new millennium.¹ An important role in this respect has been played by globalisation.

The process of globalisation encompasses many different aspects, such as de-territorialisation, increased use of technology and heightened transparency. These factors combined create – what the Netherlands Socio-Economic Council (*Sociaal-Economische Raad, SER*) refers to as – increased interconnectedness.² Companies may export their products to countries around the world or relocate part of their production process to lower-wage countries.³ Companies located in low-wage countries, such as

* A.L. Vytopil LLB MA MSc is an assistant professor and a PhD candidate at the Molengraaff Institute for Private Law, Utrecht University School of Law, Utrecht (the Netherlands). She can be reached via email at a.l.vytopil@uu.nl.

1 R. van Tulder & A. van der Zwart, *Reputaties op het spel: maatschappelijk verantwoord ondernemen in een onderhandelingsamenleving*, 2003, p. 43.

2 Sociaal-Economische Raad, *Duurzame Globalisering: een Wereld te Winnen*, 2008, p. 30.

3 *Ibid.*, p. 42.

India, China and Bangladesh, increasingly do business for firms based in Europe and the United States. Furthermore, many developing countries have set up export processing zones.⁴

By operating in multiple countries, MNCs can take advantage of the weak points that each specific legal system offers, while planning the legal structure of their daughter companies so that the corporate veil is best utilised to avoid liability for any violations of the law.⁵ This can lead to undesirable consequences: through their daily operations, MNCs may damage the local environment or they may commit human rights abuses. So how is the behaviour of MNCs governed when they operate across borders?

While companies are traditionally governed by the law of their corporate seat, their home states, generally speaking, do not have any legislative power or control when their corporate citizens operate across the borders of nation states as the result of the territoriality principle. At the same time, host states may lack the expertise or resources to regulate adequately.⁶ Globalisation has also eroded the power of the nation state. As a result, regulating the behaviour of companies operating across the borders of nation states is complex. Thus the behaviour of MNCs is often not (effectively) regulated. What remains is a regulatory gap in which multinationals operate.

Western multinationals thus make use of global supply chains in order to provide their goods and services to the public, but these global supply chains are often not regulated by public law. At the same time, information processes have changed as a result of globalisation. If things go wrong, the world becomes aware of this within a matter of minutes.

And as has been shown by various examples, things do go wrong. Consider, for example, the suicides at a Foxconn factory in Shenzhen, Southern China, producing electronics for – inter alia – Dell and Apple.⁷ Or Shell's massive oil-spills in the Ogoni delta in Nigeria, resulting in the devastation of many square kilometres of water and farmland, for which it recently accepted liability.⁸ MNCs are held accountable (both by the media and – to a slightly lesser extent – in the legal arena) for these wrongdoings.

MNCs themselves now take action in order to prevent human rights violations from occurring. These private initiatives are often brought together under the umbrella term of corporate social responsibility (CSR); in the words of Freer Spreckley described as the 'triple P bottom line' of People, Planet and Profit.⁹ In the words of the European Commission: initiatives that 'contribute to a better society and a cleaner environment'.¹⁰

This concept of CSR as encompassing the 'triple P' is currently widely accepted among academics and companies alike. This article will not elaborate on the question whether or not companies should undertake CSR measures.¹¹ After all, I believe that it is clear that companies do undertake CSR measures and, therefore, the focus should not be on whether they should do so, but rather, on gaining greater insight into their CSR initiatives. What do they look like and how can they be qualified?

While in the early days of CSR many companies did not concern themselves with written policies, over the past few decades the code of conduct (COC) has taken off.¹² Rule-setting in CSR is now mostly undertaken by private actors rather than public actors: MNCs increasingly rely on self-regulation, soft law and codes of conduct. And while CSR and these private law initiatives are largely voluntary¹³ by nature, they are not entirely non-committal. The same holds true for CSR in the supply chain. It is generally

4 EIRIS Foundation, *A Risky Business? Managing core labour standards in company supply chains*, 2009, p. 17.

5 M.T. Kamminga in J.J.A. Hamers et al., *Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective*, 2005, p. 64.

6 M.P. Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance', 2007 *UCLA Law Review*, p. 919.

7 See, inter alia, 'Apple and Dell investigate Foxconn plant', *The Financial Times*, 26 May 2010, <<http://www.ft.com/cms/s/2/8287fed0-68cd-11df-96f1-00144feab49a.html#axzz1UdGOiVK0>> (last visited 10 August 2011).

8 See, inter alia, 'Shell accepts liability for two oil spills in Nigeria', *The Guardian*, 3 August 2011, <<http://www.guardian.co.uk/environment/2011/aug/03/shell-liability-oil-spills-nigeria>> (last visited 10 August 2011).

9 F. Spreckley, *Social Audit - A Management Tool for Co-Operative Working*, 1981.

10 European Commission, 'Corporate Social Responsibility: Encouraging best behavior', 15 June 2006, at: <http://ec.europa.eu/enterprise/library/ee_online/art11_en.htm> (last visited 16 November 2011).

11 For further reading on the moral and legal foundations of CSR, see inter alia the report by the SER, supra note 2; D. McBarnet et al., (eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, 2007, and A. Crane, *The Oxford Handbook of Corporate Social Responsibility*, 2008.

12 A. Kolk, & R.J.M. van Tulder, 'Child labor and multinational conduct: a comparison of international business and stakeholder codes', 2002 *Journal of Business Ethics* 36, p. 293.

13 Examples of exceptions being CSR reporting obligations under the corporate governance code in the Netherlands, and an obligation to create tracking systems for conflict minerals in the United States under the Conflict Minerals Act.

held that MNCs are no longer simply responsible for preventing wrongdoings by their own company, but rather that they also have a (limited) responsibility with regard to their business partners, including supply partners.

This conclusion is supported by the business and human rights framework drafted by the United Nations Special Representative for Business & Human Rights, John Ruggie. The framework, entitled 'Protect, Respect and Remedy' (the 'UN Framework'), describes the obligations that businesses have with regard to human rights. This framework was endorsed by the UN Human Rights Council on 16 June 2011 and sets out the responsibilities that – inter alia – businesses have with regard to their operations and human rights. They are to respect human rights, acting with due diligence and dealing with any problems that may arise. This responsibility extends to the supply chain that companies use when producing their goods or services. According to Ruggie, companies are to take on responsibilities with regard to CSR in the supply chain.

These responsibilities are echoed in the 2011 update to the OECD Guidelines,¹⁴ which incorporates and builds upon the UN Framework. For the first time, the 2011 update contains both the general notion that enterprises are to exercise due diligence and the view that companies are to avoid any negative impact as a result of their business, regardless of whether such a negative impact is caused by their own operations or by others in their supply chain.

Such a 'responsibility' in respect of CSR and responsible supply chain management is therefore widely accepted at this moment in time; however, it should be noted that it is only that: a 'responsibility', not a (legal) obligation.

Many companies feel the demand for responsible supply chain management from society and NGOs. This is reflected in their CSR policies: nowadays, these often include supply chain issues. In the Netherlands, 60% of the largest companies investigated in the 2010 Transparency Benchmark addressed supply chain issues in some way or another in their CSR policy.¹⁵ There is currently no strict liability for MNCs who engage with suppliers in low-wage countries, although, from time to time, politicians have called for further responsibilities. In the Netherlands, such a call came from Parliament in 2007, when it requested the SER to advise on the necessity of legislation on supply chain responsibility. The Labour Party (PvdA) had proposed an Act on the Transparency of Product Chains (*Wet Openbaarheid Ketens*).¹⁶ The European Parliament, as well, has called for legislation that would create a strict liability for any MNC that included child labour in its supply chain, regardless of where this child labour would take place.¹⁷ Furthermore, calls have come for European legislation in respect of the use of conflict minerals throughout the supply chain; up until now, however, no such legislation exists.¹⁸

So while no legislation on CSR in the supply chain exists in the Netherlands, it is widely accepted that companies have a certain degree of responsibility with regard to their supply chain. The extent of this responsibility is not yet clear, however. The question whether and, if so, how these CSR issues in the supply chain are incorporated in contractual documents has not yet been answered. Moreover, it is not always clear what the contractual consequences of these choices are in terms of both tort and contract law.

This article attempts to answer these questions in terms of contract law and their binding nature. It investigates the content of the codes of conduct and the CSR contracts of best-practice players in the Netherlands. It examines how these documents are incorporated in contractual relationships between multinationals and their suppliers and what is required in order for these documents to be contractually binding. Finally, it proposes a categorisation of these measures and investigates their binding nature.

14 To be found at: <http://www.oecd.org/document/28/0,3746,en_2649_34889_2397532_1_1_1_1,00.html> (last visited 4 November 2011).

15 *Transparantiebenchmark*, The Hague, Ministerie van Economische Zaken, 2004, p. 30.

16 See: <http://www.ketens-netwerken.nl/resources/uploads/files/documenten/WetOpenbaarheidvan_productieen_Ketens.pdf> (last visited 10 August 2011).

17 See: European Parliament resolution 'Towards an EU strategy on the rights of the child' 2007/2093(INI), accessible through <<http://www.europarl.europa.eu/oeil/file.jsp?id=5479632>> (last visited 11 November 2011).

18 See inter alia, Report by MakeITFair, *Roundtable on Conflict Minerals Legislation*, 26 May 2011, <http://somo.nl/news-en/long-but-hopeful-path-towards-legislation-on-conflict-minerals/at_download/attachment> (last visited 19 September 2011).

3. Methodology

The first part of this research attempts to answer the following question: what do the contractual measures taken by MNCs in respect of CSR in the supply chain consist of? The sample of approached companies consisted of 45 Dutch multinationals: the top 25 stock exchange (AEX) listed companies¹⁹ and an additional 20 companies from industries that have traditionally developed CSR policies (the food and garment industries). It was expected that approximately 25% of these companies would be willing to participate. For this qualitative research, a sample of 10-15 companies would provide sufficient information upon which to build a model of possible choices. These multinationals were first approached by telephone, then sent a letter with more information on the research. This letter was – if necessary – again followed up with a phone call to further discuss the research.

A total of 16 companies participated, of which 14 were interviewed before this research was concluded (30%). Seven of these companies were AEX listed at the time of participation and six were also represented in the Dow Jones Sustainability World Index 2010 (out of a total of 13 Dutch companies in that Index). A variety of sectors were represented: finance (2), energy (2), clothing (3), food (2), electronics (2), services (1) and chemicals and construction (2). All companies requested that they remain anonymous.

Scripted interviews were held with each participating company, nearly all of which took place in person. Relevant documentation was gathered from the internet where possible; documents not publicly available were obtained from the company. Non-public documentation mostly consisted of model agreements (such as purchasing agreements) and general terms and conditions.

All companies were requested to provide all relevant documentation regarding CSR in the supply chain (i.e. both in respect of ‘people’ and ‘planet’ aspects). However, in order to make the analysis manageable, not all possible aspects of CSR could be included in this research. After all, this would lead to comparing documents on corruption (common in, inter alia, the building industry) and CO₂ reduction with documents on health and safety (common in the food industry). It was therefore necessary to find some ‘common ground’ in the CSR measures adopted by these companies.

In respect of assessing the *content* of CSR measures (which aspects were included and how they were described), only labour rights embodied in the eight ILO Core Conventions were included.²⁰ The reason for focusing on these core labour rights is threefold. First of all, all companies included in the sample included most or all of those rights in their CSR documentation. Furthermore, the ILO Core Conventions are historically widely accepted and lie at the heart of core CSR documents such as the OECD Guidelines and Ruggie’s framework.²¹ Finally, the rights embedded in these core conventions are fairly unambiguous: one can include quantitative standards with regard to – for example – child labour and list the grounds of discrimination. This makes a comparison of the content of the CSR measures that companies take in respect of these aspects fairly easy.

The empirical research was conducted between February 2011 and August 2011. Any new policies or codes of conduct dated thereafter were not included in this research.

The second part of this research analyses the contractual instruments in terms of content. The content of the codes was analysed based on an adaptation of the model by Kolk and Van Tulder.²² That model analyses codes on the basis of their stringency, focusing on which human rights standards have been incorporated, to what degree codes will be implemented, what type of control is established and how stringent that code is. Codes were then classified as strong, moderate or weak.

¹⁹ Date listed: 1 January 2011.

²⁰ Convention C87, Freedom of Association and Protection of the Right to Organise Convention (1948), Convention C98, Right to Organize and Collective Bargaining Convention, (1949), Convention C138, the Minimum Age Convention (1973), Convention C182, Worst Forms of Child Labour (1999), Convention C29, Forced Labour Convention, (1930), Convention C105, Abolition of Forced Labour Convention, (1957), Convention C100 (Equal Remuneration, 1951) and C111 (Discrimination, 1958).

²¹ This in contrast to other, more ‘progressive’ human rights that can be brought within the umbrella of CSR, such as the right to a living wage and the right to a healthy environment (including measures to reduce CO₂).

²² R. van Tulder, & A. Kolk, ‘Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry’, 2001 *Journal of International Business Studies* 32, pp. 267-283.

In the third part of this research, the contractual aspects of these model choices studied were analysed on the basis of Dutch private law. The possibilities and limitations of these options in terms of private law are explored: are codes binding? Are there any issues in terms of contract law? In a later stage of the research, aspects of contractual and extracontractual liability will also be investigated for these options.

It should be noted that this research does not attempt to answer the question of *why* companies choose certain CSR measures and how effective the implementation of these measures is.²³ The subject is approached from a private law angle and is not looked at from a business ethics or law and economics perspective.

4. Instruments for contractual control and Dutch law

Once a company decides to take control of corporate social responsibility in its supply chain by means of contractual control,²⁴ it has a wide range of private law instruments at its disposal. It may choose to connect with existing codes of conduct, for instance with those that exist in the sector in which the company operates, or it may find that a better fit can be obtained if the company drafts its own code of conduct or incorporates specific clauses in its contracts or general terms and conditions.

In order to assess these instruments correctly, some aspects of international private law must be discussed. After all, the nature of these contracts is inherently international, and while MNCs would prefer to see their own law applied to the contract, this may not always happen. This section will therefore first explore some aspects of private international law. Next, the theory behind various instruments will be discussed. First, the option of a contract. What is required for a binding contract to come into existence under Dutch law? The second option is to shape a CSR instrument in the form of general terms or conditions. What consequences does this have for the validity of the instrument? How does a 'battle of the forms' play out under Dutch law? Finally, I will discuss codes of conduct. I will propose a model in order to analyse and compare them, based on the model proposed by Van Tulder and Kolk,²⁵ and will answer the question whether codes of conduct are binding upon the MNC under Dutch law.

4.1. Private international law

The nature of the contracts is international; supply contracts that concern CSR-sensitive products or services are generally concluded between a Western MNC and a low-cost country supplier. As a result, it is necessary to study which legal system is to apply to these contracts and codes of conduct.

In respect of the Netherlands, the Rome I Regulation on the Law Applicable to Contractual Obligations (Rome I) will govern which law is applicable to contracts in civil and commercial cases (Article 1 Rome I). Rome I has been in effect since 17 December 2009 and it is universally applicable. As a result, the law specified by Rome I will be applied, regardless of whether it is the law of an EU Member State. Article 3 Rome I states that if a choice of law has been made, the law chosen will be applicable to the contract. Parties are free to choose which legal system applies to the agreement, except in those cases where Rome I only provides for certain legal systems. This is not the case for the contracts at hand. If no choice of law has been made, Article 4 Rome I prescribes that the law governing the contract is the law of the state with which it is most closely connected. Article 4 Rome I provides a number of examples: in the case of a sales contract (Article 4(1)) this will be the law of the state in which the seller is located. If more than one specific element listed under Article 4 is present, the law of the state of the 'characteristic performance' will govern the contract, unless it is clear that the contract is more closely connected to another country; in that case, the law of the latter country will apply. If the contract does not include a

23 For further reading on these topics, see inter alia: I. Mamic, 'Managing Global Supply Chain: The Sports Footwear, Apparel and Retail Sectors', 2005 *Journal of Business Ethics* 59, pp. 81–100; A. Kolk & R.J.M. van Tulder, 'Multinationality and Corporate Ethics: Codes of Conduct in the Sporting Goods Industry', 2001 *Journal of International Business Studies* 32, no. 2.

24 The term contractual control was first coined by D. McBarnet & M. Kurkchiyan, 'Corporate social responsibility through contractual control? Global supply chains and "other-regulation"', in D. McBarnet et al. (eds.), *The New Corporate Accountability, The new corporate accountability: corporate social responsibility and the law*, 2007.

25 Van Tulder & Kolk, supra note 22.

choice of law, the law of the home state of the MNC will often therefore not be the law which governs the contract, but rather the law of the country in which the supplier is located.

Generally speaking, however, most MNCs will include a choice of law in their contract. In approximately 90% of all contracts investigated, the MNC will choose the law of its home state as the law applicable to the contract.²⁶ In most cases, the law that governs the contract will therefore be the law of the home state.²⁷

If parties engage in a discussion as to whether a contract has been concluded at all or whether general terms and conditions apply, there may also be a discussion with regard to which law governs these pre-contractual questions. These issues are relevant in the case of CSR codes of conduct and contracts, since MNCs may argue that no legally binding contract has come into being since the parties did not intend to be legally bound. Article 10 Rome I indicates that the 'existence and validity of a contract shall be determined by the law which would govern it (...) if the contract were valid', in other words: the *lex causae*. This is only different (Article 10(2)) if one party states that it has not consented to the contract; in such a case, the law of its home state applies if, considering the circumstances, it would not be reasonable to base the consequences of that party's behaviour on the law specified in Article 10(1). These questions will therefore be governed by the law that would have governed the contract if it were assumed that a contract had validly been concluded; this is usually the home state of the MNC, unless one party disputes that it has consented at all, in which case the law of its home state may apply.

4.2. Contracts

The most straightforward choice a company could make if it wanted to regulate CSR issues with its supply partners would be to include one or more CSR clauses in its supply contracts. This section will briefly explore how and where contract law is regulated in the Netherlands. Furthermore, it will set out which requirements need to be met in order for a contract to come into place, and – to some extent – how third parties may be impacted by the content of the contract.

Contracts are regulated in the *Burgerlijk Wetboek* (Dutch Civil Code, DCC). A contract comes into being by an offer and a subsequent acceptance (Article 6:217 Paragraph 1 DCC). An offer is only qualified as such if a proposal to enter into an agreement is made, containing all essential elements of that agreement, so that a simple 'yes' by the contracting party can suffice. Acceptance of the offer flows from the 'yes' by the contracting party. If the acceptance differs from the offer, the 'acceptance' should in fact be qualified as a new offer (Article 6:225 DCC) and as a rejection of the original offer.²⁸

In practice, there may be some discussion as to whether a statement qualifies as an offer or not. A company may state that it did not wish to express an offer, but rather that its statement was the expression of an aspiration, and that those statements were not intended to have any legal consequences. How does Dutch law deal with such a scenario? In order for a contract to come into existence, parties must declare their intention (*wilsverklaring*), this declaration of intent being a kind of legal act as described in Article 3:33 DCC. If the intention of a (legal) person diverges from its declaration, such as when an MNC does not wish to be legally bound by its statement, the question is what should prevail. Should that be the appearance of the party's declaration or its intention?

Article 3:35 DCC states that the outward appearance of the declaration prevails over the internal will of the person acting, as long as the other party has justifiably relied upon the intent of the person acting. This system is known as the will/reliance doctrine (*wilsvertrouwensleer*) and it not only applies to the question whether an offer has been made but also to the question whether an offer has been accepted (see also Section 4.3). Generally speaking, most companies will clarify whether a policy or document

26 Out of the 14 Dutch model agreements, 13 effectively included a choice for Dutch law.

27 Art. 9 of Rome I relates to the application of overriding mandatory provisions (respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization) of national law, which depends on the scope of the provision. Provisions of the law of the forum as well as of the country in which the contract is to be performed may be applied. It should be noted that there may be some overlap between these provisions and the subjects governed by the CSR contract or COC (e.g. labour standards). This article investigates matters of validity and the binding nature of these documents, as well as the consequences of these codes and contracts for liability, rather than the validity of the content of these documents under national law.

28 If parties each refer to a different set of general terms and conditions, the acceptance will be different from the offer. This is referred to as a 'battle of the forms' and this is elaborated upon in Section 4.3.

is intended to be legally binding by inserting wording to that effect. If this is not clear, however, it will depend on the circumstances of the case at hand whether or not a statement could have been interpreted as an offer.

The enforceability of a contract furthermore depends on whether the contract contains determinable terms (Article 6:227 DCC) and is sufficiently certain. This criterion is met if the content of the obligations is sufficiently clear or determinable.²⁹ Assuming this is the case, the obligations arising from the contract are legally enforceable.

Besides being held to the obligations that flow from the contract, contracting parties also have other legal obligations. Article 6:2 DCC states that contracting parties are required to act in conformity with the requirements of reasonableness and fairness. This requirement of reasonableness and fairness is elaborated upon in Article 6:248 Paragraph 1 DCC: the agreement has the consequences that the parties have agreed upon, although the nature of the agreement, law, custom and demands of reasonableness and fairness may colour the agreement.

Furthermore, if the content of a contract is unclear or incomplete, the ‘*Haviltex* criterion’ will form the basis of its interpretation. In that case, the interpretation of such a written contract should not be based on a purely textual explanation of that contract, but rather on what the parties, in the given circumstances, could reasonably expect from one another, taking into account their social background and any legal knowledge they may have.³⁰

A contract between two parties may, under certain circumstances, also have consequences for others that are not party to the contract. The following may be relevant within the context of CSR contracting.³¹ The first option is that of a perpetual clause (*kettingbeding*) in a contract. This option provides for the possibility that contractual obligations between two parties are continued by their successors. Dutch law poses no specific requirements on the validity of a perpetual clause. An example of a perpetual clause in a CSR context (and one that is used in practice, as we will see) is that the MNC provides that the COC not only applies to their contractual relationship, but that the supplier must also include this COC in the contracts with its sub-tier suppliers. In this way, the COC of one MNC can possibly apply to the entire supply chain.

However, there are issues in the case of non-compliance with such perpetual clauses under Dutch law. The MNC only contracts with its supply partner, not with sub-tier suppliers. If, contrary to its contractual obligations, the supplier fails to include a certain clause in the contracts with its sub-suppliers, on the basis of contract law the MNC can only make claims vis-à-vis its own supplier. But the MNC cannot force the sub-tier supplier (which, after all, is not its contracting partner) to observe certain clauses from a contract to which it is not a party. At the same time, Dutch case law has deemed it impossible for the stipulator of a perpetual clause to claim damages from the third party on the basis of extra-contractual liability.³²

A qualitative obligation is not the solution in these cases since qualitative obligations can only cover acts of tolerating facts or refraining from acts (Article 6:251 DCC). Despite their limited effectiveness – there is no possibility to restore the contractual clause, it is difficult to claim damages from sub-tier suppliers – perpetual clauses are the only contractual solution for such a situation.

It may also be possible for third parties to derive rights from a contract to which are not a party. If the MNC and the supplier include a clause in their contract that indicates that employees must be granted a certain minimum protection of employment rights or a minimum salary, one can question whether these employees can directly make claims under this contract, despite not being parties to it. The clause on behalf of a third party is regulated under Dutch law in Articles 6:253 and 6:254 DCC. If A and B agree upon a clause on behalf of C, B is contractually obliged to fulfil this obligation if C accepts the clause. Until C has accepted this clause, C cannot claim rights under the agreement. Such acceptance may be

29 C. Asser et al., *Mr. C. Asser’s Handleiding tot de beoefening van het Nederlands burgerlijk recht*: 3, 2010, no. 283. Case law e.g.: Hof Den Bosch 15 October 2002, *NJ* 2003, 477; Hof Leeuwarden 8 June 2010, *Prg.* 2010, 169.

30 HR 13 March 1981, *NJ* 1981, 635.

31 The next paragraphs relate only to the obligations on the basis of a contract. The content of a contract may also have consequences for the extracontractual liability of contracting parties in respect of third parties. Such liability is – unfortunately – outside the scope of this article but will be further explored in my PhD research.

32 HR 4 June 1965, *NJ* 1965, 381 and HR 28 June 1974, *NJ* 1974, 400.

implicit, as with ‘regular’ two-party contracts. If a clause on behalf of a third party is not complied with, both the third party and the stipulator may request performance, unless the stipulator has no interest in performance or the third party resists the stipulators’ claim for performance.³³

If a contract has been validly concluded between parties through an offer and a subsequent acceptance of that offer, it has the consequences that the parties have agreed upon, as well as any other consequences stipulated by law. If the supplier does not comply with the contract, the MNC will have various legal options at its disposal to pressure the MNC into observing the contract.³⁴ Contracts will therefore be a legally effective option that is at the MNC’s disposal in order to regulate its supply chain. It may nevertheless be more convenient for a MNC not to have to draft a new contract for each separate supplier. If the MNC wants to use a standard set of clauses, it may either use a standard contract form which can be adapted for each individual supplier, or it may use a set of general terms and conditions that is applied to all contracts of a certain type. Most legal systems provide some sort of separate regulation for these terms and conditions. They will be discussed in the next section.

4.3. General terms and conditions

Most companies use general terms and conditions in some shape or form within the course of their daily business. Some incorporate CSR terms in their general terms and conditions, or make a reference to a CSR policy or COC. But what are general terms and conditions and how are they regulated under Dutch law?

General terms and conditions are a set of standardised conditions, which are used repeatedly and do not encompass the core terms from the contract. Title 6.5.3 of the DCC regulates general terms and conditions.³⁵ Article 6:247 DCC of that title contains scope rules in respect of three situations. First of all, if both parties are professionals and located in the Netherlands, Title 6.5.3 applies, regardless of the law that governs the agreement (Paragraph 1). If both are professional parties but one or both are located *outside* of the Netherlands, Title 6.5.3 does *not* apply, regardless of the law that applies to the agreement (Paragraph 2). Lastly, if the contracting party is a consumer and is located in the Netherlands, Title 6.5.3 applies, regardless of the law that applies to the agreement (Paragraph 4). The reason for not applying Title 6.5.3 to professional contracting parties in international situations is to create greater legal certainty for parties which operate in such an international setting; foreign users of general terms and conditions do not have to take Title 6.5.3 into account when drafting their terms that may be used for Dutch contracting parties.

Given the nature of the agreements studied in this research, it is very unlikely that either the situation mentioned in Paragraph 1 or in Paragraph 4 of Article 6:247 DCC would apply. In virtually all cases, the supplier will be a professional party located outside of the Netherlands (Paragraph 2). As a result, Title 6.5.3 will generally *not* apply to the agreements studied, even if Dutch law applies to the agreement.³⁶ If this title does not apply to the general terms and conditions at hand, those terms and conditions will only be governed by the applicable contract law.³⁷ As a result, in order to evaluate whether the terms and conditions used are valid and binding, one should refer to the general framework for contracting as set out above. Furthermore, the following should be noted.

General terms and conditions become part of the contract as a result of an offer and an acceptance; upon accepting the user’s general terms and conditions, its contracting party is bound by them. In practice, it may occur that two parties each refer to their own general terms and conditions and want them to be applied to the agreement. This is referred to as a battle of the forms.

Different legal systems adhere to different systems in respect of the battle of the forms. The Netherlands adheres to the ‘first shot’ system of the battle of the forms. Article 6:225 Paragraph 3 DCC covers the battle of the forms. This clause is *not* part of Title 6.5.3 and therefore also applies if the parties

33 Hof Arnhem 8 March 1985, *NJ* 1985, 678.

34 It should be noted that under Dutch law, performance – rather than damages – is the primary obligation in case of non-compliance with contractual obligations.

35 This title is partly based on EU Directive 93/13/EEC on Unfair Contract Terms for Consumers.

36 Which, as we will see, is highly likely.

37 See, for example, *Rechtbank Rotterdam* 12 March 1998, *S&S* 1999, 45 and Hof Arnhem 2 December 2003, *LJN* AO 1612.

are international professionals. This article stipulates that the first reference is valid; the second reference only has effect if the first set of general terms and conditions is explicitly rejected. A standardised announcement that one's own terms and conditions will apply is not sufficient to meet the criterion of an 'explicit rejection'. Mentioning that one's own set will apply, to the exclusion of all other terms and conditions, will however suffice, subject to the condition that it is presented in a manner that is to be taken seriously.³⁸

Another issue which is specific to general terms and conditions is the following. At times, general terms and conditions refer to yet *other* terms and conditions, which may or may not be provided to the contracting party at the time of contracting. Under Dutch law, such a reference to a second set of general terms and conditions will not mean, generally speaking, that this second set also becomes part of the contract. Only if the contracting party has read the second set of terms and conditions, or creates the impression of knowing their content, is this not an issue, since – as Jongeneel points out – the contracting party has either intended to be bound by these terms (Article 3:33 DCC) or has created the impression that it has such an intention (Article 3:35 DCC).³⁹

All in all, the nature of general terms and conditions (i.e. their repeated use) makes them a practical instrument for CSR contracting. Under Dutch law, general terms and conditions that are used in an international setting are not specifically regulated and are only subject to general contracting laws, making them a fairly flexible and convenient option. But there is another option at the disposal of the MNC wishing to regulate its supply chain: the code of conduct.

4.4. Codes of conduct

What constitutes a code of conduct? There are a number of aspects that scholars generally agree upon. The first is the principle of voluntariness. This is not necessarily voluntariness in the sense that once a company uses a code, it does not need to abide by it, but rather that the target group creating or adopting the code was under no (legal) obligation to do so. Another aspect often highlighted is that codes of conduct contain a set of norms and standards. Van Tulder and Van der Zwart⁴⁰ define codes of conduct as 'a set of agreements with which an organization indicates which behavior it expects from its members (and possibly business partners) in certain, defined situations.'

If a company decides to include a code of conduct as part of its broader CSR policy, it has a wide range of policies that it can choose from, varying from codes created by international organisations such as the OECD, sectoral initiatives such as the Electronic Industry Citizenship Coalition, or it may draft a code itself. Codes of conduct may contain a wide range of topics: societal responsibility, human rights, the environment, responsible investment, the integrity of employees, and so on.⁴¹

In order to make reasonable comparisons on the basis of a fairly small sample, this research only focuses on the labour norms and standards laid down in the eight core conventions of the International Labour Organization (ILO). The following four categories are covered by a total of eight ILO core conventions: (i) freedom of association and collective bargaining, (ii) prohibition of child labour, (iii) prohibition of forced labour, and (iv) non-discrimination. These principles are widely recognised and have been included in the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as well as in the UN Global Compact principles.

In order to identify the legal status of (voluntary) codes of conduct, one must distinguish the question whether a MNC can be held accountable by a third party on the basis of such a code, from the question of the binding nature between the MNC and its supply partner. I will first answer the question whether a MNC is bound by its own COC in relation to third parties. This is also the question that most of the discussions concerning the binding nature of codes of conduct in the literature have revolved around. Although the first question is more relevant in respect of liability for CSR violations by MNCs, and this research relates to the use of private law instruments in the supply chain (rather than the use of COCs in general), I will briefly discuss these theories since they provide background information on

38 S. A. Krusinga, 'Battle of Forms', in B. Wessels et al. (eds.), *Algemene voorwaarden*, 2010, p. 35.

39 R.H.C. Jongeneel, 'Gebondenheid', in B. Wessels et al. (eds.), *Algemene voorwaarden*, 2010, p. 113.

40 Van Tulder & Van der Zwart, *supra* note 1, p. 108.

41 R.C.J. Galle, *Ondernemen en ethiek*, 2000, p. 65.

how codes of conduct are classified in private law in general. I will then discuss the question of the binding nature of a COC on supply partners. This section will restrict itself to situations where the code of conduct is not embedded in another kind of private law initiative, such as a contract or general terms.

The answer to the question whether codes of conduct are legally binding upon the MNC that publicly adheres to them is not clear-cut. Generally speaking, there are two streams of thought in the international literature. The maximalist perspective argues that codes of conduct are legally binding and that the clauses of these codes should be enforceable in the courts. The minimalist view believes that the character of codes of conduct is not legally binding and that compliance with these codes should be voluntary. A third perspective is that of the 'zebra code', which contains both legally binding and non-binding clauses.⁴²

From an international perspective, the minimalist view is dominant.⁴³ An example of this is the reference in the OECD Guidelines, which indicates that 'observance (...) is voluntary and not legally enforceable'.⁴⁴ Similarly, in the Netherlands the general notion is that voluntarily drafted or accepted codes are not legally binding for those that adhere to them.⁴⁵ It is often also claimed that the provisions contained in a code are not legally binding, at least that such a binding nature does not naturally flow from the instrument of a code of conduct. Koelemeijer asserts that if any binding nature of clauses in a code is to be induced, this does not flow from the code itself but rather from general or more specific (inter)national legislation, if a code contains legally binding clauses.⁴⁶

The general view, therefore, is that a COC is not in and of itself binding for the MNC that adheres to it. What, if anything, does that mean for the status of the COC in supply relationships? I believe that a mere reference to a code of conduct ('Please take note of the Code of Conduct of Company X, enclosed as Annex A') in a contractual document is insufficient for a contract to be concluded. After all, it is not clear to the supplier that the MNC expects him to uphold the COC and does not constitute an offer in the private law sense.

In order for the COC to be binding upon the supplier, this code of conduct should therefore be contractually embedded. As has been set out supra, an offer and an acceptance is needed under Dutch law in order to conclude a contract. Therefore, it must be clear to the supplier that the reference to or provision of the COC is, in fact, an offer, which he may or may not accept. This may be done by requesting that the supplier signs for the receipt of and compliance with the COC. Another option is to refer to the COC in a contract and to declare that that COC is applicable to the contract, as a form of special terms and conditions.

Having set out the theory above, it is time to look at what CSR contracting in the supply chain looks like in practice. What are the contractual consequences of choices made by Dutch MNCs? Are the instruments used binding?

5. Contractual control in the supply chain in practice

5.1. Introduction

In the Netherlands, 16 companies were willing to participate in this research. A total of 14 were interviewed before August 2011; those companies were included in this article. All of them provided their codes of conduct, and, if applicable, the general (purchase) terms and conditions that contained CSR clauses and/or CSR clauses from their contracts. A twofold analysis was carried out on the basis of these documents.

42 S.C. Eyk, *The Oecd Declaration and Decisions Concerning Multinational Enterprises: An Attempt to Tame the Shrew*, 1995, p. 20; M. Koelemeijer, 'Gedragscode: effectief instrument voor maatschappelijk verantwoord ondernemen?', 2004 *Ondernemingsbestuur*, no. 1, p. 13.

43 R.J. Hoff, *De Integere Onderneming, De Bedrijfscode En Het Recht*, 2006, p. 130.

44 OECD Guidelines for Multinational Enterprises, 2011, Concepts and Principles I.1.

45 M. Koelemeijer, 'Naar een Nederlandse gedragscode maatschappelijk verantwoord ondernemen?', in J.J.A. Hamers et al. (eds.), *Maatschappelijk Verantwoord Ondernemen: Corporate Social Responsibility in a Transnational Perspective*, 2005, p. 108.

46 See note 45 supra.

The first type of analysis related to content. As indicated, the analysis of the content was carried out on the basis of an adaptation of the model proposed by Van Tulder and Kolk.⁴⁷ The adapted model is included as *Figure 1* infra. Secondly, the structure of the contractual control mechanisms was analysed. Which instruments were most frequently used by companies? Could a pattern be discovered that would distinguish various types of initiatives? To what extent were instruments legally binding? Did they also include clauses in relation to third parties?

5.2. Content of CSR instruments

In order to compare and assess codes of conduct, one needs a set of indicators and variables. Kolk and Van Tulder have proposed such a model, binding together the content of the issues included, the nature of the wording, references to legal systems which they make and compliance aspects.⁴⁸ For the purpose of assessing the COCs of the participating companies, I have adapted this model, thereby only including issues in respect of the 8 ILO core conventions. This adjusted model is proposed in the final section of this article.

The content of all 14 contractual control initiatives was inserted into the model inserted as *Figure 1*.

Figure 1

			Classification
Binding	<i>Code signed separately?</i>		yes / no
Issues		– non-discrimination, equal remuneration	Ranging from: 0 out of 4 to 4 out of 4.
		– industrial relations (freedom of association, collective bargaining)	
		– child labour	
		– forced labour	
Nature	<i>Quantitative standards?</i>	100% (predominant), 75% (majority)	predominant, majority, medium or frail
		50% (medium)	
		0-25% (frail)	
Measures	<i>Reference?</i>	Reference to local legal system or international standards or other COC?	none defined; home country; host country; international or combinations
Compliance	<i>Monitoring systems and processes</i>	Good insight into systems (clear), reference to some parts but criteria or time frames lacking (clear to vague), only general reference to monitoring without details (vague).	clear / clear to vague / vague
	<i>Position of monitoring actor</i>	Firms themselves (1 st), business associations (2 nd), external professionals (3 rd), combination (4 th).	1 st , 2 nd , 3 rd , 4 th
	<i>Sanctions</i>	Warnings and exclusion of membership (mild), threat to business activities (severe).	none / mild / severe

The analysis led to three types of content: weak, moderate and strong content.

Weak codes

Content described as weak often did not include all four issues of the ILO core conventions; sometimes, issues such as freedom of association, collective bargaining or force were not included. The wording was

47 Van Tulder & Kolk, supra note 22.

48 Ibid.

general and left much room for interpretation; e.g., phrases such as ‘promoting respect for people and their work environment’, ‘supplier will not indulge in acts of discrimination’ and ‘supplier will recognise its employees’ rights to freedom of association’. Such phrasing does not make it clear what the MNC exactly expects from the supplier. There was no reference to legal standards (home state, host state or international). Codes did not generally include any compliance mechanisms, such as auditing or self-assessment questionnaires. The codes are not signed for by suppliers. Out of the 14 codes, 4 were classified as weak (29%).

Moderate codes

The contents of three codes (21%) were considered moderate. These codes used either general phrasing or predominantly general phrasing; they did, for instance, describe exactly what was expected from the suppliers in terms of non-discrimination and they mentioned all possible grounds for discrimination, but only referred to freedom of association in general terms. Limited quantitative standards were included (for instance, only relating to child labour). Codes mentioned legal standards but did not make it clear which legal standards those are; e.g., codes stated that ‘all legal standards must be observed’.

Strong codes

The contents of seven codes (50%) were classified as strong. These codes included clear norms for all four issues. They usually included relevant references to ILO conventions and all included references to a mix of legal standards (home state, host state, international and international trade standards). The norms also usually set out what was expected in the case of conflict between the various norms. Quantitative standards were usually included with respect to child labour.⁴⁹ These codes frequently referred to or included external, third-party COCs as well.

All codes of conduct were signed for by supply partners. Furthermore, all strong codes included compliance mechanisms, either by means of auditing (usually by a third party; sometimes by the company itself) and/or self-assessment questionnaires.

With the exception of one COC, all strong codes included obligations in respect of sub-tier suppliers: any further sub-suppliers that the supplier engaged with would also need to agree to the content of the code of conduct.

5.3. Form of initiatives: COCs, general terms and conditions or contracts?

All three types of instruments – contracts, general terms and conditions, and codes of conduct – were seen in practice. Most companies chose a mix of these instruments and the instruments used often did not strictly fall into one category.

All companies investigated used some type of code of conduct. Almost all codes of conduct (with the exception of two) were signed for by supply partners. This has some consequences for the relevance of the concept of a ‘code of conduct’ in the original, voluntary sense. By requiring that all suppliers sign the code of conduct, these ‘codes’ would in fact qualify as general terms and conditions. They are a set of standardised terms, to be used repeatedly within the context of a certain type of contract. While this does not have major consequences in terms of Dutch private law – after all, title 6.5.3 of the DCC does not apply to international contracts – it does provide us with an excellent indication that the discussion concerning to what extent codes of conduct are binding is of limited importance in the supply chain.

Furthermore, these codes of conduct become contractually binding. The MNC extends an offer to its supplier, which the supplier – by signing for the code of conduct – accepts. It turns out that MNCs do not wait to see whether courts deem codes of conduct to be binding upon those who adhere to them; rather, they take matters into their own hands and ensure that COCs are binding on their supply partners through the means of contracting. Furthermore, the *content* of COCs does not bar them from becoming binding. In my opinion, even the content of weaker codes of conduct would meet the criterion of having sufficiently determinate terms.

49 As well as in respect of working hours, which lies outside the scope of this research.

Using a CSR clause in a contract was the least popular option among this sample. Apparently, CSR contracting is very much standardised (either through the use of COCs or general terms or conditions). Only 5 of the 14 companies also included some kind of ethical clause in their contracts. Usually, these were fairly general clauses that described the CSR obligations of the supply partner on an abstract level. For example, ‘manufacturer is obliged to demonstrate that it is actively promoting good labour conditions for its workers’. The companies that *did* include CSR clauses in contracts indicated that they only did so in the case of contracts where the risk of CSR violations would be high. In such cases, a CSR clause would be inserted to draw extra attention to CSR issues. When asked why companies did not include such a clause, most answered that they felt such an ethical clause would not be necessary since the code of conduct had already been signed for and was therefore a contractual obligation in and of itself.

5.4. Patterns

Another important discovery was that a pattern could be deduced from the choices that companies made. Those companies that used CSR codes of conduct or general terms and conditions of which the content qualified as weak did not create contractual mechanisms to embed these codes of conduct. As a result, these codes would not be contractually binding for supply partners. Furthermore, the implementation of these instruments was lacking: the use of these codes was not widespread among employees dealing with supply partners and they were often overlooked in the contracting process.

Those companies that had moderate codes of conduct and general terms and conditions made some effort in respect of the content of the code, but often one or more issues concerning implementation did arise. A number of MNCs indicated that while elaborate codes were in place, employees neglected to include them in contracts in the heat of the commercial process. Another company explained that not all supply partners signed the code, but that the general terms and conditions contained a reference to the COC. The set of general terms and conditions provided on the company website did not include such a reference. Another example was a code consisting of both a company COC and a third-party, NGO COC (the second COC being much more specific and stronger), while the form that must be signed by the NGO only referred to the weak company COC. Yet other MNCs chose to include a reference to their code of conduct in their general terms and conditions. As set out above, this would be problematic if the code of conduct is then not provided to the supplier at the time of concluding the agreement. These companies would therefore need to make sure that the code of conduct is provided with the general terms and conditions (for instance, by attaching the code to the general terms and conditions).

Those MNCs that used the strongest COCs from a content perspective also embedded their codes in the broadest manner from a contractual perspective. They not only requested that their suppliers sign their code of conduct, but they also frequently drafted specific general terms and conditions for suppliers that related to CSR and included CSR clauses in contracts. Finally, with the exception of one MNC, all strong codes included a perpetual clause in respect of sub-tier suppliers: any further sub-suppliers that the supplier engaged with would also need to agree to the content of the code of conduct.

5.5. Private international law, battle of the forms

All general terms and conditions included a choice of law. With the exception of two sets, all chose the law of the Netherlands as the law applicable to the agreement.⁵⁰ On the basis of Rome I, this will generally mean that Dutch law applies to the agreement.

Assuming that Dutch law applies, it is not likely that any battle of the forms would cause any problems. All general terms and conditions explicitly rejected any other set of general terms and conditions, thereby meeting the criterion of a sufficient rejection described *supra*. Furthermore, COCs are almost always signed for separately by suppliers. This means that these codes do not run a great risk of becoming ‘victims’ of a battle of the forms. If a set of general terms and conditions loses the battle of the forms, only that set of general terms and conditions will not apply; only CSR clauses laid down in those general terms and conditions would then not apply. Only one company investigated in this research had only anchored

⁵⁰ One company chose English law. Another chose the law of the country where the relevant contracting entity was located, which would often, but not always, be Dutch law.

its CSR policy through general terms and conditions without requesting that suppliers sign for it. All other companies either also requested that suppliers sign for their COCs, or made the COC applicable through a reference in the standard contract.

5.6. Other aspects: third parties, implementation

As set out in Section 5.2, all strong COCs and most moderate COCs extended obligations to sub-tier suppliers by means of a perpetual clause. While such a perpetual clause is not perfect, it is the only contractual option that MNCs have available in such a case. The options that MNCs have available in case their suppliers do not include a perpetual clause are exceptionally limited – they may claim damages from their supply partner on the basis of non-performance, but there is no way to restore a CSR contract in a clause between supplier and sub-tier suppliers or to claim damages from the sub-tier supplier on the basis of tort.

All of the codes included references to the rights of workers, such as clauses on non-discrimination and freedom of association. Under certain conditions, such clauses may be considered clauses for the benefit of a third party, as set out in Section 4.2. In order for a third party to derive rights from a contract between a MNC and its supplier, this clause must be sufficiently determinate. In the case of strong codes of conduct, this is generally the case. Furthermore, the clause (the offer, as it were) should be accepted by such a third party.

Within the context of CSR contracting, the most likely category of ‘third parties’ to accept such a clause would be the employees of the supply partner. It is not clear whether the codes of conduct that contained clauses for the benefit of a third party are in practice always provided to the employees of suppliers, so that they can accept these clauses and derive rights under the supplier code of conduct. In the Netherlands, it has also been considered sufficient for third parties to accept clauses by means of instigating a procedure requesting that the promisor fulfils its obligations in respect of the third party.⁵¹ It is therefore not unthinkable that employees would be able to derive rights from the supplier codes of conduct.

All three types of codes of conduct included the possibility to terminate the agreement. On the basis of the conducted interviews, however, it quickly became clear that all companies were reluctant to terminate relationships; they rather engaged with the supplier in order to draft a plan for improving the points that fell short from a CSR perspective.

6. Conclusion

In conclusion, codes of conduct are not used in the true sense of the term in the supply chain. Companies really attempt to obtain contractual control; not only by requiring that their supply partners sign their code of conduct, but also by anchoring the code of conduct in their general terms and conditions or in the contract. Furthermore, within the context of the supply chain and supplier codes of conduct, the discussion revolving around whether these codes are binding is virtually irrelevant; after all, nearly all companies with any kind of serious supply chain corporate social responsibility system in place ensure that these codes are contractually anchored.

Moreover, companies that have weaker codes of conduct from a content perspective less frequently anchor their code contractually by means of signing codes of conduct or references in contracts or general terms and conditions. This would support the idea that multinationals which have really thought their CSR policy through would also have thought better about how to implement that policy; not only from a practical point of view but also from a contractual point of view.

The findings so far provide material for further research. All companies interviewed have shown a great interest in the question of what the consequences of their policies and contracts are in terms of extracontractual liability. All of the general terms and conditions and contracts included some kind of limitation of liability. Could such a limitation of liability also be valid in respect of claims on the basis of CSR violations by third parties? Furthermore, many of the investigated MNCs use the same instruments

⁵¹ HR 19 March 1976, *NJ* 1976, 407.

in all companies they operate. But the same instruments may have different consequences (in terms of validity and their binding nature) in different legal systems. Do companies need to adapt their instruments for each state they operate in? The continuation of this research project will attempt to answer these questions.

The research to date nevertheless already provides MNCs with a frame of reference for evaluating their own codes of conduct. They can gain more insight into the extent to which their own instruments are binding on their supply partners, as well as exploring some of the best practices of other MNCs in the Netherlands.